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AGENCY AND DISTRIBUTION AGREEMENTS (BRAZIL)

In the Brazilian law, Agency and Distribution Agreements are regulated in the Brazilian Civil Code (*Código Civil Brasileiro*, hereinafter called simply Civil Code). According to the applicable law an Agency contract is that where a person undertakes on a non-sporadic basis and without dependency, the obligation to promote, on behalf of another person, upon payment of a fee, the realization of certain deals in a certain territory, the distribution is characterized when the agent has at his disposal the object to be negotiated. The legal diploma authorizes the agent to represent the tenderer to conclude his contracts. Therefore, it is the contract by which the agent manages with autonomy and independency. The tenderer's interests, where the agent is a collaborator, representing him economically.

The contract's aim is the intermediation of transactions, by the agent, between the tenderer and third parties. The agent promotes those transactions, on behalf of the tenderer. Thus, the figures of the contract are the commercial agent and the principal.

The agent has economical and functional autonomy, he is not bound to the tenderer and must support the ordinary business risks. In the case of a distributor, who has the object at his disposal, and in case the agreement has the *Del Credere* clause, he will be jointly liable for the solvency of the third parties he promotes. This clause derives from the mediation principle and it is additionally regulated by the Law 4.886/65.

Although the agency and distribution have punctual differences that hold them off in some aspects, law has given them a unique treatment with the same legal nature. It is a consensual, bilateral, onerous, informal, over time, commutative and *intuitu personae* contract, outlined by law and a determined or undetermined duration. The contract can be proved by every mean accepted by law, as well as by acts from the parties that evidence it, mails, invoices, application forms, advertising, etc.

There is no subordination or hierarchy bond, it is not occasional and, therefore, it does not characterize an employment relationship. There will be performance exclusivity in a certain region, unless otherwise agreed.

The main constitutive elements of the Agency and Distribution Agreement are: (a) the presence of the contract subjects, agent and principal; (b) manifestation of the will limited to the act of agency and/or distribution; (c) the non-sporadic basis; (d) inexistence of the employment relationship between the parties; (e) the agent's obligation of undertaking legal transactions on behalf of the principal; (f) the remuneration of the agent (commission) based on the value of the transactions consummated; (g) the restriction of the operation area of the agent or distributor.

It is a stand-alone business, where the agent is established and maintains his own business. The remuneration can be fixed, variable or mixed, combining both previous modalities. In the absence of a remuneration stipulation, usual percentage for commercial representation will be applied (Law 4.886/65) and, subsidiary, for commission. The Law 4.886/65 specifies that when there is more than one distributor agent in the same distribution area, there must be defined to whom the remuneration belongs, however when the contract silences and the transaction is concluded without interference from none of them, the remuneration shall be shared among them. There will be remuneration in the so called "useful link", when the agent is dismissed without a just cause, for the useful services done, with possibility for an action claiming recovery of losses and damages.

The agency and distribution contract can last for a determined, called fixed term, or undetermined term, called indefinite term, as stipulated by the parties. It can also be established for a certain activity or task, like a specific campaign or enterprise. If the contractual goal ends, and the same contractual posture remains, an undetermined term will be established.

According to the Civil Code, the difference in relation to the agency contract is that, in the distribution contract, the distributor has the merchandise at his/her/its disposal. To have it at disposal doesn't always mean to have its possession since the commercialized goods can be either in the possession of the distributor or of the business' owner. As a general rule, the distributor acquires the goods and is organized as a company for the distribution task.

Therefore, distribution contract is the one where one of the parties, named distributor, undertakes the obligation to purchase from the other party, named principal, goods, generally for consume, for its later placement on the market, at his own cost and risk, stipulating as a consideration a value or a profit margin.

It has the same principles and devices from the agency contract and is a consensual, bilateral, commutative, nominal, onerous, informal, *intuitu personae* and over time contract, with terms and imposed by law.

The Civil Code decided to adopt the same dispositives for both contracts and, as a supplementary form, the rules of representation, remuneration and exclusivity, as well as the principles of the 4.886/65 Law, except when there are contractual provisions on the contrary.

If effected by fixed term, cease to exist with its compliance. If effected by indefinite term, the opinion is not settled in the Brazilian doctrine, leading to a situation where can be applied, as a supplementary form for the dispositives of the Civil Code, several legal provisions, as the 4.886/65 Law, beyond what was expressly agreed by the parties.

The Civil Code allows the granting of compensation for the investments made during the business, with advance notice of rescission. The statute also stipulates a 90 (ninety) days deadline for eviction, when any of the parties can resolve the contract, upon previous notice. On the other hand, the article 34 of the 4.886/65 Law, is the rule for unilateral rescission, without just cause, on the contracts effected over 6 (six) months, imposing to the denouncing a 30 (thirty) days deadline for previous notice and payment of commissions equivalent to 1/3 (one-third) of the commissions paid over the last 3 (three) months. This deadline has been extended for 90 (ninety) days by the Civil Code.

The venue jurisdiction to solve the conflicts that raises from the agency and distribution contracts are the common courts of law, in the domicile of the agent, applying the summary proceeding, except when the small claims court has competence to solve the conflict.

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