

## AGENCY AGREEMENT IN SPAIN: REGULATION, OBLIGATIONS AND INDEMNITIES

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The agency agreement is one of the most widely used forms of commercial collaboration, as it allows companies to expand into the market, even at an international level, with virtually no need for investment.

Due to the importance of this legal relationship and with the aim of harmonising the legislation of the different Member States, the European Union enacted [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.

Spain incorporated this Directive into its domestic legal system through [Law 12/1992, of 27 May, on Agency Agreements](#)(hereinafter, the LCA), which entered into force on 18 June 1992. The provisions contained in this law, one of whose objectives is to grant minimum rights to commercial agents—who usually represent the weaker party to the agreement—are, for the most part, mandatory and compulsory in nature, except for those exceptions expressly established by the law itself.

Below, we will examine the main characteristics of an agency agreement and their interpretation in case law.

### WHAT IS AN AGENCY AGREEMENT: LEGAL DEFINITION AND ESSENTIAL ELEMENTS

Article 1 of the LCA defines an agency agreement as an agreement under which a person, whether a natural or legal person, known as the agent, undertakes, on a stable basis, before a third party, to promote and/or conclude acts or commercial transactions on behalf of another. The agent acts as an independent intermediary and, unless otherwise agreed, does not assume the risk of the transactions carried out.

Therefore, the agency agreement differs from the distribution agreement in that, in the latter, the distributor acts in its own name and on its own account, assuming the commercial risks, purchasing and subsequently reselling the products or services of the grantor (or principal) and obtaining profits solely through the resale margin.

Furthermore, the independence of the commercial agent distinguishes it from the figure of the representative and/or commercial traveller or intermediary, which, pursuant to Article 2.1(f) of the Workers' Statute, constitutes a special employment relationship governed by Royal Decree 1438/1985 of 1 August, under which a natural person undertakes, in return for remuneration, to personally promote or conclude commercial transactions on behalf of one or more entrepreneurs, without assuming the risk and venture of such transactions.

Finally, the agency agreement is distinguished from the brokerage or mediation agreement by the existence of a stable relationship. A brokerage or mediation agreement is one under which a person undertakes to pay remuneration to another so that the latter carries out an activity aimed at bringing that person into contact with a third party, for the purpose of concluding a specific contract, in which the mediator has no participation.

## **CHARACTERISTICS OF THE AGENCY AGREEMENT AND LEGAL REQUIREMENTS**

As the Supreme Court has also repeatedly pointed out, inter alia in its judgment no. 860/2011 of 10 January (Roj STS 62/2011; appeal no. 766/2007), in order for a legal relationship to be classified as an agency agreement, the following requirements must be met:

### **1- Activity of promotion and, where applicable, conclusion of commercial acts and transactions**

The agent must be engaged in the promotion of commercial transactions and, in some cases, in their conclusion, always acting in the interest of the principal.

### **2- Acting on behalf of another**

The agent always acts on behalf of the principal and may only conclude contracts in the name of the principal if expressly authorised to do so. Normally, the agent does not assume the risk of the successful outcome of the transactions; however, the parties may agree on a guarantee of the transactions to be borne by the agent. In such case, the payment must be recorded in writing and provide for a commission to remunerate this additional risk.

### **3- Independence of the agent**

It is essential that the agent acts independently from the principal. This independence is reflected in the agent's ability to organise his or her work and time autonomously.

In this regard, Article 2.2 of the LCA presumes dependence and therefore excludes the existence of a commercial agency relationship when the person promoting commercial acts or transactions

cannot organise his or her professional activity or the time devoted thereto in accordance with his or her own criteria.

At the same time, Article 1(b) of Royal Decree 1438/1985, on the special employment relationship of persons involved in commercial transactions, establishes that there shall be a presumption that no autonomous business organisation exists when those who are engaged in promoting or concluding commercial transactions act in accordance with the instructions of their employer with regard to matters such as working hours, itineraries, distribution criteria, prices or the manner of placing orders and contracts.

#### **4- Continuous or stable obligation**

The agency agreement entails a lasting relationship, which distinguishes it, as we have seen, from other similar contractual arrangements, such as commission, mediation or brokerage agreements, which are established for a single specific and determined obligation or for a specific transaction (for example, the intermediation in a specific real estate development).

#### **5- Remuneration**

The agency agreement is always remunerated. According to Article 11 of the LCA, the agent's remuneration may consist of a fixed amount, a commission or a combination of both systems. The most common system is the commission, which is calculated by applying a percentage to the number of transactions or to their economic value.

### **DURATION AND FORM OF THE AGENCY AGREEMENT: FIXED-TERM AND INDEFINITE CONTRACTS**

The agency agreement may be for a fixed term or for an indefinite period. If the parties have not set a specific term, it shall be deemed to be indefinite. Likewise, a fixed-term agreement that the parties continue to perform after the agreed term has expired shall be converted into an indefinite agreement.

The choice between these two types of duration is not irrelevant because, if the principal wishes to terminate the agreement, unless there has been a breach or another form of defect: (i) in the case of a fixed-term agreement, the principal must wait until the agreed term expires; (ii) whereas in the case of an indefinite agreement, the principal may unilaterally terminate the agreement at any time, provided that the notice period is respected. According to the LCA, this minimum notice period is one month for each year the agreement has been in force, up to a maximum of six months, although the parties are free to agree on a longer period.

As regards form, the agency agreement is perfected by the expression of the parties' consent, which may also be given orally. Therefore, no written form is required. However, Article 22 of the LCA allows either party to require the agreement to be formalised in writing at any time. In addition, the LCA provides that certain agreements are only valid if they have been formalised in writing (for example, the guarantee of transactions, Article 19 LCA; the non-compete clause, Article 21 LCA). For these reasons, it is very common for the parties to formalise the agency agreement in writing from the outset.

## **LEGAL OBLIGATIONS IN THE AGENCY AGREEMENT**

### **Obligations of the commercial agent under the Agency Agreement Act**

Article 9 of the LCA sets out the obligations of the agent, based on the principles of good faith and professionalism. The agent must act in the interest of the principal, safeguarding the trust placed in him or her and doing everything necessary to benefit the principal, avoiding any acts that could be detrimental to the principal.

In this regard, although provided for in another regulation, there is also a non-compete obligation for the agent. The agent may carry out an activity similar to that of the principal, on his or her own account or on behalf of other principals, only with the consent of the principal. The specific obligations of the agent include:

- **Act with due diligence:** The agent must carry out his or her professional activity with the diligence of a prudent trader, promoting and, where applicable, concluding the acts and transactions entrusted to him or her.
- **Communication and information to the principal:** The agent must inform the principal of any relevant information for the management of transactions, especially regarding the financial solvency of third parties.
- **Comply with the principal's instructions:** The agent must follow the principal's instructions, provided that they do not affect his or her professional independence.
- **Receipt of complaints:** The agent receives and passes on to the principal complaints from third parties relating to defects, flaws in quality or quantity of the goods and services marketed.
- **Organised and separate accounting:** The agent is obliged to keep separate accounts for each principal on whose behalf he or she acts.

### **Obligations of the principal in the agency agreement**

The obligations of the principal are set out in Article 10 of the LCA. Like the agent, the principal must act loyally and in accordance with the principle of good faith. This principle, also enshrined

in Articles 7.1 and 1258 of the Civil Code and Article 57 of the Commercial Code, constitutes an ideal model of conduct and a source of obligations for both parties. The principal must not only comply with what has been agreed in the agreement, but also act loyally and in good faith in all situations arising from it.

The specific obligations of the principal include:

- **Facilitating the agent's professional activity:** The principal must provide the agent with the documentation necessary for the performance of his or her activity with sufficient advance notice (samples, catalogues, price lists, etc.).
- **Duty to inform:** The principal must provide the agent with all the information necessary for the performance of his or her professional activity. In this regard, it should be recalled that the LCA grants the agent the right to require the disclosure of the principal's accounting records in order to verify information relating to his or her right to commissions.
- **Obligation of payment:** The principal must pay the remuneration agreed with the agent for the performance of the agency agreement. In accordance with Article 16 of the LCA, if a commission has been agreed and the parties have not provided for a shorter period, it must be paid no later than the last day of the month following the calendar quarter in which it accrued.
- **Communication of acceptance:** The principal must inform the agent, within a period of 15 days, whether the proposed transaction is accepted or rejected. In the event of acceptance, the principal must also inform the agent of the performance (in whole or in part) of the transaction or of its non-performance.

#### **REMUNERATION OF THE COMMERCIAL AGENT: COMMISSIONS AND ACCRUAL**

The agent's remuneration may be freely agreed between the parties and may consist of a fixed amount, a commission or a combination of both systems. In the absence of an agreement, the remuneration shall be determined in accordance with the customary practices of trade in the place where the agent carries out his or her activity, or on the basis of what is reasonable in view of the circumstances of the professional activity (Article 11 LCA).

Article 14 of the LCA provides that the commission shall accrue when the principal has carried out (or should have carried out) the commercial transaction, or when the third party has carried out the transaction in whole or in part.

As regards the time at which the commission accrues, there are two scenarios:

- **Acts or transactions concluded during the term of the agency agreement (Article 12 LCA):** The agent shall be entitled to a commission if the transaction is concluded as a result of his or her professional intervention; if it is concluded with a third party with

whom the agent had previously promoted and/or concluded a similar professional activity; or if the commercial transaction is concluded with a person from the area or sector assigned to the agent, even if the agent did not intervene in the transaction.

- **Acts or transactions concluded after the termination of the agency agreement (Article 13 LCA):** The agent shall be entitled to a commission if the commercial transaction is concluded within three months following the termination of the agreement and is attributable to the activity carried out by the agent during the term of the agreement, or if the third party's order to the principal was received before the termination of the agreement, provided that the agent had acted as an intermediary in that transaction.

### **INDEMNITIES IN THE AGENCY AGREEMENT AFTER ITS TERMINATION**

The termination of an agency agreement may entitle the agent to receive certain indemnities, in accordance with the provisions of the LCA. Specifically, these are the goodwill indemnity and the indemnity for damages and losses due to early termination of the agreement. Where the relevant requirements are met, these indemnities are cumulative.

However, the agent loses the right to these indemnities if the principal terminates the agreement due to a breach of the agent's legal or contractual obligations, if it is the agent who terminates the agreement without a cause attributable to the principal, or if the agent transfers his or her rights and obligations to a third party with the consent of the principal.

#### **Goodwill indemnity in the agency agreement**

Among the compensations to which the agent may be entitled, the goodwill indemnity has probably been the most extensively analysed by the courts. Pursuant to Article 28 of the LCA, this indemnity is not granted automatically, but only if the agent has brought new clients to the principal or has significantly increased business with existing clients.

In addition, this activity must continue to generate substantial benefits for the principal after the termination of the agreement and must be equitably justified due to non-compete agreements, unpaid commissions or other circumstances. The amount of this indemnity may not exceed the annual average of the remuneration received by the agent during the last five years, or during the entire duration of the agreement if it was shorter. This compensation also applies where the agreement is terminated due to the death or declaration of death of the agent and is payable whether a fixed-term or an indefinite agreement is terminated.

In this regard, it should be recalled that the CJEU, in its judgment of 23 March 2023 (Case C-574/21), concerning the interpretation of Article 17(2)(a) of Directive 86/653/EEC on commercial agents, had the opportunity to clarify that the expression “commission lost by the commercial agent”, very similar to that used in Article 28 of the LCA to determine the goodwill indemnity, does not refer to commissions arising from transactions to which the agent contributed before the termination of the agreement—which in any event constitute remuneration—but rather to future and hypothetical commissions that the agent would have obtained if the agreement had not been terminated.

Moreover, the Spanish Supreme Court has also had occasion to rule on the goodwill indemnity on several occasions. Among others, we recall:

- **Judgment no. 560/2022 of 11 July** (Roj STS 2905/2022; appeal no. 1858/2019), in which the Supreme Court held that, for the calculation of the indemnity, the agent’s total remuneration must be taken into account and not only the commissions agreed. Therefore, if there are other remunerative items for different services provided by the agent, these will form part of the “overall remuneration” that will be used as the basis for determining the indemnity.
- **Judgment no. 506/2007 of 16 May** (Roj STS 4825/2007; appeal no. 2310/2000), in which the Supreme Court emphasised that, for the calculation of the indemnity, factors favourable to the principal must also be taken into account, such as the well-known nature of the products marketed and the existence of strong advertising campaigns carried out by the principal.

### **Indemnity for damages and losses due to termination of the agency agreement**

There is also an indemnity for damages and losses that is granted when the principal unilaterally terminates the agreement, provided that such early termination prevents the recovery of the expenses incurred by the agent in accordance with the principal’s instructions. For this compensation to be applicable, certain requirements must be met, such as the agreement being of indefinite duration and the existence of investment expenses pending amortisation.

In this regard, the Supreme Court, in its judgment no. 26/2019 of 17 January (Roj STS 59/2019; appeal no. 3600/2015), stated that although notice is not required to terminate agreements of indefinite duration, the exercise of the right of termination in a sudden manner, without reasonable notice, may be regarded as an abusive exercise of rights and may give rise to compensation where it causes damages and losses. Furthermore, in that same decision, the Supreme Court recalled that, in accordance with its own case law, the losses resulting from the failure to give notice are

not limited to actual damage, such as investments made and not amortised, but may also extend to loss of profit. Finally, it stated that:

*“With regard to loss of profit, that is, the determination or calculation of the gain that the agent has failed to obtain, or in other words, the increases in assets that the agent expected to obtain and that have been frustrated by the unilateral termination by the principal without the required notice, this Chamber has considered that taking the average monthly profit obtained during the last five years of the agency agreement and projecting it over the six months following the notice period during which the agency agreement would have continued may be a reasonable and correct way, although not the only one, to estimate the profit lost as a result of the breach of the duty to give notice, in accordance with the case-law doctrine contained, inter alia, in judgments 569/2013 of 8 October and 317/2017 of 19 May.”*

From the analysis of case law, it can be stated that, on the one hand, the courts are willing to grant the indemnity provided for in Article 29 of the LCA only where the principal has failed to respect the notice period. In other words, although the rule does not expressly require the lack of notice as a condition for this indemnity, in practice case law considers it necessary.

On the other hand, case law holds that the mere lack of notice does not automatically entail the granting of the indemnity provided for in Article 29 of the LCA, but rather it must be examined whether damage actually exists and whether it is compensable in accordance with the principles of good faith and contractual loyalty.

## **CONCLUSIONS**

The agency agreement in Spain is regulated by Law 12/1992 of 27 May, which incorporated 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. Despite the objective pursued by the European Directive of harmonising the legislation of the different countries, significant differences continue to exist among the EU Member States, mainly due to the interpretation given by the courts to the various concepts inherent in the agency agreement, such as the indemnities to which the agent is entitled.

On the other hand, despite the theoretical freedom as to the form of the agreement, the documents reflecting the obligations of the parties are becoming increasingly complex and, when operating in an international environment, very often contain provisions that the principal seeks to impose on all its agents, regardless of the country in which they operate. This attempt is perfectly understandable from a strategic and commercial point of view, but it is not always possible.

Therefore, before entering into a commercial agency agreement in Spain, it is always advisable to seek the advice of a professional.