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AGENT, DISTRIBUTOR AND SALES/MARKETING REPRESENTATIVE LAWS IN SPAIN

Miquel Llimona
DS Advocats I Economistes
Balmes 150
08008 Barcelona
SPAIN
Telephone: +34 93 488 15 20
Fax: +34 93 488 27 90
Email: mllimona@ds-ae.com
www.dsavocats.com

The lightest structure that could be chosen to sell the products in the Spanish Market would be to operate through appointed agents, distributors or sales representatives. It is most important to have a clear understanding of the differences between the three figures in order to be able to make the adequate choice.

The figure of the agent is regulated by law. In 1992 an Act on agency agreements implemented EU directive 86/553/EU in Spain and thus the contents of the agency contract are, in general terms, provided by law. The case of the distributor is completely different, as there is no regulation whatsoever of the distributor agreement and jurisprudence has only established certain matters concerning such agreements, such as indemnity in the case of termination. Finally, sales representatives are regulated by a special law that states that they may be considered employees and subject to employment law.

Contracts with agents, distributors and sales representatives may be made in writing.

Main differences between the three figures

As already stated, the agency is ruled by a special law. Few of the legal provisions concerning the agent are left to the contractual freedom of the parties. In general, articles concerning the rights of the agent make these rights "inalienable" and they cannot therefore be changed by mutual agreement of the parties. The same happens with the sales representative, the most important difference between both figures being the concept of independence.

The agent is considered an independent subject and this must be pointed out, as independence is the main difference from sales representative. The agent is an

independent person or company that has the power to organize its professional activity according to its own criteria. The sales representative, as an employee, does not have this possibility and is subject to the instructions of his or her principal. The relationship between the sales representative and the principal is ruled by employment law and this has an important influence with regard to indemnities in the case of termination, social security payments, collective rights and so on.

The agent will deal with potential clients and develop your products, but will not buy your products. He or she will be an intermediary and this is the main difference from the distributor, who will buy the products and then sell them in the market. As already stated, the figure of the distributor benefits from considerable freedom of contract and practically only questions related to indemnity in the case of breach of contract have been dealt with by the Courts of Justice.

Exclusivity and non-competition provisions

The exclusivity of the agent is a matter than can be negotiated in the agreement, but if the agent intends to intermediate in products similar to those manufactured by the Company, he or she will need permission. Non-competition provisions are limited to two years after termination of the agreement and are restricted to the products distributed, geographical zone of distribution and so on.

In the case of a distributor, contractual freedom of the parties will be the answer. Jurisprudence states that the contractual provisions agreed in the distribution contract must be respected, except when contrary to good faith and law, and only in those particular points where the parties have not stated anything will an interpretation in accordance with the rules of the agency contract be possible. Thus, exclusivity and non-competition provisions are perfectly possible in the case of distribution, provided they are not contrary to good faith.

As regards the sales representative, exclusivity is part of the nature of the contract and non-competition provisions are possible provided an indemnity for clientele is assured.

Mandatory provisions and indemnity

Indemnity becomes a very important concept when we refer to agency agreements. Prior notice before termination is established in law, corresponding to one month's prior notice per year of contract.

There are two different indemnities in the agency agreement. One is the indemnity for clientele, equal to average earnings over the last five years or lesser period and applicable even in case of the agent's death; and the other is the indemnity for damages that the agent can claim, should he or she consider that termination of the contract will be prejudicial to his or her interests. This is normally implemented when the agent has been forced to make investments or employ additional people, etc. as a result of the agreement.

As already stated, the distributor and the Company have the right to agree practically all terms of the agreement. Only in those matters that have not been made the object of a disposition by the parties has jurisprudence made an analogical interpretation in relation to the agency agreement, the principles of law and contractual good faith. In very general terms, prior notice is expected and only if nothing to the contrary has been established in the agreement is the possibility opened up of an indemnity claim for clientele and/ or damages in the case of termination without cause.

The sales representative indemnity refers to dismissal without cause and is equal to 45 days' salary per year of work.

In general terms, it is very important to study the agreement carefully, both in the case of an agent (to draft a contract taking the law and its interpretation very much into account) as well as in that of a distributor, drafting all provisions clearly in order to avoid difficulties later.

Choice of law

It seems unlikely that in the case of an agent carrying out his or her activity in Spain we could make a choice other than that of the Spanish law on agency agreements. There can be no doubt, as the law states this as an unwaivable provision, that jurisdiction in the case of conflict will be that corresponding to the domicile of the agent.

In the case of the sales representative, Spanish law will rule and only in that which concerns the distributor will the parties be in a position to choose the applicable law and the jurisdiction they intend to submit their eventual conflicts .

Special tax consideration

Only in the case of a sales representative, as an employee of a foreign manufacturer/service provider, could the Company be considered as having a permanent establishment in Spain and therefore be obliged to declare the profits obtained in Spain. As regards the agent, you should be careful to underline his or her independence, so that he or she could never be considered as an employee and the company as having a permanent establishment in Spain.

International Conventions

Spain ratified The United Nations Convention on Contracts for the International Sale of Goods the 24th. July 1990 , the convention entering into force the 1st. August 1991 .

Spain also ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards the 12 May 1977, entering into force the 10th. August 1977.

Internet links

Ministry of Justice . International cooperation

http://www.mjusticia.es/cs/Satellite?c=Page&cid=1151913189285&lang=es_es&menu_activo=1151913189285&p=1151913189285&pagename=Portal_del_ciudadano%2FPage%2FCooperacion&ppagina=2

Organisation of Commercial Agents in Spain

<http://www.cgac.es/>

Ministry of Commerce . Network of delegations in the different countries

http://www.oficinascomerciales.es/icex/cda/controller/pageOfecomes/0,,5280449_5310100_5310307_0,00.html

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