The Agency Contract: BRAZIL

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1 The sales representation agreement

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1. Applicable legislation

The sales representation agreement is regulated in Brazil by Law 4.886, of December 9, 1965, with the amendments introduced by Law 8.420, of May 8, 1992. Agency and distribution agreements (which present significant similarities with sales representation, as we will see below) are provided for in the Brazilian Civil Code (Law 10.406, of January 10, 2002, which came into effect on January 11, 2003), in articles 710 to 721.

2 Concept of the Sales Representation Agreement

Article 1 of Law 4.886/65 defines sales representation as follows:

"Independent sales representation is exercised by a corporate entity or natural person, without an employment relationship, who acts as an intermediary, on a non-occasional basis on behalf of one or more people, for the conduct of mercantile transactions, soliciting and mediating proposals or orders, to transmit them to the principals, whether carrying out acts associated with the conclusion of the transaction or otherwise."

The Brazilian Civil Code, subsequently to said Law 4.886/65, defines the agency and distribution as follows:

"Art. 710. By the agency agreement, a person assumes, on a non-occasional basis and without an employment relationship, the obligation of promoting, on behalf of another, subject to

remuneration, the conduct of certain transactions, in a determinate zone. Distribution is characterized when the agent is in possession and control of the item to be transacted."

As can be inferred from the two legal definitions above, there is no essential difference between sales representation and agency agreements, except with respect to the limitation of the type of transactions. While in Law 4.886/65 the intermediation refers only to mercantile transactions, the Civil Code withdrew this limitation to mercantile transactions from the concept of this agreement. Consequently, the agency agreement may involve the intermediation of any kind of transaction, except the intermediations regulated by specialized law. In our opinion, in essence, these refer to the same legal figure, but with different denominations. The difference lies merely in the amplitude of their respective objects. However, the subject is not without opposition among Brazilian jurists. While for many jurists they refer to the same agreement, others understand that although very similar, these agreements have distinct characteristics.

2 Characteristics of the sales representation agreement

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This is a long-term agreement, as results from its distinct legal definition, which construes it as a relationship of a "non-occasional nature". It is not, therefore, an instantaneous act, of a short duration, which is exhausted in one or a few operations.

Another characteristic of this agreement is its onerous nature, i.e., the independent sales representation is a professional activity in the sense that it is exercised as a means of earning a living and, therefore, the representative shall be remunerated by the principal.

Another point to emphasize in this type of agreement is that it is of an exclusive or private nature of a person and cannot be transferred to another person ("natureza personalíssima"), considering that it is entered into with a view to the representative's technical qualities, as well as his honorableness, personal experience, knowledge of the market, proximity with his clientele, etc. This means that, once contracted, the sales representative may not be substituted by another person, without the principal's authorization, delegating his duties to persons that are not known to the principal. If the agreement does not authorize delegation and, even so, such occurs, the sales representative will be liable for contractual breach, and will be subject to the effects of indictment for gross misconduct.

It should be noted, however, that Law 8.420/92 mitigated the exclusive or private nature ("pessoalidade") of the sales representation agreement, by allowing the legal representatives to delegate their duties, through a sub-representation agreement.

3. Other compatible legal figures. Similarities and differences.

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Some legal figures resemble the independent sales representation agreement, such that, very often, they can cause confusion for the layperson. Sometimes it is held equivalent to a simple mandate, other times to a mercantile commission, service hiring, concession of a mercantile sale and franchise, distribution agreement and contract of employment, among others.

3.1. Mercantile mandate

The sales representation and mercantile mandate are commonly confused, which is only natural, since as can be verified from the history of sales representation in Brazilian law, the latter figure was originally part of the mandate and is now breaking away from it, acquiring autonomy. In the mandate, for however long its activity lasts, this duration is occasional or exceptional. The sales representative, on the other hand, receives permanent powers from the company and this stability is part of its essential features.

The mercantile mandate can be incorporated in the sales representation, but this does not mean that they are the same thing. The mandate represents a simple internal relationship between the mandator and mandatary. The mandator decides on the conduct of the transaction for the mandatary. However, this decision is not taken to third parties by the mandatary. The exercise of this decision and its knowledge by third parties occurs by means of representation. The sales representative, then, places himself in the place of the principal, places his willingness at the service of the latter.

3.2. Mercantile commission

Art. 693 of the Brazilian Civil Code defines the mercantile commission as follows:
"Art. 693. The objective of the commission agreement is the purchase or sale of goods by the commission merchant, in his name, on behalf of the principal."

Art. 694 of the same Code adds:
"Art. 694. The commission merchant is directly bound to the persons with whom he contracts, without such persons having action against the principal, or the latter against such persons, except if the commission merchant assigns its right to either of the parties."

The mercantile commission is thus a mandate without representation. In a mercantile commission, the commission merchant acts in his own name, but in the interest of another party. The commission merchant presents himself before the third party, with whom he contracts, acting apparently in his own name, but in the interest of another party.

In the sales representation, the sales representative acts on behalf of and in the interest of another person and, therefore, is not affected by the acts that he performs, within the powers that he received. In the mercantile commission, the commission merchant acts in his own name, being responsible for the performed act before the third party, even though he has performed the act on behalf and in the interest of the principal.

3.3. Service hiring

The Brazilian Civil Code, in art. 594 determines that:

"Art. 594. Any kind of lawful, material or immaterial service or work can be contracted subject to remuneration."
For service hiring, the purpose of the agreement is the work force of the hired party (physical or intellectual) made available to the hiring party, to whose benefit the result of the work inures.
Some scholars understand that the sales representation contains the idea of service hiring, or, better said, that service hiring is an element of sales representation.
It is true that the first impression in the analysis of the nature of the sales representation can lead to confusion between the two figures. However, what occurs is that the sales representative is distinct from the service provider, because the latter operates as an agent of another party, seeking material ends, while the activity of the sales representative results from a legal transaction, by the manifestation of his will.

3.4. Concession of a mercantile sale

The concession of a mercantile sale, which is almost always accompanied by exclusivity, constitutes one of the modern intermediation business mechanisms, for the sale of manufactured goods, especially vehicles. The concessionaire acquires from the grantor the product to be sold and resells it to a third party, assuming the risk of the purchase and sale agreement, both in respect to the price to be paid by the customer, and the delivery of the goods sold, being responsible for its possible defects.

The independent sales representative, even if operating as a company, does not perform the selling act, in his own name or at his own expense. He merely brings together the people interested in the transaction, who will directly close the principal transaction. The activity of the independent sales representative is the mediation or intermediation, exercised through appropriate techniques and is aimed at obtaining the declaration of the intention of the seller and buyer on the fundamentals of a transaction, which will be entered into if this declaration of intention is issued, in a positive manner, establishing the characteristics of the thing, as well as the respective price. The legal representative, as such, does not acquire the ownership of any object whatsoever to resell it with profit. If he does so, he will not be in the exercise of his profession.

3.5. Franchise agreement

The franchise, which is called a business franchise in Brazil, is regulated by Law 8.995/94, which defines this activity in article 1, transcribed below:

"Art. 1 A business franchise is a system whereby a franchisor grants to a franchisee the right of use of a trademark or patent, associated with the right of exclusive or semi-exclusive distribution of the products or services and, possibly, also the right of use of the implementation and administration technology of the business or operating system developed or held by the franchisor, subject to direct or indirect remuneration, but without the characterization of an employment relationship."

The franchise agreement uses the basic principles of commercial concession, but is not to be confounded therewith. In a concession, the concessionaire is limited basically to being a distribution channel of the products and services of the granting party, while the franchise has a much broader scope. The business franchise also absorbs, without doubt, the principles of the concession, sales representation, agency, mandate, purchase and sale, hiring, technology transfer and know-how agreements, etc.

The franchise is also not to be confounded with sales representation, for, as we have seen, the latter is much simpler than the former and, in addition to this, both are regulated by their own laws: the sales representation by Law 4.886/65 and the business franchise by Law 8.955/94, as previously mentioned above.

3.6. Distribution agreement

The Brazilian Civil Code, in art. 710, transcribed above, when regulating the agency agreement, considering the situation that the agent has under its possession and control the product whose sale he shall intermediate, creates another contractual type, which is called “distribution”.

The distribution agreement, by the stated law, presents a difference from the agency agreement, because it has a physical base: the thing, the movable property, whose transmission or destination for circulation are also included in the concept of the distribution agreement, along with the duty of conducting intermediation. The fact of having the thing in its possession and control does not mean that it always has this possession. The goods to be sold may continue in the possession of the dealer or owner of the business. As a rule of thumb, the distributor acquires the goods and is organized as a company for the task of distributing them.

Doctrine has defined distribution as being the agreement whereby one of the parties, called the distributor, undertakes to purchase from the other party, called the dealer, merchandise generally for consumption, for its subsequent placement on the market, at its own risk and expense, stipulating as consideration a resale amount or margin.

The dealer shall supply the goods and all the means by which the distributor can conduct the sales, while the distributor undertakes to make the sale of the products and, fundamentally, pay the price to the owner of the business or dealer.

As can be seen, the distribution is not to be confounded with sales representation, in which the sales representative is a mediator of mercantile transactions, soliciting proposals that will be transmitted to the principal, which will conclude the transaction with the customer.

3.7. Contract of employment

The independent sales representation agreement is also not to be confounded with the contract of employment. The latter, in conformity with Brazilian labor legislation (C.L.T. or Consolidation of Labor Laws), occurs when a natural person provides permanent, or non-occasional work, subject to a wage and under the subordination regime. It is precisely the latter element that characterizes the difference between the two types of contracts.

In the sales representation agreement, qualified as autonomous by law, there is no subordination, i.e., the sales representative does not remain under strict command, legally speaking, of the principal, which does not have the right to control the activity time of the former. The sales representative is autonomous because he has technical, economic and legal independence.

4. The registration of the sales representative in the Federal Council of Sales Representatives

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In accordance with article 5 of Law 4.886/65, remuneration will only be payable, as a intermediary of commercial transactions, the sales representative (natural person or corporate entity) that is duly registered with the Regional Council of Sales Representatives, which is the organ responsible for supervising the exercise of the sales representative profession. The objective of the legislator, when instituting the rule that impedes the payment of commission to those not enrolled in said Council, was that of stimulating the registration of those who exercise sales representation and, at the time, discouraging the irregular exercise of the activity. However, this rule does not imply exemption for the company that contracted the intermediary, which would be inadmissible. The intermediary will not receive commission as sales representative, which in fact he is not, while he does not arrange for his registration. The situation will be that of an intermediation business, based on common law rules, without the benefits established by Law 4.886/65.

5 The clauses and conditions of the sales representation agreement

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Article 27, of Law 4.886/65 (with the amendments introduced by Law 8420/92) determines that:

"Art.27. The sales representation agreement shall, in addition to the common elements and others at the discretion of the interested parties shall necessarily stipulate:

a) the general conditions and requirements of the sales representation;
b) generic or specific indication of the products or articles subject of the sales represen tation;
c) certain or indeterminate term or time of the sales representation;
d) indication of the zone or zones in which the sales representation will be exercised;
e) guarantee or not, partial or total, of the exclusivity of the zone or zone sector;
f) remuneration and time of payment, for the exercise of the sales representation, depending on the effective conduct of transactions, and the receipt, or not, by the principal, of the respective amounts;
g) the cases in which the restriction of the zone granted with exclusivity is justified;
h) obligations and responsibilities of the parties to contract;
i) exclusive exercise or not of the sales representation in favor of the principal;
j) indemnification due to the sales representative, for the termination of the agreement in non-conformity with the cases set forth in art. 35, the amount of which shall not be less than one twelfth (1/12) of the total remuneration received during the time in which he exercised the sales representation."

5 The clauses and conditions of the sales representation agreement

5.1. General conditions and requirements for the sales representation

The general conditions and requirements for the sales representation are the operating elements that the parties impose on one another, as limiting factors of the freedom of each. Examples of general conditions are: the possibility of the principal temporarily suspending the sales; the imposition of default interest or a fine, in case of failure or delay in the rendering of accounts of the sales representative; replacement of the products sold; the prohibition, subsequent to the termination of the agreement, of the sales representative or principal operating in the zone, during a short period of time, intermediating or selling the same product subject of the agreement; the selling methods, terms, financial costs etc...

5.2. Indication of the product whose sale constitutes the purpose of the agreement

Is the specific description (type, brand, and model) of the product whose sale shall be intermediated, or its generic description (name, in the popular sense).

5.3. Term of the agreement

The term of the sales representation agreement may be certain or indeterminate. It will be indeterminate when there are no means for the parties or third parties to know when the agreement will end. The determinate term can be established at the wish of the parties, adopting a certain data (day, month and year) or linking the final term of the agreement to a future fact, which will occur irrespective of the wish of the parties.

Paragraphs 1 and 2 of Law 4.886/65 prohibit the renewal of the agreement for a determinate term, as well as the extension of a new agreement entered into prior to the completion of six months from the end of the primitive agreement. If this occurs, the renewal is considered for a determinate term.

The Civil code allows the agency agreement to have a determinate term or indeterminate time. Article 720 established that, in case the agreement has no term, either party may cancel it subject to notice of 90 days. Nevertheless, this notice can only be given after a certain period of time, taking into consideration the nature and volume of the investment required from the agent.

5.4. Indication of the operating zone

Zone is the technical name to designate the professional's area of operation. The zone may have a geographical fixing (municipality, region, State) or be based on the clientele (list of customers to be served). The zone is not unchangeable, and may be reviewed at any time, provided there is consensus between the parties. Unilateral alteration is not permitted.

5.5. Exclusivity

The law provides for the possibility of the establishment of total or partial exclusivity, for a certain term or otherwise, of a zone or zone sector. Exclusivity in favor of the sales representative means that the principal cannot carry out the solicitation and promotion of transactions by means of its managers, officers and employees, or third parties (other representatives) in the same zone, during a certain term, or indefinitely. If it does so, it will have to pay the commission generated by the transactions deviated from the incumbent sales representative, or assume the contractual breach.

When the exclusivity is total in favor of the principal, the sales representative may only maintain the relationship set forth in Law 4.886/65 with the principal.

In accordance with art. 710 of the Civil Code, exclusivity is considered an element of an agency agreement. According to article 711 of the same Code, it is forbidden for the proponent to constitute more than one agent in the same zone. Article 714, in its turn, determines that the agent is entitled to remuneration derived from the transactions concluded in his zone.

Exclusivity may be partial, when, for example, it refers to a given geographical region that is smaller than the area of operation of the agent or sales representative, a given market place, or to certain customers, or customers of a given category or located in a certain region. It can be determined for one or some products, and excluded for others.

Law 4.886/65 establishes that the agreement shall define the cases where the restriction of the zone granted with exclusivity is justified. The agreement may provide for certain situations in which the exclusivity may be restricted, such, for example, when it is verified that the sales representative has not managed to serve the entire zone for which he was designated, failing to visit the known clientele, or not visiting them with the frequency established in the agreement. In this and other similar situations, previously established in the agreement, the restrictions on exclusivity may occur, which may be temporarily or definitively suspended with respect to certain zone sectors.

5 The clauses and conditions of the sales representation agreement

Exclusivity may be permanent, lasting during the lifetime of the agreement, or may be limited in time, in which case such limitation shall be express. It cannot be imposed unilaterally by the proponent or by the sales representative, except as provided in the agreement. It will depend on the consensus of the parties and, even then, will only be valid if, in an amendment to the agreement, which thenceforth limits or ends the exclusivity, there is no direct or indirect loss to the agent or to the sales representative. This aspect denotes the legislative protection enjoyed by the latter two parties.

5.6. The commission

The remuneration of the independent sales representative is called "commission" and is fixed, or calculated, by the application of a percentage of the value of the goods sold. The rate is fixed by the parties to the agreement.

The legal representative acquires the right to commissions at the time of the payment of the orders or proposals. The payment shall be made by the 15th day of the month subsequent to the invoice settlement month, accompanied by the respective copies of the invoices.

In case of unjust termination of the agreement on the part of the principal, any pending remuneration, generated by unfilled orders or orders in the phase of execution and receipt, will fall due on the termination date.

The law prohibits, in sales representation, any alterations that directly or indirectly imply a reduction of the average earnings received by the sales representative during the last six months of the validity period of the agreement.

No remuneration will be due and payable to the sales representative, if the lack of payment results from the buyer's insolvency, and also if the transaction is undone or the delivery of the goods is suspended due to the commercial situation of the buyer, capable of compromising or making the settlement doubtful.

5.7. Obligations and responsibilities of the parties

Letter h of art. 27, transcribed above determines that the agreement shall set forth the obligations and responsibilities of the parties. The rule provides for the possibility of the ample exercise of freedom of choice, limited only by the provisions of Law 4.886/65 and other laws as may influence the construction of the agreement.

6 Contractual termination with good cause

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6.1. By the principal

In conformity with article 35, of Law 4.886/65,

"The following constitute good cause for the termination of the sales representation agreement, by the principal:

a) the inertia of the sales representative in performing the obligations resulting from the agreement;
b) the commitment of acts that imply the commercial discredit of the princpal;
c) the failure to perform any obligations inherent to the sales representation agreement;
d) definitive condemnation for a crime considered infamous;
e) force majeure."

Inertia assumes various forms in conformity with the contractual provisions, the modus operandi of the parties and the customs of the place. It is the carelessness, laziness, indolence, lack of attention, indifference with which an obligation is performed. It is the negligence of a person that is bound by an act, the omission of diligence, in a continuous manner or in relation to a given act or fact, to which the author is linked by an ex officio obligation.

Once alleged, inertia shall be evidenced by the principal that invokes it.
Inertia does not cause the loss of commissions credited or pending, unless the loss by the principal is evidenced, which may retain such commissions for compensation.

6 Contractual termination with good cause

These same inertia rules in sales representation are applicable to agency and distribution agreements, of the Code Civil.

The commitment of acts that imply the commercial discredit of the principal is another fault that can be attributed to the sales representative. The sales representation agreement and agency and distribution agreements are part of the image of the principal or proponent, its fame, the reputation of its trademarks, the good standing of his company and of its business.

The representative or agent cannot perform acts that injure this asset. If they do, they will be classified in the situation of art. 35, b of Law 4.886/65, transcribed above.

The third situation of gross misconduct set forth in law is the failure to observe any obligations inherent to the sales representation agreement.

It is sufficient that a written agreement contains, in its text, a given obligation to be performed by the sales representative, for its non-observance to result in the possibility of the agreement's cancellation due to the gross misconduct of the sales representative's responsibility. It is important to mention that the faults committed against the obligations inherent to an agreement shall be serious, have an injurious content with force to strike down the agreement. Small failures, especially those that did not have an economic impact, may be excused as grounds for contractual termination. Their repetition may lead to another form of gross misconduct, which is inertia.

Definitive condemnation for a crime considered infamous is another good cause provided for in said art. 35, which, once occurred, may bring about the cancellation of the agreement by the principal.

The expression of the law is not very fortunate, since there is no crime in the Brazilian penal law whose nature is considered infamous. The method of interpreting the provision is to examine art.4, c, of Law 4886/65 according to which:

"The following persons cannot be sales representatives:

a) .....;
b) .....;
c) those that have been condemned for a criminal offense of an infamous nature, such as falsity, larceny by fraud, embezzlement, contraband, robbery, stealing, pandering or crimes also punished with the loss of public office."

Although this legal provision refers to the concept of criminal offenses of an infamous nature, it exemplifies, mentioning the crimes of falsity, larceny by fraud, embezzlement, contraband, robbery, stealing, pandering or crimes also punished with the loss of public office. For this reason, only these crimes would have the prerogative of causing the agreement's termination, if perpetrated by the sales representative, although against third parties.

Note, also, that the simple criminal proceeding, in which it is sought to investigate and fix liability for the crime, does not suffice to constitute gross misconduct. It is necessary to obtain the condemnation, on a definitive basis, that is to say, from which no appeal is applicable.

Force majeure also constitutes good cause for the termination of a sales representation agreement. Article 393 of the Civil Code determines that the debtor is not held to answer for the losses resulting from fortuitous events or force majeure, if the party to contract has not assumed liability therefor in an express manner. The sole paragraph of said article 393 defines force majeure:

"The fortuitous or force majeure event is verified in the necessary fact, whose effects were not possible to avoid or prevent."

Such events are causes of the exemption of liability, because they do not result from the culpa of the party to contract. Doctrine seeks to distinguish a fortuitous case (unforeseeable and irresistible) from force majeure (a foreseeable event but uncontrollable within the forces of the debtor), without this distinction resulting in any practical result, for their effects are the same.

The fortuitous or force majeure event, to exempt the party to contract from liability is only verified when, in an absolute manner, it precludes the fulfillment of the consideration. If it renders them more difficult and onerous, but even so enforceable, there is no force majeure or fortuitous event.

6.2. By the sales representative

Article 36, of Law 4.886/65 determines that:

"The following constitute good cause for the termination of the sales representation agreement, by the sales representative:

a) reduction of the representative's sphere of activity in non-conformity with the clauses of the agreement;
b) the direct or indirect breach of exclusivity, if provided for in the agreement;
c) the abusive fixing of prices in relation to the sales representative's zone, with the exclusive purpose of precluding his regular activities;
d) the non-payment of his remuneration at the proper time;
e) force majeure.

The reduction of the representative's sphere of activity is prohibited by Law 4.886/65, which affords an imperative nature to the rules that deal with contractual amendment (prohibiting that they cause direct or indirect adverse effects) and to those that establish indemnification clauses. They cannot be ignored by the parties, having a non-postponable action, and contractual solutions that dismiss or violate them are forbidden.

Breach of exclusivity can also be invoked by the sales representative as good cause for the termination of the sales representation agreement.

The agreement can provide for exclusivity both in favor of the sales representative and

the principal. It may be total (covering the entire zone, geographically speaking, all the customers of a list, prohibiting the extension thereof, or all the products manufactured, or sold by the principal), or partial, referring to only part of the geographical zone, or only some customers or one or some of its products.

The direct breach of exclusivity occurs when the principal acts personally in the zone with the exclusive clientele or selling the exclusive products, accumulating orders, forwarding them and executing them. Indirect breach occurs through the appointment of another sales representative to operate in the same marketplace, with the same clientele or with an exclusive product.

The breach of exclusivity by the principal has a double sanction. The first, as determined in art. 31 of Law 4.886/65, is the payment to the sales representative, of the commissions generated by the transactions conducted in the closed zone (in an ample sense), not excusing the payment made to third parties. The second is the suspension of the agreement, with the payment of the indemnification determined in art. 27, (j), of Law 4.886/65.

The sales representative can offend the exclusivity clause that is favorable to the principal. The case does not fall within art. 36, (b), but rather within art. 35, (c), which sanctions this contractual breach.

The abusive fixing of prices in relation to the sales representative's zone, with the exclusive objective of precluding his regular activities, is also considered good cause for the termination of the sales representation agreement on the part of the sales representative.

The principal will offend the sales representation agreement, giving rise to just termination by the sales representative, when it adopts discriminatory practices, with the aim of impairing the activities of the sales representative in his zone.

The analyzed fault is related to the price question. There are other forms of discrimination against the sales representative that can be based, for example, on heavier conditions, in comparison with those employed in other zones. But these do not fall within article 36, (c), but rather within item (a), and may give rise to termination for gross misconduct.

If the principal fails to pay commission at the proper time, i.e., on the date determined in the agreement, or when the agreement omits such, by the fifteenth day of the month subsequent to the invoice settlement month, it will be liable for default, entailing the just termination of the agreement and subject to price-level restatement and default interest, as well as the compensation determined in said art. 27, (j).

The sales representative may also terminate his agreement when he is affected by force majeure, that is to say, by an unforeseeable or unavoidable fact, which prevents his performance. The same comments made on art. 35, (e), above, are applicable here inverting the positions.

7 Retention of commissions

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The law provides, only for the case of the occurrence of good cause for the termination of the agreement, the prerogative of the principal retaining commissions due and payable to the sales representative, with the purpose of recovering damages caused by the sales representative and, also, in the cases set forth in art. 35, transcribed above, as compensation.

The law is clear, therefore, when it states that the retention of commissions can only take place in the event of reimbursable damages. If there is no damage or such damage is not immediately demonstrable, there will be no way of retaining the commission due and payable.

The prohibition of the del credere clause

The del credere clause, whereby the sales representative answers for the solvency and punctuality of the customer is prohibited in the sales representation agreement. The reason for the prohibition is that the use of this clause was a source of significant abuse, against which the sales representative could not fight, due to his position of submission, for it permitted the value of notes that had not been paid by customers, as well as the exorbitant interest to be posted in the commissions account, which could affect the entire assets of the sales representative.

8 Indemnification

8.1. In the agreement for an indeterminate time

In conformity with item (j), of art. 27 of Law 4.886/65, the agreement shall provide for the indemnification due to the sales representative, for the termination of the agreement by the principal, without good cause. This indemnity amount cannot be less than 1/12 of the total remuneration received during the time in which the sales representative has exercised the representation. This rule is valid for agreements for an indeterminate time. For agreements for a determinate term the rule is different, as we will see below.

The expression remuneration is comprehensive. It basically covers the commission for successful sales, but may embrace other titles besides the commission strictly speaking, such as production bonuses, for the attainment of quotas, results obtained with the work of subordinates, special commissions generated during the sales campaign, test of the product in the market, recovery of receivables, commissions paid for the collections made etc. It covers all the amounts paid, credited or payable by the principal or proponent, which are directly or indirectly linked to the work carried out by the sales representative in favor of the principal, taking the form of the remuneration due and payable for this rendering.

The parties are free to fix the indemnity amount, but the above mentioned legal limit shall always be observed.

If the agreement, in any way, establishes a percentage that is lower than the one set forth in the legal rule, the latter shall prevail. Likewise, if the agreement is verbal, or if in writing,

fails to specifically provide for indemnification, the legal percentage shall prevail. The latter precludes the imposition of common law to fix the compensation for losses and damages.

8.2. In the sales representation agreement for a determinate term

When the sale representation agreement for a determinate term reaches its expiration date and its contractual relationship ceases, there is no right to compensation. Such compensation will only be cogitated when the term is not observed. Thus, if the principal breaks the agreement before the end of the term, it will pay indemnity equivalent to the average monthly commission paid or credited, as from the effective date of the agreement, multiplied by half the number of months that result in the contractual term, as established by paragraph 1 of art. 27 of Law 4.886/65. Better explained, in an agreement of twelve months, for example, the minimum indemnity amount will be equivalent to the average monthly commission times six, regardless of the time missing to complete the final term of the agreement.

Though the Civil Code admits the agency agreement for a determinate term, it does not contain a similar rule to that of paragraph 1, of art. 27 of Law 4.886/65. This rule will be applied in compliance with art.721 of the Code, according to which:

"The rules concerning the mandate and commission and those contained in special law will apply to agency and distribution agreements."

Therefore, in case of default, in relation to the duration period, of an agreement for a determinate term on the part of the proponent, the agent will be entitled to compensation calculated on the basis of the average monthly remuneration that it received up to the termination date, multiplied by half the number of months fixed by the agreement as its term.

8.3. In the distribution agreement

It is important to distinguish between the agreements that were signed before and after the effective date of the Civil Code of 2002.

8.3.1. Distribution agreements prior to the effective date of the Civil Code of 2002

Given the absence of an express legal provision, Brazilian case law has understood that the indemnification set forth by art. 27, (j), of Law 4.886/65 applies by analogy to distribution agreements entered into prior to the coming into force of the Civil Code of 2002.

8.3.2. Distribution agreements subsequent to the effective date of the Civil Code of 2002

For the distribution agreements signed after the effective date of the Civil Code, the latter, in its articles 715, 717 and 718 determines that:

"Art. 715. The agent or distributor is entitled to indemnification if the proponent, without good cause, ceases to fulfill proposals or reduces such to the extent that it renders the continuation of the agreement anti-economic."

"Art. 717. Even if dismissed for good cause, the agent will have the right to be remunerated for the services provided to the proponent, notwithstanding losses and damages for the damages suffered."

"Art. 718. If the dismissal occurs without the fault of the agent, he will have the right to the remuneration theretofore due and payable, including on pending transactions, as well as the compensation determined in special law."

Moreover, article 720 determines that:

"Art. 720. If the agreement is for an indeterminate time, either party may terminate it, by giving notice of ninety (90) days, provided that a period of time that is compatible with the nature and volume of investment required from the agent has elapsed."

"Sole paragraph. In case of controversy between the parties, the judge will decide the reasonableness and volume of the investment required from the agent."

8.4. In the business franchise agreement (franchising)

The law does not provide for specific indemnification in the case of the breach of any rule of a business franchise agreement. The parties are free to establish the fine or fines relating to the contractual breach, as well as liability for losses and damages.

conclusion

These are, in our opinion, the most relevant aspects of the sales representation agreement, in conformity with Brazilian law, which we present in a succinct manner.

CONTACT

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Corporate, M&A, Foreign Investment, Litigation, Environment, Tax, International & Local Contracts, Real Estate, Anti Trust, Dumping, Administrative Law, Privatization & Regulatory Agencies, Distribution, Agency & Franchising, Offset & Project Finance Operations, General Practice.

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General Information
The Law Firm was founded in August, 1975. The firm consists of 2 partners and 10 lawyers. The firm prides itself in offering a very quick, dedicated and high quality service. The firm is a member of IBA, UIA, IABA, as well as a member of the main local Chambers of Commerce. The firm has published many articles and papers and presented at Seminars both in Brazil and abroad.

References
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