

# LEGAL ASPECTS REGARDING THE AGENCY CONTRACT'S REFLECTION IN THE ROMANIAN LEGISLATION

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**Abstract:** *The legal practice has revealed several collaboration contracts, under the impulse of the new social and economic expectations. The agency contract is a juridical institution set up and developed by practice. In opposition with rare, isolated collaboration which characterizes the commission contract, the agency contract features stable, durable collaboration with commercial agents that sometimes manage to find customers or conclude contracts on behalf of the deal principal. The agency contract is concluded in writing for a stipulated or non-stipulated period of time including all subsequent changes and additional clauses; it can be proved only in writing irrespective of its value, both between the two parties and to third parties.*

**Keywords:** *contract, commercial agent, deal principal, non-competition clause.*

## 1. General considerations

Integrating the regulatory contents of EU Council's Guidelines no.653/1986 of 18 December 1986 regarding the compliance of EU member state independent commercial agents' rights with the Romanian legislation involves the adjustment and supplementation of the Romanian Commercial Code or the adoption of a special law.

The Romanian legislation does not include a juridical category different from the one of proxy or commission under the agency title although, there are other regulations for certain types of agents.

The Romanian commercial code foresees a single type of collaboration contract – the commission contract and its variant, the consignment contract.

The legal practice has revealed several collaboration contracts, under the impulse of the new social and economic expectations resulted from the changes in the goods and services distribution system. Thus, the new commercial contracts have various often inaccurate names which have assigned law courts very difficult tasks when trying to qualify contracts and setting up their contents.

The agency contract is a juridical institution set up and developed by practice. In opposition with rare, isolated collaboration which characterizes the commission contract, the agency contract features stable, durable collaboration with commercial agents that sometimes manage to find customers or conclude contracts on behalf of the deal principal.

A special law has been adopted in this field regarding the above issues – Law no.509/2002 related to permanent commercial agents which does not confide to the provisions in EU Council's Guidelines no.653/1986, but adjusts the latter to the Romanian juridical context.

The law applies to the juridical relationships between permanent commercial agents and their deal principals.

A permanent commercial agent is any marketer, individual or business, who is permanently authorized as an independent intermediary to:

- negotiate business on behalf of an individual or business called *deal principal*;
- negotiate and conclude business on behalf of and at the expense of the deal principal.

The contract concluded between an agent and a deal principal is called *agency contract*.

An agent may use the authorization provided by a deal principal only in certain regions, as it is stipulated in the contract.

The agent is not the deal principal's official in charge (that is the agent is not hired on a work contract basis). According to article 392 in the Commercial Code, the official in charge is "the one assigned with their manager's trade activities either at the site of effective practice or in any other place". Thus, the official in charge receives that position by the work contract concluded by the marketer and the former. The contract conclusion entails the official in charge's dependence upon the marketer as he/she is one of the latter's employees. The agent renders a service as main title or supplement for some remuneration

The provisions of Law no.509/2002 do not apply to the people who:

- a) act as jobbers within stock exchanges and regulated markets of goods and financial derivative instruments;
- b) work as insurance/reinsurance agents and brokers;
- c) render unpaid services.

According to the law, an agent is not the one who:

- a) is the legal or statutory body of a business and has the duty to stand for the latter;
- b) is a partner or shareholder and has the legal authorization to act for the other partners or shareholders;
- c) is a judiciary administrator, liquidator, trustee, guardian, custodian or distraint executor to the principal in a deal.

## **2. Rights and obligations of the parties**

The agent cannot negotiate and conclude on his own competition trade operations with similar goods and/or services within the region stipulated in the agency contract, and without the deal principal's consent.

If the agency contract does not stipulate a counterclause, the agent may act for several deal principals and the deal principal may use several agents in the same region, at the same time and for the same trade.

The agent may be given the authorization to negotiate or conclude operations for several competitor deal principals in the contract-stipulated region only if there is such an allowance within the contract.

The agency contract may stipulate a *clause of non-competition* – which is a contract provision whose effect is to reduce the agent's professional activities during the development of and/or after the conclusion of the agency contract.

The non-competition clause should be drafted in writing, under the penalty of nullity. The non-competition clause is applicable only in the geographic area or to the people stipulated in the agency contract, and only regarding the goods and services the agent is authorized to negotiate for and conclude operations. Any extension of the non-competition clause scope can be cancelled at the agent's request. The non-competition clause cannot last for more than two years from the date of agency contract conclusion.

The agent shall meet the requests ensuing from authorization received personally or by means of his deal principals with a view to accomplish the latter's interests.

In order to execute granted authorization, the agent must act with goodwill and professional diligence.

## **3. Agent's obligations:**

- a) to gather and communicate useful information to the deal principal regarding the region/s stipulated in the contract as well as all other information at hand;
- b) to show required diligence when negotiating or concluding business that he is authorized for in most favourable circumstances to the deal principal;
- c) to closely observe the deal principal's sensible instructions, taking account of their imperative, indicative or optional nature;
- d) to record in his registers separate entries that relate to each deal principal;
- e) to store the goods or samples so that he can easily identify the ones belonging to a certain deal principal;
- f) to meet any other requirement stipulated by the contract or law provisions. .

#### **4. Deal principal's obligations:**

- a) to provide the agent in due time with the right amount of samples, catalogues, tariffs and all other documents the agent needs in order to apply authorization;
- b) to provide the agent with the information necessary to execute the agency contract;
- c) to inform the agent in due time if he foresees that the commercial operation amount is going to be lower than the one normally anticipated by the agent;
- d) to pay the agent the due remuneration within the terms and conditions provided by the contract or law;
- e) to accomplish any other task stipulated by the contract or law.

The deal principal must duly inform the agent about every commercial operation negotiated or concluded by the agent and which has been disapproved, declined or not executed.

If, after the notice, the deal principal does not duly inform a third party about his acceptance directly or by means of his agent, the negotiated operation shall be quit.

The deal principal must act with goodwill and professional diligence.

#### **5. Agent's remuneration**

The agent's remuneration is either a fixed amount or commission, either partly fixed or partly commission, as agreed upon by the parties.

When legal provisions or derogative stipulations are missing, the agent is entitled to a remuneration in compliance with the commercial usage in the area or market sector of his activities. In the absence of certain usage, the agent shall receive a proper remuneration taking account of all his activities' aspects.

A *commission* is any remuneration form whose amount is set in relation with operations' volume or value.

The *agent* is entitled to a commission for an operation concluded during the contract development if:

- a) the operation has been completed due to the agent's intermediary practice;
- b) the operation has been completed with a third party that has been previously found as a client by the agent providing the operation should be similar with the one concluded with that client before;
- c) the operation has been completed with a client from a stipulated region that the agent has exclusive authorization for.

The *agent* has the right to a commission for an operation completed after the contract conclusion if:

- a) the operation conclusion takes place within a reasonable term from the contract conclusion and it is mainly due to the agent's activities;
- b) the third parties' order has been received by the deal principal or agent before the agency contract conclusion.

The right to a commission starts on the date one of the following conditions is met:

- a) the deal principal executes his contract duties to the third person;
- b) the deal principal should have executed his contract duties to the third person;
- c) the third party executes their contract duties.

The right to a commission starts no later than the date the third person executes or should have executed their duties on condition the deal principal has duly executed his.

A commission is also received for completed operations that have yet been left aside by the parties. If the third person performs a partial execution, the agent has the right only to a part of the commission.

The right to a commission ceases when the operation completed between the deal principal and the third person is not executed because of circumstances that are not the deal principal's fault.

The parties (deal principal and third person) cannot resort to derogation that is unfavorable to the agent's interests.

The commission account shall be liquidated by the deal principal at the end of each term and sent to the agent along with copies of the invoices dispatched to clients, including the specification of the essential elements underlying commission calculation.

The agent has the right to require and receive any information including extracts from the deal principal's account books in order to check the commission value he is due to get. The commission must be paid no later than the last day of the month following the term during which the right to a commission started.

## **6. Agency contract conclusion and cancellation**

The agency contract is concluded in writing for a stipulated or non-stipulated period of time including all subsequent changes and additional clauses; it can be proved only in writing irrespective of its value, both between the two parties and to third parties.

The agency contract with a stipulated duration shall be executed by the parties and it is considered a non-stipulated duration contract after its expiration date.

The non-stipulated duration agency contract can be *denounced* by either party on condition a notice is first sent.

The notice term accompanying the denouncement statement should be at least one month long for the first contract year lasts more than a year, the minimum notice term is increased by a month corresponding to any additional year with the notice term not exceeding six months.

The parties may agree upon longer terms only at the expense of the deal principal. If the parties do not agree otherwise, the notice term end shall coincide with the end of a calendar month. Either party may cancel an agency contract without a notice or before the contract term expiration if there is a non-execution due to the other party's serious fault and duty execution failure.

The agency contract may be immediately denounced by either party along with the adjustment of damages caused to the other when special circumstances, other than the force majeure or accidental case, make the contract continuation practically impossible.

Thus, the contract cancellation presumably takes place on the date of written notice receipt about the denouncement intention, also including the reasons.

When the agency contract is cancelled, the agent has the right to an indemnity from the deal principal if:

- a) he has found new clients for the deal principal or has extended the commercial operations with existing clients, so that the deal principal gets benefits;
- b) having in view concrete circumstances, the indemnity is equivalent, especially due to the commissions the agent should receive after the deal principal's concluded operations as well as to the agent's potential activity reduction as a result of the non-competition clause.

The indemnity value may not exceed the amount of an annual remuneration whose calculation is based on the average annual remunerations cashed by the agent over the last five contract years. If the contract lasts less than five years, the annual remuneration is calculated based on the average cashed during that period.

Granting an indemnity does not cancel the agent's right to ask for compensations according to the law.

If the agency contract is cancelled because of the agent's death, the calculated indemnity shall be properly granted to his successor.

The right to an indemnity is cancelled if the agent or his successor does not delay the deal principal in his claims within **one year** from the agency contract cancellation date.

The agent has no right to an indemnity if:

- a) the deal principal cancels the contract because of the agent's infringement of his obligations from his own fault;
- b) the agent *denounces* the contract, except when the denouncement is justified by reasons such as the agent's age, handicap or disease that clearly prevent his activities from being executed, or justifiable reasons from the deal principal's fault;
- c) in case of agency contract novation when replacing the agent by a third person.

The deal principal cannot exonerate himself from the *non-competition clause* if the agency contract is cancelled in the following circumstances:

- a) the deal principal denounces the contract without obeying the notice term and having a serious reason previously communicated to the agent;
- b) the agent cancels the contract for a serious reason due to the deal principal and immediately informs the latter;
- c) the agency contract is cancelled by the law court subsequent to the deal principal's fault.

The law court may, at the agent's request and observing the deal principal's legal interests, remove or restrain the non-competition clause effects when the consequences damage the commercial agent and are against evenness.

At the agent's request, the law court may reduce the penal clause or stipulated indemnity share for his infringement of the non-competition clause if they think it is excessive as compared to the causes and circumstances.

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