

CHECKLIST FOR A COMMERCIAL AGENCY CONTRACT

1. Introduction – identification of the parties

- specify the nature of the agreement (zelfstandige handelsagentuur, commercial agency, agence commerciale autonome, Handelsvertretung, ...) in order to differentiate this contract from other types of distribution
- specify the legal status, name and place of business of the contracting parties
- specify the n° under which the parties have been registered (commercial registry, companies registry, VAT-registry, commercial agents' registry ...)
- if applicable, indicate who represents the parties and in what quality

In contracts with common law partners, agreements are often initiated by a “consideration”:

'Whereas the principal wishes [...],

Now therefore, in consideration of [...]

The Parties agree as follows [...]'

2. Products

- specify the agency products; does the agency cover
 - o all the products sold by the principal?
 - o all the products manufactured by the principal?
 - o only a limited range, specified in an annex?
 - o only a specific trade mark, packaging ... (private label - own brand - bulk ...)?
- do new or improved products automatically resort under the agency?
- what about products no longer manufactured by the principal? How to notify, notice periods, ...

3. Territory

- Clearly specify the territory assigned to the agent
 - o geographical territorial (by country, county ...)
 - o type of customers within that territory (wholesale, retail, public, supermarkets, ...)
- what happens if the territory changes (e.g. EU expansion, restructuring of clients ...)
- what about previously existing clients?
 - o transfer to the (new) agent – fee?
- the criteria to allocate a customer in a market segment
 - o registered office - delivery address - billing address - address signing contract / order ...

4. Exclusivity

- is the agent the only person entitled to represent the products of the principal in the contractual territory (= absolute exclusivity - 'exclusive agent')?
- does the principal retain the right to contact and/or reply to potential customers in the contractual territory directly without however appointing other agents or distributors for that territory or opening an office in the territory (= relative exclusivity - 'sole agent')?
- what about costumers situated in one contract territory, but with sales points in other territories?

5. Scope of the authority of the representative

- to what extent is the agent allowed to use the trademark of the principal?
- is the agent allowed to appoint (independent) sub-agents or is the consent of the principal needed?
- to what extent may the agent represent complementary products?
- applicability of the principals terms and conditions
- does the agent have the right to receive payments on behalf of the represented principal?
- is the agent allowed to accept orders on behalf of the principal or is a confirmation by the represented principal required?
- does the agent have the right to take orders for his own account in certain situations?

6. Obligations of the representative

- common general obligations of the agent:
 - o development of a joint marketing and promotion plan;
 - o training, sufficient staff, participation in sales meetings, ...;
 - o visiting the customers (frequency ...), trade fairs, exhibitions, ...
 - o periodic activity report (structure - frequency ... ?)
 - o market research (competition, opportunities ...) and follow up of market requirements (product standards, duties, ...)
 - o transfer of orders (delay, form, ...)
 - o follow-up of contacts and contracts
 - policy regarding customer complaints (who does what, when, how ... cf. general conditions of sale)
 - assistance in the event of payment problems
 - o monitoring of the industrial property rights of the principal
 - o confidentiality (during negotiations - during contract - after contract)
 - o information about the creditworthiness of customers ...
- determine the scope of an eventual del credere clause
- are minimum turnover requirements applicable?
 - o how is the requirement calculated (volume - turnover - market penetration - evolution ...) ?
 - o what effects are related to a breach of this obligation (loss of exclusivity , downsizing territory ...) ?
- are goods supplied on consignment? additional conditions?
- are there additional tasks? (such as after-sales service ...)

7. Obligations of the principal

- support of the agent by means of samples, brochures and advertising material, if necessary training of the agent, sufficient advance notice of changes in products, price lists and conditions of sale, ...
- payment of the remuneration (see further on);
- order processing
 - o communication of acceptance, refusal and/or non-execution of orders;
 - o specify the conditions that allow the principal to reject an order;
 - o information duty in case of insufficient capacity of supply;
- transfer of relevant communication with customers in the territory.

8. Competition

- even when there is no objection to the agent representing complementary products, it might be important to be informed which ones;
 - o list of existing representations, approval/information required when accepting new representations;
 - o prohibition of representing direct competitors:
- duration and scope of non-competition clause after termination of the agreement
 - o compensation for the agent (*Wettbewerbsentschädigung*)
 - o sanctions in case of violation

9. Electronic commerce

- is the agent allowed to use the Internet to find customers?
 - o for all contract products – only for certain products ?
 - o control the principal claims on the website of the agent?
 - is the agent allowed to use the principal's brand name as a (part of) the domain name, as a meta tag ...
 - access (e.g. only access to the (relevant page on the) website of the agent via a link from the website of the principal)
 - structure of the website (obligatory link to the site of the principal, prohibition of / control over other links, layout, web design, transmission of information that the agent collects through its website ...)
- to what extent should sales made by the principal through his website fall under the exclusivity?
 - o may the principal target customers within the agent's territory through Internet?
 - o may the principal use the internet only to sell to customers outside the agent's territory?
 - o Indirect commission?

10. The remuneration of the agent

- commission rate
 - o %, lump sum or combination?
 - % with a minimum amount per order made ?
 - o same rate for all orders - for which orders is the commission due and for which orders not?
 - existing customers - new customers
 - customers outside the contractual territory (rayon) – follow-up orders placed directly with principal (follow-up commission) – orders from new customers within the contractual territory without the agent's intervention (indirect commission) – orders executed after the agency agreement was terminated ...
 - large customers - small customers ... ?
 - orders for spare parts supplied under warranty obligations
 - third-party products that are supplied together with the principals goods
 - interest on deferred payment
 - o at the start of the agency a relatively high commission may be required (may be supplemented by a flat fee) to build up the agency
 - will this " starter fee " be compensated afterwards (as an advance on future commission) ?
 - o depending on the evolution of turnover a reducing (digressive) or higher (progressive) commission may be agreed upon
 - o premiums - bonuses ...

- reference amount to calculate the commission
 - o total invoice price or invoice price reduced with certain expenses (transportation, insurance , discounts , taxes , packaging , ...) – preferably use an amount with reference to a specific delivery condition (eg. EXW Incoterms 2010)
- entitlement to commission
 - o at the moment of confirmation, delivery, after payment, ... ?
- when is the commission payable?
 - o currency - advances on future commissions?
- does the principal participate in certain expenses – delcredere fee?
- is the commission the full remuneration of the agent or may certain charges (VAT on the commission, social security contribution, ...) be added.
- periodicity and structure of the commission notes/invoices
 - o right to verify the commission notes
 - o scope of the right to verify - prohibition to verify the accounts with the customers of the principal
 - o through external experts, held by a professional secrecy
 - o cost allocation
 - o confidentiality

11. Duration and termination of the agreement

- fixed term or indefinite term
 - o may a fixed-term contract be extended after the deadline
 - with express approval of the contracting parties
 - tacitly
 - o is termination possible before completion of the fixed term or may the agreement only be terminated at the end of the agreed term?
- duration of the notice period taking into account the applicable law (mode of termination, beginning of the notice period , end date ...)
 - o describe the circumstances that might allow for a unilateral termination of the agreement,
- how to notify the termination (formalities - delays ...) ?
- what about a “client indemnity” or “compensation”
 - o note that depending of the applicable law, mandatory rules of law may be applicable.
 - o add a list of already existing customers with current sales to the contract
- other provisions in the event of termination
 - o settlement of pending transactions ;
 - o what happens to stocks, samples, spare parts, price lists, brochures, ... the agent still has in his possession ?
 - o end the right of the agent to use the trade names, trademarks and designs of the principal
 - o striking the registration of the agency (who, cost ... ?)

12. Applicable law

- national law of one of the parties
- 'intermediate' national law
- principles of law generally recognized in international trade as applicable to agency contract (also called «lex mercatoria»)

Check whether the choice of the applicable law clause is effective in the countries involved.

13. Dispute settlement (competent jurisdiction – arbitration)

- national court of one of the parties
- (optional) amicable method of dispute resolution (ADR)
- arbitration

Check whether the choice of forum clause is effective in the countries involved.

14. Miscellaneous (“Boilerplate” Clauses)

- date and place of signature
- what about other pre-contractual arrangements?
 - are they cancelled? (“Entire contract clause” – “four-corners-clause”)
- what in the event of invalidity of certain clauses
 - do or do they not entail the invalidity of the entire contract (‘Severance clause ’)
- force majeure and hardship
- assignability (permitted or not – consequences)
- entry into force of the contract
- how to make changes to the contract?
- language of the contract, number of originals, number of attachments
- procedural and tax requirements