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Agency and distribution agreements (Portugal)

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General

The contract of agency is governed by Portuguese law by Decree Law (DL) 178/86 of 3 July, with the amendments of DL 118/93 of 13 April, which transposed to internal law Directive No 86/653/EEC, of 18 December 1986 on the coordination of the laws of Member States about commercial agents.

It was meant to separate, as much as possible, agency from other distribution contracts, given the difficulty that sometimes occurs to distinguish agency from other contracts such as, for example, commission, franchise, intermediation or even mandate.

According to art. 22, paragraph 1 of Directive 86/653/EEC, contracts in progress on 1 January 1994 are subject to provisions of each state to implement the Directive. And paragraph 2 of DL 118/93, of April 13, states that the new legal regime governs contracts signed before the coming into force of that law.

In this case, in accordance with general principles of Portuguese law, are protected the effects already produced by the facts that the law aims to regulate (Article 12, paragraph 1 of the Civil Code).

Even if a contract has a consensual in nature, in which parties are free to agree the terms of their contract, Portuguese law gives each of the parties of an agency contract the right to require that the other party shows a signed document indicating the contents of the contract, as well as subsequent additions or modifications.

Contractual freedom

Regardless of contractual freedom, the Portuguese legislation (such as the EU) calls the principle of good faith in complying with obligations of the contract.

Given the nature of the contract, the law is concerned about the need to ensure the agent meets the interests of the other party, for whom he performs (see Article 6 of the DL 178/86), without forgetting the same duty from the principal (art. 12 of the same law).

But there are other norms, namely but not limited to those related to secrecy, that he must meet, not disclosing certain aspects to third parties, irrespective of convention, even after termination of the contract (v. art. 8 of the same law).

Portuguese law also stipulates, without prejudice to any other damages that may take place, that the agent is entitled, after the termination of the contract, to an indemnity and/or compensation of clientele, the latest provided that certain requirements are cumulative met, related to increase of clientele, increasing the turnover of the principal, etc.

The compensation of clientele is calculated according to equity and cannot exceed the sum of one year's commission based on the agent's average annual remuneration over the preceding five years.

Choice of Law

Portuguese law requires that to contracts performed wholly or predominantly in Portugal shall only be applicable legislation other than Portuguese, regarding the termination, if it is more advantageous for the agent (Article 38).

It is the application of the principle of best treatment, in favour of the agent, though restricted to the termination of the contract. Since the activity of the agent is developed wholly or predominantly in Portugal, arts. 24 to 36 of that law shall also be applicable.

However, that article 38 should be interpreted in articulation with rules of conflict as follows: checked a priori the specific connexion of that article, as far as the termination of the contract is concerned, arts. 24 to 36 shall be applicable. That won't be the case if the party proves that, before the normal conflict rules, the competent law is another one and, furthermore, it states a regime more favorable to the agent.

In any case, considering that international conventions signed by Portugal have higher value than national ones, it can not be ignored, in such context, the international conventions governing this matter, including the "**Hague Convention on the law applicable to contracts of mediation and representation**", of 14 March 1978 and later ratified by Portugal by Decree 101/79 of 18 September and the "**Rome Convention**" of 19 June 1980 on the law applicable to contractual obligations, approved for ratification by Resolution of the AR 3 / 94, 4 November.

Competition law

While the right to exclusive agency, under art. 4, is a limitation to the activity of the parties during the contract, the non-competition obligation under art. 9 lasts after its termination. Moreover, while the contract continues, the agent may not engage in activities in competition with the principal.

On the other hand, it is also important to distinguish between the obligations of secrecy those of non-competition. The first ones are more comprehensive, since they last even after the termination of the contract, in order to safeguarding the professional ethics and to prevent improper or harmful conducts to the principal.

However, Portuguese law does not prohibit that parties, by agreement, stipulate a non-competition agreement, although subject to certain limits: the agreement must be in writing, may not exceed two years and should be limited to the area or the circle of clients entrusted to the agent.

If the agent has accepted a non-competition clause, he has the right to compensation under Article 13, point g).

Taxes

Without prejudice to any agreements to avoid double taxation Portugal has subscribed, in general terms the development of the agency business in Portuguese territory is likely to determine several obligations.

Thus, in terms of IRC (Income Tax for legal persons), legal persons and other entities with registered office or effective management in Portugal, are charged to IRC on all their income, including those obtained outside that territory.

Legal persons and other entities that have not established or effective management in Portuguese territory shall be charged to IRC only for income obtained in it.

The expression “obtained in Portuguese territory” means the income arisen by a permanent establishment situated therein, and furthermore, those who are not in these conditions, arisen from intermediation in the conclusion of any contract and from services performed or used in Portugal.

The overall rate of IRC is 30% and can vary in some cases, between 15% (intellectual property, for example) and 35% (of premium gamble)

Regarding VAT (value added tax), every transmission of goods and services made in Portugal by a taxable person acting as such is charged on VAT.

Taxpayers of this tax are natural or legal persons, who in an independent and usual way are engaged in production, trade or services.

VAT in Portugal has a rate of 20%, with other lower taxes for certain type of goods or services, including medicines, health care, certain food items, etc.

As for IRS (Income Revenue tax of individuals), it is charged on annual individual income be it arisen from an independent activity or not and its rate depends on a number of factors including the amount of income, marital status, family, etc., with a maximum of 42%.