

Legal Regime of the Agency Agreement

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Legal Regime of the Agency Agreement

DL 178/86

1. In the agreemental sphere, the parties have a wide range of freedoms, allowing them to establish and shape legal relations to suit their interests, creating the appropriate legal instruments for this purpose.

Freedom of agreement proves to be an indispensable means of self-discipline in the face of constant and accelerated economic and social evolution. It is therefore a valuable factor in the internal rejuvenation of the legal system. The possibility for parties to enter into atypical agreements thus allows them to tune in to renewed practical needs, often anticipating the legislator in this task.

2. The agency agreement, or commercial representation agreement, as it is also known, despite its long-acquired social typicality, has been used in our country as an atypical business scheme.

The problems that have arisen in the meantime and which have been highlighted by case law call for legislative inertia to be overcome, as has happened in other legal systems. Portugal's recent entry into the European Economic Community has made it more imperative and urgent for the legislator to intervene, given the lack of definition of the rules governing this agreement in our country; allowing the omission of the duty to legislate could prove significantly damaging to the legitimate interests of agents operating in national territory.

3. From an economic history perspective, it can be said that the need for an efficient distribution of products, accentuated from the middle of the last century by the growth of industry, led to the traditional method of placing goods on the market being overcome.

The need to seek out new markets and develop existing ones, in areas far from the production centers, in order to respond to the increase in productivity and to encourage commercial expansion combined with the development of foreign trade, are factors behind the progressive appeal for employees who assist the company, but have autonomy from it.

The use of the company's own staff, workers or employees, legally subordinated to it by employment agreements, not only proved to be less and less effective, but also entailed high costs, particularly in terms of organization, and risks for the company. Instead of sending employees to places far from its head office, or setting up subsidiaries or branches there, the company preferred to use people based in those areas, taking advantage of its organization, its skills and its credibility with the local public.

4. This collaboration, or "economic representation", began to take place, in a more significant way, and in more recent times, through the commission agreement. However, multiple factors - inherent to industrial civilization, such as the development of means of communication and mass production - soon led to the emergence and spread of the agency agreement. And with it came a qualitative leap.

Like the commissioner, the agent is independent and acts autonomously and is paid according to the results he achieves. However, it is the company - i.e. the principal, as the agent's counterparty may not be an entrepreneur - that concludes the agreements with clients, and the agent is limited, unless otherwise agreed, to promoting their conclusion. His actions are characterized by autonomy and stability and are limited to a certain area or circle of clients.

It is a fundamental obligation of the agent to promote the conclusion of agreements on behalf of the other party, which implies not only the dissemination of goods and their penetration into the market, but also their ability to make a difference,

It is also responsible for a complex range of tasks linked to the negotiation and preparation of agreements. In the case of an agent who has been given representative powers, he is also responsible for concluding the agreements he promotes. But even here, his actions are different from

those of the agent, since they are ancillary functions, merely complementary to the material activity that precedes them.

It is with this in mind that article 1º of this law defines the agency, in order to highlight the fundamental features that characterize the agreement, trying to dispel misunderstandings with other figures, especially with mediation commission and concession agreements.

With regard to the latter, comparative law shows a certain tendency to maintain it as an atypical agreement, while at the same time highlighting the need to apply the agency regime to it by analogy - when and to the extent that it occurs - especially with regard to the termination of the agreement.

5. It was deemed necessary not to neglect the protection of third parties. Thus, after Chapter II, dedicated to the rights and obligations of the parties, which to a large extent were already implied by their fundamental obligations (negotiation promotion, on the agent's side, payment of remuneration, on the principal's side), a chapter was added to protect clients.

The purpose of the duty to inform - in the absence of a proper registration service - was to inform interested parties in advance of the powers granted to the agent. The rule on apparent representation was intended, albeit cautiously, to protect the legitimate expectations of third parties. Some would like the legislator to go further; others fear that the legislator has gone too far. However, we have opted for a solution that we consider to be balanced, in such a sensitive issue as apparent representation.

In Chapter IV, which deals with the termination of the agreement, special attention should be paid to client compensation. In essence, this is an indemnity designed to compensate the agent for the income which, after the agreement has ended, the other party may continue to enjoy as a result of the activity carried out by that party. Once the conditions on which it depends have been met, the client compensation is due, regardless of how the agreement is terminated.

As for termination, its effectiveness was limited to open-ended agreements. However, with the notice periods set, an attempt was made to properly safeguard the interests of the agreementing parties in the event of a sudden termination of the agreement. Failure to comply with the established deadlines imposes an obligation to compensate the other party.

Termination can be based on serious or repeated failure to comply with agreemental obligations, or on circumstances of a personal or objective nature, in both cases depending on the verification of other requirements. It also deals with the right to compensation.

6. The drafting of this law took precedents from comparative law into account. The solutions that seemed most appropriate were adopted, innovating where deemed advisable, particularly in terms of protecting third parties. The suggestions of the Council of the European Communities were also taken into account; Such suggestions are generally welcomed.

Thus:

The Government decrees, under the terms of paragraph a) of no.º 1 of article 201.º of the Constitution, the following:

CHAPTER I

General provisions

Article 1º

Concept and form

- 1 - Agency is the agreement whereby one of the parties undertakes to promote the conclusion of agreements on behalf of the other, in an autonomous and stable manner and for a fee, and may be assigned a certain area or a certain circle of clients.
- 2 - Either party has the right, which cannot be waived, to demand a signed document from the other stating the content of the agreement and any subsequent additions or modifications.

(Edited by Decree-Law no.º 118/93, of April 13.)

Article 2º

Agent with representation

- 1 - Without prejudice to the provisions of the following paragraphs, the agent may only conclude agreements on behalf of the other party if the latter has given him the necessary powers in writing.
- 2 - Claims or other statements relating to business concluded through the agent may, however, be submitted to the agent.
- 3 - The agent is entitled to request the urgent measures that are indispensable in order to protect the rights of the other party.

Article 3º

Recovery of claims

- 1 - The agent may only recover debts if the other party authorizes him to do so in writing.
- 2 - The agent to whom powers of representation have been conferred shall be presumed to be authorized to collect claims arising from agreements concluded by him.
- 3 - If the agent collects debts without the necessary authorization, the provisions of article 770.º of the Portuguese Civil Code shall apply, without prejudice to the regime enshrined in article 23.º of this statute.

Article 4.º

Exclusive agent

The granting of an exclusive right to an agent is subject to a written agreement between the parties, whereby the other party is prevented from using other agents within the same area or the same circle of clients to carry out activities that compete with those of the exclusive agent.

(Edited by Decree-Law no.º 118/93, of April 13.)

Article 5.º

Subagency

1 - Unless otherwise agreed, the use of sub-agents is permitted.

2 - The rules of this law apply to the sub-agency relationship, with the necessary adaptations.

CHAPTER II

Rights and obligations of the parties

SECTION I

Agent's obligations

Article 6.º

General principle

In fulfilling the obligation to promote the conclusion of agreements, and in all other matters, the agent must act in good faith, and it is his responsibility to look after the interests of the other party and carry out the appropriate activities to fully achieve the agreement purpose.

Article 7º

Enumeration

In particular, the agent is obliged:

- a) To respect the other party's instructions that do not jeopardize their autonomy;
- b) To provide any information that is requested or that is necessary for good management, especially information regarding the creditworthiness of customers;
- c) Enlightening the other party on the market situation and prospects;
- d) To render accounts, as agreed, or whenever justified.

Article 8º

Obligation of secrecy

The agent may not, even after termination of the agreement, use or disclose to third parties' secrets of the other party which have been entrusted to him or of which he has become aware in the course of his work, except to the extent permitted by the rules of professional ethics.

Article 9º

Non-competition obligation

- 1- A written agreement must stipulate that the agent must not, after the agreement has ended, engage in activities that compete with those of the other party.
- 2- The non-compete obligation can only be agreed for a maximum period of two years and is limited to the area or circle of customers entrusted to the agent.

Article 10.º

Convention "del credere"

- 1- The agent may, by means of an written, guarantee compliance with the obligations of a third party, provided that they relate to an agreement negotiated or concluded by him.
- 2- The *del credere* agreement is only valid when the agreement is specified, or the guaranteed people are individualized.

Article 11º

Temporary impossibility

Any agent who is temporarily unable to perform the agreement, in whole or in part, must immediately notify the other party.

SECTION II

Agent's rights

Article 12º

General principle

The agent has the right to demand that the other party behaves in good faith in order to fully achieve the agreement's purpose.

Article 13°

Enumeration

In particular, the staff member is entitled to:

- a) To obtain from the other party the elements that, taking into account the circumstances, are necessary for the exercise of its activity;
- b) To be informed, without delay, of the acceptance or rejection of agreements negotiated and those concluded without the necessary powers;
- c) To receive, on a regular basis, a list of the agreements concluded and the commissions due, no later than the last day of the month following the quarter in which the right to the commission was acquired;
(Edited by Decree-Law no.º 118/93, of April 13.)
- d) To demand that he be provided with all the information, including an extract from the other party's accounting books, that is necessary to verify the amount of commission that will be due to him;
(Edited by Decree-Law no.º 118/93, of April 13.)
- e) Payment of remuneration, as agreed;
- f) To receive special commissions, which can be cumulated, relating to the charge for co-branding credits and the del credere agreement;
- g) Compensation for the non-compete obligation after the termination of the agreement.

Article 14°

Right to notice

The agent has the right to be immediately warned that the other party is only in a position to conclude a considerably lower number of agreements than has been agreed or would be expected given the circumstances.

Article 15°

Remuneration

In the absence of an agreement between the parties, the agent's remuneration shall be calculated according to custom or, failing that, according to equity.

Article 16°

Right to commission

1- The agent is entitled to a commission for the agreements he has promoted, as well as for the agreements concluded with clients he has recruited, provided they were concluded before the agency relationship ended.

2- The agent is also entitled to commission for acts concluded during the term of the agreement if he has an exclusive right for a geographical area or a circle of clients and the acts were concluded with a client belonging to that area or circle of clients.

(Edited by Decree-Law no.º 118/93, of April 13.)

3- The agent shall only be entitled to commission for agreements concluded after the agency relationship has ended if he proves that he negotiated them or, having prepared them, that they were concluded mainly due to his activity, provided that in both cases they are concluded within a reasonable period of time after the agency has ended.

(Edited by Decree-Law no.º 118/93, of April 13.)

Article 17º

Succession of agents over time

The agent shall not be entitled to the commission during the term of the agreement if it is due, by virtue of paragraph (3) of the previous article, to the agent who preceded him, without prejudice to the fact that the commission may be divided equally between the two, when circumstances justify so.

(The heading and text of the article were amended by Decree-Law no.º 118/93, of April 13.)

Article 18º

Acquisition of the right to commission

1- The agent acquires the right to commission as soon as and to the extent that one of the following circumstances occurs:

- a) The principal has fulfilled the agreement or should have fulfilled it by virtue of the agreement concluded with the third party;
- b) The third party has fulfilled the agreement.

2- Any agreement between the parties on the right to commission cannot prevent it from being acquired at least when the third party has fulfilled the agreement or should have fulfilled it, if the principal has already fulfilled his obligation.

3- The commission referred to in the previous paragraphs must be paid by the last day of the month following the quarter in which the right was acquired.

4- If there is a *del credere* agreement, however, the agent can demand the commissions due once the agreement has been concluded.

(The heading and text of the article were amended by Decree-Law no.º 118/93, of April 13.)

Article 19°

Lack of compliance

If the non-compliance with the contract is due to a cause attributable to the principal, the agent does not lose the right to claim the commission.

Article 20°

Expenses

In the absence of an arrangement to the contrary, staff members shall not be entitled to reimbursement of expenses incurred in the normal course of their duties.

CHAPTER III

Protection of third parties

Article 21° Duty to inform

The agent must inform interested parties of the powers he possesses, in particular by means of signs displayed in his place of work and on all documents in which he identifies himself as an agent for others, which must always state whether or not he has representative powers and whether or not he can recover debts.

Article 22°

Representation without powers

1- Without prejudice to the provisions of the following article, the business concluded by the agent without powers of representation on behalf of the other party shall have the effects provided for in article 268.°, paragraph (1), of the Portuguese Civil Code.

2- The deal is deemed to have been ratified if the other party, as soon as it becomes aware of the deal and its essential content, does not inform the *bona fide* third party of its opposition to the deal within five days of becoming aware of it.

(The wording of n.° 2 was given by Decree-Law n.° 118/93, of April 13.)

Article 23.°

Apparent representation

1- A transaction concluded by an agent without powers of representation is effective *vis-à-vis* the principal if there are weighty reasons, objectively assessed, taking into account the circumstances of the case, which justify the third party's trust in good faith in the legitimacy of the agent, provided that the principal has also contributed to establish the trust of the third.

2- The provisions of the previous paragraph shall apply *mutatis mutandis* to the recovery of debts by an unauthorized agent.

CHAPTER IV

Termination of the agreement

Article 24°

Forms of termination

The agency agreement can be terminated by:

- a) Agreement of the parties;
- b) Forfeiture;
- c) Complaint;
- d) Resolution.

Article 25.º

Mutual agreement

The agreement by which the parties decide to end the agreement's relationship must be set out in a written document.

Article 26º Expiry

In particular, the agency agreement expires:

- a) After the deadline;
- b) If the condition to which the parties have subjected it is met or if it becomes certain that it cannot be met, depending on whether the condition is resolute or suspensive;
- c) The death of the perpetrator or, in the case of a legal person, its extinction.

Article 27º

Duration of the agreement

1- If the parties have not agreed on a term, the agreement is presumed to have been concluded for an indefinite period.

2- An agency agreement for an indefinite period is considered to have been transformed into a fixed-term agreement whose content continues to be carried out by the parties, despite the expiry of the respective period.

(The wording of n.º 2 was given by Decree-Law n.º 118/93, of April 13.)

Article 28°

Complaints

1 – The complaint is only permitted in agreements entered into for an indefinite period of time and provided that the other party is notified in writing at least one month in advance:

- a) One month if the agreement lasts less than a year;
- b) Two months, if the agreement has already started its 2nd year.
- c) Three months in other cases.

2 - Unless otherwise agreed, the end of the period referred to in the previous paragraph must coincide with the last day of the month.

3 - If the parties stipulate longer time limits than those set out in paragraph 1, the time limit to be observed by the principal may not be shorter than that of the agent.

4 - In the case provided for in Article 27, paragraph (2) the time prior to the expiry of the deadline shall also be taken into account in determining the notice period.

(The wording of the heading and the articles was given by Decree-Law no.º 118/93, of April 13.)

Article 29°

Lack of notice

1 - Anyone who terminates the agreement without respecting the deadlines referred to in the previous article is obliged to compensate the other party for the damage caused by the lack of notice.

2 - The staff member may demand, instead of this compensation, an amount calculated on the basis of the average monthly remuneration earned during the previous year, multiplied by the time missing; if the agreement has lasted less than a year, the average monthly remuneration earned during the term of the agreement will be taken into account.

Article 30°

Resolution

The agency agreement can be terminated by either party:

- a) If the other party fails to comply with their obligations, when, due to their seriousness or repetition, it is not possible to maintain the agreement's relationship;
- b) If circumstances occur that make it impossible or seriously impair the achievement of the agreement's purpose, in terms of the agreement not being required to be maintained until the expiry of the period agreed or imposed in the event of termination.

Article 31°

Declaration of withdrawal

Termination by means of a written statement, within one month of becoming aware of the facts that justify it, stating the reasons on which it is based.

Article 32°

Compensation

- 1- Regardless of the right to terminate the agreement, either party has the right to be compensated, in general terms, for damages resulting from the other's failure to comply with its obligations.
- 2- Termination of the agreement based on Article 30, paragraph (b) confers the right to fair compensation.

Article 33°

Customer compensation

- 1 - Without prejudice to any other compensation that may be due under the terms of the previous provisions, the agent is entitled, after the termination of the agreement, to customer compensation, provided that all of the following requirements are met:
 - a) The agent has acquired new clients for the other party or substantially increased the volume of business with existing clients;
 - b) The other party will benefit considerably, after the termination of the agreement, from the activity carried out by the agent;
 - c) The agent ceases to receive any remuneration for agreements negotiated or concluded, after the termination of the agreement, with the clients referred to in point (a).
- 2 - In the event of the agent's death, the client compensation can be claimed by the heirs.
- 3 - Client compensation is not due if the agreement has ended for reasons attributable to the agent or if the agent, by agreement with the other party, has assigned his agreement position to a third party.

(Edited by Decree-Law no.° 118/93, of April 13.)
- 4 - The right to compensation is extinguished if the agent or his heirs do not notify the principal within one year of the termination of the agreement that they wish to receive it, and the legal action must be brought within one year of this notification.

(Edited by Decree-Law no.° 118/93, of April 13.)

Article 34°

Calculating customer compensation

The indemnity for clients shall be fixed on an equitable basis but may not exceed an amount equivalent to an annual indemnity, calculated on the basis of the average annual remuneration received by the agent during the last five years; if the agreement lasted less time, the average of the period during which it was in force shall be taken into account.

(The heading and text of the article were amended by Decree-Law no.º 118/93, of April 13.)

Article 35°

Right of retention

For claims arising from his activity, the agent enjoys a right of retention on the objects and valuables he holds by virtue of the agreement.

Article 36°

Obligation to repay

Without prejudice to the provisions of the previous article, each party is obliged to return the objects, valuables and other items belonging to the other at the end of the agreement.

CHAPTER V

Conflict rules

Article 37°

Application over time

- 1- The provisions of this statute shall apply to agreements in progress on the date of its entry into force, without prejudice to legal or conventional provisions that are more favorable to the agent.
- 2- The parties have 60 days after the entry into force of this decree-law to reduce any previously concluded agreements to writing, if this is the form required by this decree-law.
- 3- The agent has the same time limit to comply with the duty to inform imposed in Article 21 .º

Article 38°

Application in space

Agreements governed by this statute that take place exclusively or predominantly in national territory shall only be subject to legislation other than Portuguese law, as regards the termination regime, if this proves to be more advantageous for the agent.

CHAPTER VI

Final disposal

Article 39º

Duration

This law comes into force 30 days after its publication.

Seen and approved by the Council of Ministers on May 28, 1986. - Aníbal António Cavaco Silva - Mário Ferreira Bastos Raposo.

Promulgated on June 18, 1986.

Publish.

The President of the Republic, MARIO SOARES.

Referendum held on June 18, 1986.

The Prime Minister, Aníbal António Cavaco Silva.