

The Agency Contract: PORTUGAL



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1 Preliminary Considerations

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The agency contract (also known as commercial representation) is a legal arrangement that emerged and has been developing in such a way as to meet the requirements of economic and industrial evolution. The need to seek new markets and develop those currently existing in areas far from production centres, in order to accompany increased productivity and foster commercial expansion, allied to the development of foreign trade, are some of the factors that explain the increasing recourse to collaborators, who provide assistance to companies without establishing a legal relationship with them.

This (new) legal arrangement brings advantages for both parties involved:

- (a) The agent is released from the liability inherent to the business and basically focuses on promoting negotiations;
- (b) The agent may work for several companies without his autonomy being affected, without prejudice to his sense of initiative being remunerated proportionally to the results achieved by his work;
- (c) For the company, the agent is a vital market penetration auxiliary: he saves it organisation costs and allows it to rely on his sense of initiative, in terms of both market research and customer prospecting and of circulating its trade name and product brand, with the advantage of reserving to itself the right to make final decision, which is its privilege.

Indeed, aside from the fundamental mission of promoting the company's business, the agent – by relying on his savoir-faire, on the trust he inspires, on his direct and personal relationship with customers and on the loyalty ties he establishes – ultimately allows for the company to significantly save on setting-up expenses and reduce the risks always associated to any new market deployment.

On the other hand, the agent performs additional tasks that are of major importance for the company, notably in terms of guiding its production policy. Indeed, it is he who, based on his direct and personal knowledge of consumers, is in the unique position of providing the company vital information on market possibilities, customers' reaction and the status of the competition.

2 The Agency as a Promotion and Prospecting Activity:

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In agency contracts, the agent is independent and acts autonomously, and is paid according to the results he achieves. But it is the company, or more precisely the principal (the term designating the other party to the agency contract), that enters into contracts with the customers, the agent's participation being limited to promoting the signing of any such contracts.

The agent carries on his activity of providing regular cooperation, which likens him to an employee, but contrary to an employee, he acts autonomously and has no legal relationship with the company that he “economically” represents.

It has been the understanding of the Portuguese courts that “the agent is a collaborator who carries on a material activity: he seeks to prospect customers and brings them to the principal so that it may contract with them directly; where he has been conferred powers to conclude transactions, the agent is acting for the account and in the interest of the principal”¹. The agent will “break the ground” for the market, “channel” customers to the principal, promote its products and services and build the “bridge” between the principal and those interested in doing business with the company, and his activity ultimately consists of his taking the necessary steps to cause these interested parties to become customers with which the principal will contract.

¹ Vide Judgment of the Supreme Court of Justice of 09.11.1999.

3 Applicable Law:

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In Portugal, the legal framework governing the commercial agency contract was established by Decree-Law no. 178/86 of 3 July². Later that year, Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents was approved. This made it necessary to assess if and to what extent amendments would have to be made to ensure the Portuguese law's compliance with this Directive. As was to be expected, the original version of Decree-Law no. 178/86 was very close to the Directive, given that at the time this Portuguese law was approved, the proposals for a directive then under discussion were taken into account. However, this assessment revealed that certain aspects needed to be reviewed and improved in order to ensure the full compliance of this Portuguese law with the Directive, this being the reason for Decree-Law 118/93 of 13 April, which introduced certain (minor) amendment to the initial wording of Decree-Law no. 178/86, to have been approved.

In the Portuguese law the choice of the term principal (principal)³ to identify the other party to the agency contract appears to have been influenced by the terms used within the scope of agency in Common Law: agent and principal. In Portuguese doctrine, there are commentators who criticise this choice, claiming that the law should have opted for a term such as proponente (principal or person conferring powers to act), which is already used in Portuguese law to designate the party that contracts with “non-independent commercial representatives”, such as the so-called “trade managers” to which articles 248 et seq. of the Commercial Code refer.

²The reference to legal provisions without the express indication of the statute to which they belong must be understood as being to Decree-Law no. 178/86 of 3 July, as amended by Decree-Law no. 118/93 of 13 April, to which reference will be made further ahead.

³To which express reference is made in the Preamble and in articles 18, 19 and 23 of Decree-Law no. 178/86. The vast majority of the legal provisions of the law refer to the principal being the “other party” to the agency contract, with no apparent reason for preference to have been given to the term “other party”, which is somewhat uncharacteristic and generic.

3 The Applicable Law

Despite the term principal (principal) not being strictly accurate – as it could be considered that where there is a “principal” there is a “subordinate”, whereas the agent is an independent collaborator, as has already been mentioned herein – it appears to be the least inappropriate⁴, in so far as it reflects the superiority relationship between the parties to an agency contract. In fact, although he is an autonomous collaborator, the agent is a service provider and he is required to pursue the interests of the person who contracted his services, to whom he is accountable and whose general instructions he is required to follow (provided these do not affect his autonomy), acting as this person’s auxiliary.

Article 1 of the Portuguese law defines the agency contract, placing emphasis on the points that identify this type of contract and concurrently distinguish it from others serving a different economic and social purpose.

Article 1 (1) sets forth:

“Agency is the contract whereby one of the parties undertakes to autonomously and regularly promote the conclusion of contracts for the account of the other and against a remuneration, for which purpose this party may be assigned a certain area or group of customers”.

On the basis of this notion, the following are therefore the essential points:

(a) Obligation of promoting the conclusion of contracts: this is the agent’s basic obligation, which involves complex and manifold material activities, such as market and customer prospecting, diffusion of products and services and negotiation, among others, preceding and in preparation of the conclusion of contracts, in which the agent does not generally participate.

(b) For the account of the other party: in the performance of his activity and duties (to promote the conclusion of contracts), the agent always acts for the account of the principal, this basically meaning that the effects of the acts he performs are intended for the principal and are reflected or projected in its legal situation. It is therefore right to say that the agent pursues the principal’s interests and must therefore firstly look after these interests (as is expressly set out in article 3 of Decree-Law no. 178/86 and article 3 of the Directive)⁵. The agent autonomously and independently carries on the activity of managing third party interests and can be considered as be-

⁴The Portuguese version of the Directive uses the term *comitente* (principal), which is not in line with Decree-Law no. 178/86, given that the legal form *comitente* (principal) already exists in Portuguese law in connection with commission contracts (article 266 of the Commercial Code) and within the scope of civil liability, where its meaning greatly differs from that which it is given in the agency relationship. Thus being, the term *comitente* is used in the Portuguese version of the Directive, this also being the case of its French version (*commettant*) but, strangely enough, in the provisions applicable to agency in Portuguese law, the other party to agency contracts is called the principal (principal), i.e. the chosen term was the translation of the one used in English law, where in agency contracts the parties are the commercial agent and the principal (vide the English version of the Directive).

⁵Unless expressly stated otherwise, it is to be understood that we are referring to Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

ing the principal's collaborator who represents it economically (and sometimes legally). However, to be repeated is the fact that the agent is not, in the legal sense, a true representative of the company (unless he is granted representation powers). In fact, it is this absence of representation powers that affords the agency contract much of its practical importance, in so far as the company continues to control and manage its business activity, given that it is the one that decides whether or not the contracts negotiated by the agent, who is not empowered to bind the principal, are to be concluded;

(c) Autonomy: contrary to the employee, who is legally subordinated to his employer under an employment contract, the agent is independent and acts autonomously. Consequently, he who claims to be an agent but is bound to his principal under an employment contract is not an agent, irrespective of his enjoying a certain degree of autonomy in the performance of his duties and also of regularly promoting negotiations. This is the case, for example, of “travelling salesmen” and of certain “insurance agents” and “sales agents”. Under Portuguese law, certain structures that claim to be the subsidiaries or branches of a company⁶ or even its departments are also not agents, regardless of their being separate from the company, as in the case of the so-called *agências bancárias* (bank branches). However, there is no doubt that the agent's autonomy is not total, as he must comply with the instructions he has been issued, adjust to the company's economic policy and regularly account for his activity. But these and other agent's obligations (notably those set out in article 7, which will be addressed further ahead) must not affect his basic autonomy;

(d) Regularity: much like the non-autonomous employee, the agent is a collaborator of the company and carries on his activity on a regular basis, with a view to concluding not one but an indefinite number of transactions. Regularity is compatible with the setting of a short term, and the effectiveness of the contract may even be limited to certain periods or seasons of the year. It is however necessary that the agent's activity not be limited to a single act (as is generally the case of authorised representatives and commission agents) and that its duration cover the entire term of the relevant agency contract;

(e) Remuneration paid by the principal to the agent: this is an essential element of agency, which is determined essentially based on the volume of business achieved by the agent and therefore variable, and takes the form of a commission or percentage on the value of the concluded transactions.

⁶ We must naturally not confuse the agency contract with company agencies or delegations, in spite of these also acting as the company's intermediaries. In other words: agencies represent the company of which they are an “extension”, sign contracts with consumers, but their acts are not based on an agency contract, but solely on the company's internal organisation system.

3 The Applicable Law

Under Portuguese law, defining the specific area where the agent will carry on his activity, notably establishing its geographical limits (area), has ceased to be considered⁷ an essential element of the contract due to the understanding adopted in the Directive, where no reference is made to the agent being assigned an area or group of customers, notwithstanding this requirement possibly serving as an aid for the interpretation and settlement of certain issues (articles 7 (2) and 20 (2)(b) of the Directive and articles 4, 9 and 16 (2) of Decree-Law no. 178/86). It has however been the understanding of the Portuguese courts⁸ that defining a specific area or group of customers continues to be one (further) important element to determine whether the contract is indeed an agency contract, in those cases where the parties have not specifically named the contract they entered into, or have given it a different name, when the rights and obligations set out therein clearly point to their having wanted to enter into an agency contract.

⁷ As has already been mentioned herein, after the coming into force of Decree-Law no. 118/83, aimed at causing Portuguese law to fully conform to the Directive.

⁸ Such are the cases of: judgment of the Supreme Court of Justice (SCJ) of 17.03.1993; judgment of the Porto Court of Appeal of 15.09.1994; judgment of the SCJ of 27.10.1994.

4 Formation of the Contract

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law does not require agency contracts to be made in writing, but it is nonetheless customary for them to be so, thus affording the parties increased security. In any event, pursuant to the provisions of the Directive (article 13), either party (the agent or the principal) is entitled to demand a signed document from the other setting out the content of the contract and any subsequent addenda or amendments thereto (article 1 (2) of Decree-Law no. 78/86).

However, there are cases where Portuguese law requires the written form for the agent's acts to be valid: in the event of the agency contract conferring powers to represent the principal, the agent will only be permitted to enter into contracts in the name of the other party, where such other party has granted him the necessary powers for this purpose in writing (article 2 (1)). Moreover, in order to collect credits in the name and on behalf of the principal, the agent must be authorised to do so in writing, although if he has been conferred representation powers (i.e. powers to conclude contracts), the law assumes that he is authorised to collect credits arising from contracts he concluded (article 3).

Where the agency contract involves exclusive rights, the principal may not resort to other agents for the area or group of customers, but any such exclusive rights granted to the agent will only be valid if set out in a written agreement between the parties⁹. In light of the law's wording, it appears that these exclusive rights are not reciprocal: the agent only benefits from these if there is a written agreement between the parties; the principal, however, can require that the agent abstain from any competition restraining practices (in the area or group of customers entrusted to him), even where the contract does not contain any provision to this effect.

In the event of the contract being made in writing (even in those case where the law does not impose this requirement), as it practically always the case, it must be recorded with the Register of Companies.

⁹Initially, Portuguese law considered that if the contract contained no provision on the subject, the agent would have exclusive rights, or in other words, the principal would not be permitted to use other agents to perform competing activities in the same area or group of customers. Currently and by force of the Directive, for the agent to enjoy exclusive rights, it is necessary for the parties to have made an agreement in writing to that effect. In any event, prudence must be exercised when setting out exclusive rights susceptible of restraining competition, under the terms of Community law.

5 The Agency Contract Compared to Other Similar Legal Forms:

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Commercial Concession Contract:

The first important distinction is in connection with the so-called commercial concession contract. Despite of this type of contract not being governed by specific legal regulations, its importance in legal and commercial traffic is paramount, to exactly the same extent as the agency contract. It is a commercial cooperation contract (which, in turn, must be classified as a commercial distribution contract) that the law does not typify, under which one of the parties (the concessionaire) undertakes to purchase from the other (the grantor) for resale in a given area, the goods produced or distributed by the grantor.

The two characteristic and differentiating points of the commercial concession contract are therefore: (a) under the concession, the concessionaire undertakes the obligation to purchase for resale; (b) the concessionaire acts in his own name and for his own account, assuming the risks inherent to distribution/sales.

In addition to the (concessionaire's) obligation to purchase for resale, the parties undertake other obligations, whereby the integration of the concessionaire in the grantor's network or distribution chain takes place. The issue is to define and implement a given commercial policy, which can involve establishing rules applying to the concessionaire's organisation and facilities, sales methods, advertising, customer support, inter alia, the grantor even exercising a certain degree of control over the concessionaire's business. Beyond this and in day-to-day commercial practices, the concessionaire is autonomous and not directly subject to the grantor's directions .

¹⁰ There are those who object to the dependence of the distributor (concessionaire), who is required to comply with a number of obligations in order to harmonise his performance with the network of which he is a member, speaking in this respect of dependence contracts. However, not to be forgotten is that the distributor reaps a number of benefits from the fact of becoming a member of an organised network.

5 The Agency Contract Compared Other Similar Legal Forms

As a framework contract, the commercial concession contract establishes a stable, lasting and multiple-content cooperation relationship, the implementation of which implies, inter alia, future contracts being entered into between the parties (performance contracts), under which the grantor will sell the concessionaire, for resale and under the previously established terms and conditions, the goods the concessionaire has undertaken to distribute. Under the concession contract, the concessionaire is “conceded” the “privilege” of marketing “pre-sold” goods, because their brand is well-known, because of the concessionaire’s integration in a distribution network, because these products are well advertised or, lastly, because of the competitive advantage and opportunities for profit in relation to the other traders.

The commercial concession contract differs from the agency contract precisely because the concessionaire, contrary to the agent, acts in his own name and for his own account, acquiring title to the goods by purchasing goods or assets from the supplier or manufacturer with a view to their subsequent resale to third parties (End Users). In fact, by acting in his own name and for his own account, the concessionaire alone takes on the marketing risks¹¹. While the agent is the autonomous collaborator of companies, on behalf of which he undertakes to promote the conclusion of contracts and sometimes concludes them himself, albeit on behalf and in the name of his principal, the concessionaire acts in his own name and for his own account, buying goods from the manufacturer in order to resell them to third parties – the end users – undertaking to comply with certain requirements and fulfil certain obligations.

The Mediation Contract:

Another legal arrangement possessing features in common with the agency is the mediation contract, which basically consists of an (accessory) agreement whereby one of the parties will act as an intermediary to bring the contracting parties together, possibly with the obligation of finding a party interested in concluding the main transaction and of preparing the conclusion of the contract.

In other words, such as it is defined by case-law, mediation is the contract whereby one of the parties undertakes to find a party interested in concluding a given transaction and to bring this interested party and the other party together. Upon this transaction being concluded, the mediator is paid and the mediation ends, irrespective of the performance of this transaction. In mediation, there is a third party that has no interest in the transaction, his role being solely to introduce the interested parties to each other, thus contributing to their subsequent conclusion of the transaction in question between themselves.

¹¹ There is no agency contract where one of the parties orders goods directly from the other and sells them directly to its customers, billing them in its own name and charging customers the relevant price.

5 The Agency Contract Compared Other Similar Legal Forms

The mediator acts impartially and only occasionally, when requested to perform a given act, contrary to the agent, whose activity involves a certain degree of regularity and continuity¹². On the other hand, the mediator's remuneration does not depend on the performance of the contract and he is entitled to demand that it be paid upon the contract being concluded (judgment of the Lisbon Court of Appeal of 11.11.2004).

In the mediation contract, the mediator's position is far less active than is the agent's under the agency contract, seeing that, as a rule, the mediator only undertakes to find one party interested in the transaction and is not subsequently involved in the actual conclusion of the contract, whereas the agent, in addition to being entitled to conclude contracts in the name and on behalf of the company (which is not the case in mediation, where the interested parties always conclude the transaction directly), carries on his activity regularly and autonomously and only acquires the right to a commission upon the contract he promoted being performed.

Commercial Agent vs. Commission Agent:

Furthermore, the commercial agent cannot be confused with the commission agent, despite their having certain common characteristics¹³. While the commission agent is always a mere authorised representative (therefore acting in the interest of the principal) who does not hold representation powers, the agent, if he has been conferred representation powers, also acts in the principal's name. In the commission contract (contract under which commission is payable), the commission agent contracts on his own behalf and in his own name, in the capacity as principal and sole contracting party, the commission therefore being a form of authorisation without representation.

On the other hand, contrary to the commission contract (aimed essentially at the performance of legal acts), the agency contract is not comparable to the trustee contract, as it is aimed essentially at the performance of material acts, the conclusion of legal transactions in the principal's name taking on a merely ancillary nature, to complement the main obligation of promoting the conclusion of contracts.

¹² The legal definition itself of agency contains an express reference to autonomy and regularity, as well as to the conclusion of contracts (and not of one contract).

¹³ The agent's remuneration itself is called "commission", which reveals there are affinities between the two forms.

6 Parties' Duties And Rights Under The Agency Contract

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As has already been mentioned herein, the agent's main obligation is to promote the conclusion of contracts for the account of the other party. Although article 1 of Decree-Law no. 178/86 places particular emphasis on promoting negotiations, the agent's activity has a far broader purpose, which defines the economic function itself and consists of creating a clientele – by prospecting it, increasing it or, where applicable, maintaining and consolidating it – that serves the interests of both parties. In fact, the clientele acquired during the term of the agency contract benefits both the principal, who increases its turnover and the distribution of its products, and the agent, who seeks to increase and consolidate his commissions (particularly through “commissions on subsequent orders”, i.e. on transactions concluded with customers acquired by him, irrespective of his participation in the conclusion of contracts).

As for the agent's duties, these are set out in articles 6 to 9 of Decree-Law 178/86 and listed hereunder:

- (a) As a general principle, the agent is required to act in good faith, look after the other party's interests and take all such steps as may be necessary to fully achieve the object of the contract¹⁴;
- (b) Duty of complying with the principal's instructions, provided these do not jeopardise the agent's autonomy;

¹⁴ This is a formula that, in essence, is equivalent to that laid down in the Directive and derives from the general theory of contracts, which must be performed in observance of the principle of good faith, this normative legal principle covering loyalty, honesty and truthfulness.

6 Parties' Duties And Rights Under The Agency Contract

(c) Duty of clarifying and informing, the agent being required to provide clarifications and information not only on the principal's request, but whenever the circumstances so justify according to good management standards, this particularly applying to clarifications and information relating to customers' solvency, the market situation and its evolution prospects. Basically, the agent must advise the principal and inform it whether or not it is desirable to contract with a given customer acquired by him¹⁵;

(d) Duty of reporting to the principal, which is of particular relevance if the agent holds powers to collect credits (article 3 of Decree-Law no. 178/86);

(e) Duty of secrecy, during the term of the contract and even thereafter, the principal being entitled to be indemnified, within the scope of post-contractual liability, in the event of the agent failing to comply with this duty;

(f) Duty of not competing, even after the term of the contract expiring, but only in the event of the parties having made an agreement in writing to this effect. In any event, the non-compete obligation will not remain in force for more than two years after the contract ceases and will be limited to the area or group of customers entrusted to the agent¹⁶;

(g) Duty of informing third parties of his capacity as agent, notably whether he holds representation powers and whether he is entitled to collect credits.

With regard to the agent's rights, the main one is his remuneration, or in other words, the commission to which he is entitled based on the contracts he has promoted. Portuguese law adopts the same system as for the duties and sets out a general principle followed by a list of rights, drawn up merely by way of example:

(a) The general principle is naturally the right to require that the other party act according to the principle of good faith;

(b) Right to obtain from the principal the elements required to carry on the agency activity and, in particular: (i) right to be informed of the acceptance or refusal of the contracts he negotiated; (ii) right to periodically receive a list of the contracts concluded and commissions payable, no later than by the last day of the month following the quarter in which the right to a commission shall have been acquired;

(c) Right to demand all such information as may be required to verify the amount of the commissions payable to him, notably an extract of the principal's accounting books;

(d) Right to receive payment, under the agreed terms;

(e) Right to receive the special commissions that may accumulate;

(f) Right to receive compensation, in the event of a non-compete obligation being agreed upon after the contract terminating.

¹⁵The content of these duties is variable and must be seen in light of a concrete situation: for example, simple references to the general circumstances may suffice or it may be necessary to prepare economic policy studies.

¹⁶The requirements for this non-compete clause to be valid under Portuguese law are precisely those laid down in article 20 (2) and (3) of the Directive.

6 Parties' Duties And Rights Under The Agency Contract

These rights are essentially aimed, on the one hand, at enabling the agent to carry on his activity, on the one hand, and at regulating the aspects relating to his right to be remunerated, on the other. As is understandable, the agent requires a number of tools – price lists, printed advertising material, catalogues, knowledge of commercial conditions, etc. – to adequately perform his job. He also needs to be timely informed of the decision the principal will be making on the contracts promoted by him, i.e. whether or not it intends to conclude them.

On the other hand, Portuguese law provides for the “right to notice”, by stipulating that “The agent is entitled to forthwith be notified, in the event of the other party being in a position of concluding a considerably lower number of contract than the one agreed upon or the one that was to be expected, given the circumstances”. The law is thus aiming at making it clear that although the principal is under no obligation of concluding all the contracts procured by the agent, its systematic or unreasonable refusal to do so may cause the agent to sustain serious losses, in terms of both his professional reputation and his remuneration. Consequently, if the principal anticipates that it is unable to match the agreed volume of business, it is required, in the name of good faith, to forthwith notify the agent accordingly, so that he may avoid sustaining possible losses and not be defrauded of his legitimate expectations.

Contrary to the Directive where the principal's obligations are set out separately (in article 4), Decree-Law no. 178/86 contains no provision relating to the rights and obligations of the other party to the agency contract. The principal's rights naturally derive from the agent's obligations (i.e. the right to issue general instructions to the agent, the right to request all the information required to assess whether the agency contract is being duly performed by the agent, the right to call the agent to account), the same reasoning applying to the principal's duties, which are precisely the reverse of its rights, with particular emphasis, of course, on the obligation of paying the agent the agreed commission. Basically, Portuguese law has preferred to place the emphasis on the agent, by listing his rights and obligations, contrary to the Directive which sets out the obligations of both the agent and the principal, it being on the basis of the latter that the agent's rights are established.

7 The Agent's Remuneration The Entitlement To Commission

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The agent's remuneration, which is called a commission, usually consists of a given sum or percentage on the volume of business achieved by the agent¹⁷, there being no doubt that Portuguese law, like the Directive, requires that the customary practices and equity be observed in the event of the parties not having expressly agreed on the criteria to be applied in calculating the commission. As a rule, remuneration is variable, but can accrue to any other fixed sum having been agreed upon between the parties¹⁸.

As regards the issue of establishing which contracts entitle the agent to a commission¹⁹, Portuguese law makes the distinction between two different times, depending on whether the contracts are concluded before or only after the agency relationship comes to an end²⁰.

Thus, article 16 (1) sets forth that the agent is entitled to a commission for the contracts he promoted and for those concluded with customers he acquired, provided they are concluded prior to the agency relationship ending. In this respect, Portuguese law appears to be less restrictive and clearer than article 7 (1) of the Directive.

¹⁷ This complying with Article 6 (2) of the Directive: "Any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission".

¹⁸ Vide judgment of the Supreme Court of Justice of 25.03.2004.

¹⁹ A different issue is to establish when the entitlement to commission is acquired and when it becomes payable.

²⁰ To be noted is that the Directive refers to "commercial transactions", whereas Portuguese law speaks only of "contracts", or in other words, adopts a more restrictive view.

7 The Agent's Remuneration

The Entitlement To Commission

Under article 16 (2), the agent is also entitled to a commission for acts²¹ concluded during the term of the contract in the event of his holding exclusive rights over a geographical area or group of customers and of these being concluded with a customer belonging to that area or group. Portugal decided to adopt the version that calls for the observance of both the exclusive rights and the geographical area requirements, thus complying with the Directive (vide final part of article 7). Thus, the agent benefiting from an exclusive rights clause maintains his entitlement to commission, even for contracts negotiated without his participation, provided however that they are concluded with customers belonging to his reserved area or group²². Before the Directive, Portuguese law provided for this exclusive agent's right, the parties being allowed to waive it by way of a written agreement, but this is no longer the case.

The agent will only be entitled to a commission for contracts concluded after the agency relationship ending in the event of his proving that he negotiated them or, where he prepared them, that they were concluded essentially as a result of his activity, provided however, in both cases, that the contracts be concluded within a reasonable period of the agency having ended.

As for the precise moment when the agent acquires the right to commissions, Portuguese law reproduces the essence of the Directive provisions and adds the possibility of the agent being entitled to claim his commission upon the contract being concluded (i.e. before the parties perform it), in the event of the fulfilment of third party obligations being guaranteed by a so-called "del credere agreement", which will only be valid where it expressly refers to the thus guaranteed contract or persons (third parties that will contract with the principal).

²¹Strangely enough, in this case Portuguese law no longer refers to "contracts" but rather to "acts", which raises doubts as to interpretation, given that we fail to understand the reason for the law to have adopted a different criterion in the case of exclusive agents.

²²The law thus seeks to discourage attitudes that are contrary to exclusive rights, while allowing the principal to contract in the exclusive agent's reserved area without his participation. The principal does not depend on the agent's acts and diligence, but the agent maintains his right to a commission and his expectations as an exclusive agent are not defrauded.

8 Protection Of Third Parties

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Agency law in Portugal goes beyond that which is imposed by the Directive, by devoting an entire chapter to the protection of third parties, which is an innovation in comparative law precedents.

Thus, article 21 sets out the agent's duty to inform, based on the idea that many customers, because they negotiate and deal with the agent, believe that in his capacity as agent he is automatically entitled to conclude contracts and collect credits. The agent is therefore required to clarify, on his own initiative, the particulars of his relationship with the principal by including in any signs he posts and documents he uses, be they invoices, receipts, letterhead, etc., reference allowing third parties to immediately know whether or not he holds powers to conclude contracts and collect credits on behalf of the principal. This concern of advertising the agency relationship and giving it transparency is also reflected in the requirement of registering the agency contract, where it is made in writing.

Under article 23 of the Agency Law, the transaction concluded by an agent holding no representation powers is enforceable against the principal in the event of there having been ponderous reasons, objectively considered, given the circumstances of the case, which justify the third party in good faith having trusted in the agent's legitimacy, provided however that the principal shall have also contributed to establish the third party's trust.

9 Forms Of Contract Termination

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The forms of terminating the agency contract are set out in article 24 of Decree-Law no. 178/86 and are: (i) by agreement between the parties; (ii) lapsing; (iii) termination by notice; (iv) dissolution. As is to be expected, Portuguese law is rather more detailed than the Directive imposes as regards the possible forms of termination. Let us briefly examine each one:

As for termination by agreement between the parties, these are obviously free to terminate the contract, provided they do so by way of a written document, for reasons of legal safety and protection of third parties.

The second form of agency contract termination is lapsing, which is governed by the provisions of articles 26 and 27 of the Portuguese Agency Law. This form of termination causes the contract to immediately cease, without the parties being required to express the wish that it be terminated. Upon any of the events for which Agency Law (in particular) or general law provide occurring, the contract will cease. It will cease upon its term expiring²³, upon the condition to which the parties submitted the contract occurring, or upon their becoming certain that it cannot occur, depending on whether the condition is resolutive or suspensive. Lastly, the law provides that the death of the agent constitutes typical grounds for lapsing, the same applying to the principal being declared bankrupt.

²³ However, in observance of the Directive (article 14), Portuguese law sets out that even in those cases where the term of the agency contract has expired but it nonetheless continues to be performed by both parties, it will be "converted" into an agency contract for an indefinite period, in which case it may only be terminated by notice (or dissolved, as the case may be) by either party, albeit subject to the requirement of serving prior notice to this effect.

9 Forms Of Contract Termination

As for termination by notice (for which article 15 of the Directive provides), Portuguese law has adopted the rules laid down in the Directive²⁴ and has not used the possibility of setting longer (mandatory) periods of prior notice for contracts of more than three years. Either there is a reason, based on the law or the agreement between the parties, justifying the immediate termination of the contract – by dissolution – or no such reason exists and the contract can only be terminated by notice, provided it is notified with the required minimum prior notice. The aim is to prevent permanent ties, which would be an inadmissible limitation to the freedom of persons and contrary to public order.

The contracting party wishing to exercise its right to termination by notice is free to do so, without being required to present any reason or justification. However, it is required to give the other party a certain length of notice in relation to the effective date of the termination, or in other words, it is required give prior notice. Indeed, each of the parties must be prevented from abruptly terminating the contractual relationship for no serious reason, taking into account the various losses that the sudden termination of the contract would cause the other.

Thus being, the right to freely terminate contracts concluded for an indefinite period²⁵ by termination by notice can only be validly exercised if notified in writing: (a) one month in advance, where the contract has been in force for less than one year; (b) two months in advance, where the contract is in the second year of its term; and (c) three months, in all other cases. This signifies that under Portuguese law, the length of prior notice for a contract that has been in force for more than three years is the same as for one having been in force for fifteen or twenty years, for example (the parties may obviously establish a longer prior notice).

In any event, the Portuguese courts have interpreted the law taking into account the prohibition of abuse of rights and the protection of the legitimate expectations of the contracting party to which the termination by notice is communicated. Therefore, it has been the general understanding that although the law imposes a period of prior notice of only three months for contracts having been in force for three years or more, this rule must not be restrictively construed and the particular circumstances of the case must be considered. As a rule, the longer the contract has been in force the longer the period of prior notice will be, in the name of the general duties of loyalty and good faith.

²⁴ Reference should be made to the fact that the pre-Directive version of the Portuguese law set out much longer periods, establishing a flexible criterion for contracts having been in force for more than one year, in which case their termination was subject to notice to this effect being sent no less than three to twelve months in advance, depending on the importance of the contract, the expectations of the party and other circumstances of the case.

²⁵ Lapsing as a result of the term having expired obviously only applies to fixed-term contracts, termination by notice only being applicable to contracts for an indefinite period.

As a last resort, the parties can take precautions (particularly when the contract implies significant investments), by establishing a longer period of prior notice than the one imposed by law in the contract itself.

The contracting party that fails to observe the periods of prior notice will be required to indemnify the other against the damages resulting from this failure, but where it is the principal that terminates the contract by notice, the agent may demand, instead of the indemnity, a sum calculated on the basis of his average monthly remuneration for the previous year multiplied by the missing prior notice.

Lastly, Portuguese law provides for dissolution as a form of terminating the contract, in the event of any failure to fulfil contractual obligations or of (exceptional) circumstances occurring that render it impossible to attain or seriously jeopardise the contractual goal²⁶.

Thus, contrary to termination by notice, dissolution must be duly substantiated, but applies to fixed-term contracts and any others, does not require prior notice and takes effect upon communication thereof reaching the party to which it is addressed, thus allowing the non-defaulting party to be immediately released from the contractual tie without it being required to indemnify the other party. According to article 31 of the Agency Law, this dissolution communication is made “by way of a written statement that shall be sent within one month of becoming aware of the facts justifying the dissolution, and shall contain the reasons on which it is based”²⁷.

Portuguese law provides for two reasons for dissolution (article 30): the first is the failure by one of the parties to comply with its obligations “where such failure, in light of its seriousness or repetition, results in it not being possible to require that the contractual tie be maintained”. It is not just any failure to comply that entitles the non-defaulting party to dissolve the contract. The right to dissolution will only be properly exercised where the failure is particularly serious, to the extent that one of the contracting parties cannot be required to remain bound by the contract. In other words: the law requires that the failure to comply be particularly significant, due either to its seriousness (depending on the nature of the infringement, of the circumstances surrounding it or of the other party’s justified loss of trust) or to its repetition, it being essential that, as a result, the other party not be required to maintain the contractual tie.

²⁶ Vide Article 16 of the Directive.

²⁷ If there are grounds for dissolution and the non-defaulting party allows the one-month time limit laid down by law to expire without formalising the dissolution, the right thereto will expire, there always being the possibility of terminating the contract by notice, subject to compliance with the prior notice period. On the other hand, where the reasons for the dissolution are not set out in writing, the termination will take the form of termination by notice and in the event of it not being communicated with the agreed prior notice, the reparation of the damages arising from any such failure will be required.

9 Forms Of Contract Termination

As has already been mentioned herein in connection with the parties' obligations, Portuguese law establishes the general principle of both parties to the agency contract being required to act in good faith, with a view to fully accomplishing the contractual goal. This principle of good faith and loyalty may be a precious aid in implementing the concept of just cause, but in order to acquire the right to dissolution, the injured party must allege and prove that: (a) the wrongful conduct of the other party is so serious and contrary to good faith that the continuation of the contractual relationship is not justified; (b) it became aware of the facts constituting "just cause" less than one month earlier.

The other reason for dissolution is set out in article 30 (b) of the Agency Law and reflects what is customarily covered by the institution of supervening change in the circumstances on which the parties based their decision to contract. In this case, either party may resort to dissolution, irrespective of the contract being properly performed, in the event of any circumstance making it impossible to accomplish or seriously endangering the contractual goal. Here too, it is decisive for it not to be required that the term be continued until it expires (in the case of fixed-term contracts) or imposed in the case of termination by notice (as regards periods of prior notice).

In practical terms, the difference between this possibility and the one first mentioned, in the case of a failure to comply, is that resorting to dissolution on the grounds of exceptional circumstances, may not release the contracting party having decided to terminate the contract from doing so reasonably in advance. The only thing is that this period in advance will obviously always be far shorter than that required for prior notice in the case of termination by notice.

The dissolution for which article 31 (b) provides applies to a situation where there is "just cause", not because of the failure to comply with contractual obligations, but because of circumstances not imputable to either party (e.g. loss of goods or services market, exponential increase of the competition, etc.), which make it impossible to accomplish or seriously jeopardise the contractual goal. Under article 32 (2), where a contract on these grounds, indemnity in an equitable amount will be payable.

10 Indemnity In The Event Of Termination Of The Contract



As in other Member States (vide articles 17, 18 and 19 of the Directive), Portuguese law provides for the cases where termination of the contract confers the agent the right to an indemnity called “clientele indemnity”. Clearly, the law has chosen the so-called “German model” foreseen in article 17 (2) over the “French model” that the Directive also allows (vide article 17 (3)) relating to compensation for the damage suffered by the agent as a result of the termination of the agency contract.

Notwithstanding the terminology used, the truth is that clientele indemnity, adapted from the “German model” is more a compensation than an indemnity, there being no doubt that the indemnity against the damage suffered as a result of the termination of the agency ultimately corresponds to the “French model” that the Directive somewhat inappropriately calls compensation.

In fact, clientele indemnity is the compensation payable to the agent following the termination of the contract, for the benefits the principal continues to derive from the customers acquired or developed by the agent. It is aimed at compensating the agent for the enrichment his activity (carried on during the contract) continues to bring the principal and is payable irrespective of how the contract was terminated and of any other indemnity being payable (such as, for example, indemnity for absence of prior notice or indemnity for non-performance of the contract).

Underlying this indemnity is the institution of unjust enrichment, for which Portuguese civil law provides. If it were not established by law, upon the contract ending the clientele created by the agent would be transferred by the agent to the principal and the latter would imburse at the expense of the former’s work who ceased to have this source of income.

10 Indemnity In The Event Of Termination Of The Contract

As has already been mentioned, despite what it is called, it is not a true indemnity, to begin with because it does not depend on the agent proving the damage he suffered²⁸, but only on meeting the requirements set out in the law for it to be awarded. Upon these requirements being met, the right to clientele indemnity is awarded to the agent (or to his heirs, in the event of his death).

Clientele indemnity is therefore “deferred remuneration” aimed at restoring the interrupted contractual balance. In fact, the advantages both parties enjoyed during while the contract was in force are, after its termination, only enjoyed by the principal if and to the extent the principal has actual access to the clientele acquired by the agent during the term of the contract (judgments of the Supreme Court of Justice of 07.03.2006 and 22.09.2005).

In order to claim clientele indemnity, the agent must demonstrate and prove that all the following requirements have been met:

- (a) that he has acquired customers for the other party and substantially increased the volume of business with the existing clientele;
- (b) that, upon the contract ending, the principal will considerably benefit from the agent’s activity
- (c) that, upon the contract ending, he will not be remunerated for contracts negotiated or concluded with the new customers he acquired.

Where the second requirement is concerned (benefits earned by the principal), it is not necessary for the benefits to have already been earned, it sufficing that it be highly probable that they will be, or in other words, that the clientele acquired by the agent is, in itself, an opportunity for the principal to do more business and make more profits. If the principal has agreed with the agent that, after the contract ends, it will continue to pay him a certain sum for the transactions it concludes with the customers acquired by him, the clientele indemnity will be established in the conventional way, provided the sums it covers are not merely symbolic. In the event of such an agreement being reached, the payment of a clientele indemnity will not be justified, this being the reason for Portuguese law to impose that the third requirement be met.

To summarise: the agent is entitled to a clientele indemnity where two positive requirements and one negative requirement have been met:

- (a) the agent has acquired new clientele;
- (b) after the contract ended, the principal benefited from the agent’s activity;
- (c) the parties have not agreed on any remuneration for the contracts concluded with customers acquired by the agent, after the agency relationship comes to an end.

²⁸ An aspect that Portuguese case-law has been expressly acknowledging: in this sense, vide judgment of the Supreme Court of Justice (SCJ) of 27.11.94; judgment of the SCJ of 22.11.95; judgment of the Coimbra Court of Appeal of 26 November 1996.

10 Indemnity In The Event Of Termination Of The Contract

Under Portuguese law, clientele indemnity will not be payable where termination of the contract has occurred for reasons imputable to the agent and, accordingly, where the contract has been dissolved on the principal's initiative on the grounds of the agent's failure to comply, the agent will not be entitled to clientele indemnity. The law also excludes the right to clientele indemnity in the event of the agent assigning his contractual position to third parties, thus complying with article 18 (c) of the Directive.

There are the only two cases in which the law establishes that clientele indemnity is not payable, no reference being made to the possibility of the agent terminating the contract, contrary to article 18 (b) of the Directive. In this respect, Portuguese law appears to favour the agent's position, but introduces a time limit (one year) for him to exercise his right to resort to the courts.

As has already been mentioned herein, in the event of the agent dying, the clientele indemnity may be claimed by his heirs²⁹, but the right to this indemnity will be extinguished in the event of the agent or his heirs not notifying to the principal, within one year of the contract expiring, of their intention to receive it, the relevant legal proceedings being required to be filed within one year of any such notice. In other words: upon the requirements for clientele indemnity to be paid being met, the agent has one year to notify the principal that he wishes to receive it; in the event of the principal refusing to pay, the agent may resort to the courts, but he has one year of the above-mentioned notice to do so, after which his right will lapse.

Lastly, as regards the form of calculating the clientele indemnity, Portuguese law resorts to equity by establishing that "the amount of the indemnity shall be equitably fixed", but also establishes a maximum amount, in so far as it "cannot exceed the remuneration for one year, calculated based on the yearly average remuneration received by the agent over the last five years". In the event of the contract having been in force for a lesser period of time, this amount will be calculated based on the agent's average remuneration throughout the period it was in force.

It is therefore clear that Portuguese law reproduces the essence of article 17 (2) (b), by fully adopting the so-called "German system" that the Directive allows Member States to implement.

²⁹ This means that, despite causing the contract to lapse (vide paragraph 46), the agent's death does not prevent the clientele indemnity from being claimed by his heirs.



CONTACT

The law firm Sousa Machado, Ferreira da Costa & Associados, Sociedade de Advogados ("SMFC") was founded in 1991 by 4 partners and now comprises the 4 founding partners, 8 associates and 5 trainee lawyers.

SMFC offers legal advisory services particularly in the following practice areas:

business law, including commercial law, labour law and commercial contracts;
civil law in general and in particular civil contracts, law of obligations (contract), insurance law, family and inheritance law;

litigation, pre-litigation and debt recovery, notably in areas of mobile telecommunications, credit insurance and motor vehicles (financial lease contracts) and in the chemical, agri-foodstuffs, pharmaceutical and cosmetics, etc., industries;

Generally speaking, the scope of the SMFC services covers consultancy, arbitration and court related practices and procedures in the following areas:

- Commercial and Corporate Law, notably:
 - incorporation of companies and articles of association amendments;
 - mergers, acquisitions, management buy-outs and buy-ins, takeover bids, initial public offerings, corporate restructuring;
 - joint-ventures and partnerships;
 - commercial contracts (distribution, financial leasing, factoring, etc.);
 - corporate advisory services.
- Administrative Law, notably:
 - licensing;
 - procurement procedures;
 - concession contracts;
 - consortia, complementary groups of companies, European Economic Interest Groupings, commercial associations ;
 - public works contracts;
 - public supplies and services contracts.
- Banking, Economic and Insurance Law:
 - banking law;
 - credit insurance and life assurance law;
 - securities transactions;
 - payment systems.
- Law of Obligations and Contract Law, notably:
 - mobile telecommunications contracts;
 - software licensing contracts and implementation of information technology solutions;
 - civil law and civil contracts.
- Family and Inheritance Law.
- Bankruptcy and Pre-Bankruptcy Law:
 - liability consolidation;
 - company recovery and bankruptcy procedures;
 - debt recovery and conversion.
- Competition and Regulation Law, notably:
 - concentrations;
 - concession, representation and distribution contracts.
- Tax Law, notably:

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- tax litigation;
- calculation and planning of tax liabilities.
- Real Estate and Urbanisation Law, notably:
 - leases, assignments of operation, conveyances (key money— trespasses), etc.;
 - promissory agreements, sales, leasing, time-sharing, etc.
- Community Law, notably:
 - freedom of movement of capital and establishment, and free movement of persons and goods,
 - tax rules.
- Labour Law, notably:
 - negotiation of association agreements;
 - downsizing operations: collective dismissals, suspension of employment contracts, etc.;
 - labour advisory services.
- Legal due diligences:
 - outline of companies' legal situation;
 - outline of the lawfulness of companies' boards and resolutions;
 - characterisation of companies' legal/tax, para-fiscal, administrative, labour and licensing obligations and of those relating to their premises;
 - review of the adopted legal procedures;
 - characterisation and assessment of companies' litigation and pre-litigation situations.
- Litigation, notably:
 - recovery of commercial, bank and insurance debts;
 - civil;
 - labour;
 - administrative offence;
 - corporate, commercial and bankruptcy;
 - tax;
 - criminal;
 - insurance.

The experience SMCF has acquired in the course of its years of activity, combined with the previous experience brought in by its partners, who were lawyers formerly having their own offices, have allowed for the provision of the services succinctly described above to top ranking companies in the areas of mobile telecommunications, software and information technology, credit insurance, motor vehicles and real estate, among many others.

For a number of years now, SMFC has been providing services to Clients in the above-mentioned sectors, particularly within the scope of litigation and debt recovery, and therefore possesses the structures and expertise needed to ensure its competent performance of the actions required to attain proposed goals.

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