

The Agency Contract: SPAIN





1 Introduction

SPAIN

Introduction

This agency contract is governed by Law 12/1992, dated 27th of May, on agency contracts, as a result of the transposition to Spanish Law of Directive 86/653/EC relating to the co-ordination of the rights of member states as regards commercial agents, whilst the Code of Commerce is of supplementary application here, given that this contract involves private relations of a commercial nature.



SPAIN

The legislators of Law 12/1992 have not contemplated in any of its provisions compliance with special formalities as regards the validity or effectiveness of the agency contract. Therefore, the general principle established in our positive legal framework as regards freedom of form, shall govern.

3

3 Main Obligations and Rights of the Parties



SPAIN

In the exercise of his professional activity, the agent shall act loyally and in good faith, protecting the interests of the principal or principals on whose behalf the agent is to act.

In particular, the agent shall:

- a) Perform his activity in accordance with the reasonable instructions received from the principal, provided that these do not affect his independence.
- b) Receive on behalf of the principal any type of claim from third parties as regards quality or quantity defects and vices relative to the goods sold and the services rendered as a result of the operations performed, even prior to their completion.
- c) Keep a separate account of the transactions and operations relative to each principal on whose behalf the agent is acting.

3. Main Obligations and Right of the Parties

Article 7 of the Law provides that, except when agreed to the contrary, “the agent may perform his professional activity on behalf of one or various principals”. The general rule of empowering the agent to enter into an agreement with one or various principals is subject to, in the first place, the principle of contractual autonomy and, in second place, that the principals with whom the agent has entered into an agency contract are dedicated to economic activities of a different nature.

The essential obligation of the agent is the promotion or promotion and formalisation of contracts and, in order to assume any other obligation, that obligation must be agreed by the parties; otherwise it may not be used as grounds for breach of contract.

As regards the rights and obligations of the principal, it is important to highlight that the principal must act loyally and in good faith.

In particular, the principal must satisfy the agreed remuneration.

Within a period of fifteen days, the principal must notify the agent his acceptance or rejection of the notified operation. Likewise, the principal must communicate to the agent, as soon as possible, in view of the nature of the operation, the execution, partial execution or non-execution of the operation.

Among the provisions of the agency contract, the parties may include a restriction or limitation to the professional activities to be performed by the agent once the contract has been terminated.

The competition restriction agreement may not have a validity period longer than two years from the date of the termination of the agency contract. If the agency contract has been agreed for a shorter period, the competition restriction agreement may not have a validity period longer than one year.

4. Remuneration

SPAIN

The remuneration of the agent will consist of a fixed amount, a commission or a combination of both systems. Failing agreement, the remuneration shall be fixed in accordance with commercial practices of the location where the agent is to exercise his activity. In the absence of such commercial practices, the agent shall receive a reasonable remuneration that reflects the circumstances that have concurred in the operation.

The commission refers to any part of the remuneration that is variable according to the volume or value of the transactions or operations performed, and, as the case may be, concluded by the agent.

The agent shall lose his right to the commission if the principal is able to prove that the transaction or operation concluded as a result of the intermediation of the agent between the principal and a third party failed to be executed for reasons not attributable to the principal. In such an event, the commission that the agent may have received as a result of the transaction or operation pending execution shall be immediately returned to the principal.

4. Remuneration

For the transactions or operations concluded during the validity term of the agency contract, the agent shall have the right to the commission when one of the following circumstances concur:

- a) That the commercial transaction or operation has been concluded as a result of the professional involvement of the agent;
- b) That the commercial transaction or operation has been concluded with a person who the agent has brought forth and, as the case may be, previously concluded a transaction or operation of a similar nature.

On another front, the agent has a right to the commission for transactions or operations concluded after the validity period of the contract. However, entitlement to that right is subject to some of the circumstances provided in the law, which are applicable on an alternative and non-accumulative basis. First of all, that the transaction or operation is the direct result of the activity performed by the agent during the validity term of the contract, provided that the transaction was concluded within three months following the termination of the contractual relationship. In second place, that the principal or the agent received the order prior to the termination of the contract and, if the commercial transaction or operation was concluded during the validity term of the contract, the agent shall be empowered to demand the payment of the commission. Finally, it is provided that the agent shall not be entitled to the commission for the transactions or operations concluded during the validity term of the agency contract if said commission were to correspond to a previous agent.

The above-mentioned commission will accrue from the moment the principal executes or should have executed the commercial transaction or operation, or the commercial transaction or operation was fully or partially executed by the third party.

In regulating the payment of the commission, article 14 has taken into account the independence and autonomy of the commercial agent, shifting the risk of non-execution of the operations for reasons attributable to third parties onto the agent. What the agent does not take on is the risk of non-executed operations due to reasons attributable to the principal. The right to the commission is therefore subject to the condition precedent of a regular execution of the transactions brought forth or concluded by the agent.

4. Remuneration

As regards the guarantee of the operations performed by the agent, article 19 establishes that the agreement by virtue of which the agent assumes the risk and fate of one, various or all of the transactions or operations brought forth or concluded on behalf of the principal, said agreement shall be null and void if it is not in written form and includes the commission to be received. In general terms, it is worth stressing that under no circumstances shall the commissioned agent respond to non-compliance of a contract entered into with third parties. However, this can be stipulated by means of express agreement as provided in article 272 of the Code of Commerce.

5. Term

SPAIN

The agency contract convened for a specific term shall terminate once the agreed term has ended. Notwithstanding that provided in the previous number, agency contracts for a specific term that continue to be executed by both parties after the initially contemplated term has elapsed, shall have the consideration of indefinite contracts.

An agency contract for an indefinite term shall terminate upon unilateral notice from any of the parties via prior written notice.

The prior notice period shall be one month for every year of the term of the contract, with a maximum period of six months. If the agency contract has been in force for less than one year, the prior notice period shall be one month.

The parties may convene longer prior notice periods, however, under no circumstances may the prior-notice period from the agent be less than the one established for the principal.

Unless convened to the contrary, the end of the pre-notice period shall coincide with the last day of the month.

The calculation of the prior notice period for specific term contracts that have become indefinite contracts through operation of law shall be based on the duration of the specific term contract plus the time elapsed from the time the contract become an indefinite contract.

The Spanish law governing agency contracts establishes that the jurisdiction for hearing suits derived from agency contracts will correspond to the judge of the agent's place of residence.

6 Compensation

SPAIN

Compensation for clients:

Upon the termination of the agency contract, whether said contract was for a specific or indefinite term, the agent responsible for providing new clients to the principal or notably increasing operations with existing clients, shall have the right to compensation if his previous activity continues to generate substantial benefits to the principal and it is equitably appropriate owing to the existence of competition restriction agreements, the commissions that he may lose or other concurring circumstances.

Thus, three requisites must be met. First, that the principal obtains a benefit consisting of the peaceful enjoyment of the clients brought forth by the agent; in second place, that the agent loses the commissions that he would have supposedly obtained through the clients had the unilateral termination of the contract not been produced; and lastly, that the contribution towards the asset increase by the agent is the determining cause of the loss of his future businesses, given that he is being deprived of the commissions derived from the client base acquired as a result of the activity performed by him during the term of the contract.

The right to compensation for clients also exists in the event of the termination of the contract due to the death or the declaration of death of the agent.

The compensation payment is subject to the condition that **the activity previously performed by the agent can continue to produce substantial benefits** to the principal, and that it is equitably appropriate. To determine this equitable and appropriate nature, the Law obliges to consider all the concurring circumstances and, in particular, the commissions lost by the agent due to the termination of the contract or the existence of competition restriction agreements.

6 Compensation

In view of the above, it is worth stressing that the agent shall have the right to compensation for clients, in the first place, when the contract expires upon reaching its termination date, in the case of specific term contracts; in second place, when the contract is terminated through a unilateral notice on the part of the principal, regardless of the causes that have led to the termination, provided that the agent has met his legal and contractual obligations in accordance with the principle of loyalty and good faith, including instances where the unilateral notice responds to a just cause.

The agent shall also have the right to compensation for clients in instances where the contract is terminated due to the death or declaration of death of the agent, in which case, the compensation will correspond to the heirs of the deceased according to the norms on the legitimate or testamentary inheritance.

The compensation shall be calculated based on the number of contracts brought forth or, as the case may be, concluded by the agent during the term of the contract.

Under no circumstances shall the compensation exceed the average annual amount of the remuneration received by the agent in the last five years, or in the entire term of the contract, should the latter be below the previously-mentioned five years.

Lastly, it is worth stressing that when establishing the compensation amount instead of a predetermined fixed amount an estimate based on the harm experienced by the agent as a consequence of the loss of clients has been decided.

Compensation for losses and damages:

Notwithstanding the compensation for clients, the principal providing unilateral notice of the termination of the indefinite term agency contract shall be obliged to compensate the agent for the losses and damages which, as the case may be, are caused to the agent by the early termination of the contract, provided that the compensation does not allow for the amortisation of the expenses that the agent, upon the instructions of the principal, may have incurred in the execution of the contract.

Therefore, the agent must prove the damaging consequences derived from the termination of the contract even when these were not caused directly. The losses and damages must remain sufficiently accredited as in the case of the causal link between the losses and damages and the termination of the contract. Jurisprudence has reinforced this aspect in such a way that it upholds the possibility of ensuring the existence of the damages through the set of assumptions, provided that there is a logical connection between the two.

The regulation contained in article 29 of the Law also covers direct and indirect moral damage derived from a loss of confidence in the agent on the part of the principals or the clients.

- Event of non-existence of the right to compensation.

6 Compensation for losses and damages

The agent shall not be entitled to compensation for clients or losses and damages:

- a) When the principal has provided notice of the termination of the contract on grounds of breach of the established legal and contractual obligations entrusted to the agent.
- b) When the agent has terminated the contract, unless the termination is on grounds of circumstances attributable to the principal or founded on the agent's age, disability or illness and the agent can not be reasonably obliged to continue performing his activities.
- c) When, with the principal's consent, the agent has transferred to a third party the rights and obligations of which he was the bearer by virtue of the agency contract.

Therefore, under this hypothesis it is worth highlighting any event of total or partial breach on the part of the principal, in terms of the established legal and contractual obligations, including non-compliance with the general principles as regards obligations and contracts established in the Civil Code.

The provision contained in section c) contemplates the possibility of agent assigning the contract and, consequently, the possibility available to the agent of presenting a successor, provided that this is backed by the principal's consent. The principal's refusal to give his consent would give rise to compensation to the agent under the concept of clients.

Any action to claim compensation for clients or for losses and damages will expire after one year from the termination of the contract.

“It's the way services are delivered that they value”

In the last four years LR Law Firm has more than doubled in size and turnover. LR Abogados' sustained growth is based on strong client relationships and a solid reputation for excellence. The firm's legal teams work closely with clients to deliver fast and effective business solutions.

The firm

The firm is client and industry focused, delivering multi-disciplinary expertise in key sectors such as private equity and finance, media, construction, technology and tourism. Its main office is in Madrid, with a local branch in Tenerife (Canary Islands) LR Law Firm recruits lawyers who are commercially aware and who can deliver the business goals focus essential to successful client relationships. The firm is well known for its pragmatic way of doing business and clients appreciate the contribution the firm makes in meeting their objectives.

Partners: 4

Assistants: 14

Trainees: 4

Staff: 4

Types of work undertaken

The firm is highly regarded in the following sectors:

Corporate

The team has built its reputation acting for management teams, lending institutions and investors in MBOs, MBIs, IBIs, acquisitions and mergers.

Commercial

The team gives specialist advice on a full spectrum of commercial agreements, often with an international element, which includes advice on intellectual property rights, trade marks, supply and logistics, licensing, joint ventures and competition law. Multi-disciplinary and cross-border transactions are undertaken as well as work in overseas jurisdictions. Clients for whom the firm acts range from governments, multinational companies, banks, and Private Equity Companies to entrepreneurs, private companies and individuals.

Insolvency

Lawyers' skills are solid and prestigious as Trustees in Bankruptcies and Commissioners too, reporting to the Superintendent of Bankruptcy and performs duties as specified by the Bankruptcy and Insolvency Act.

Employment

A complete service by combining legal, human resources and industrial relations skills supplemented by practical training and HR consultancy services.

Real Estate

This team advises on a wide range of investment, development, property, project management and construction issues. LR Abogados provides a high-value service to clients ranging from entrepreneurs to leisure and retail occupiers, property companies and institutional investors. Specialist services include environment, planning and zoning. Due to a strong presence in Canary Islands LR offers a skill team specialized in Timesharing, representing the interest of one of most important German promoters in this area.

International

An increasing volume of cross-border work comes through overseas clients and contacts. This increasing volume is possible to attend through the International Law Firm Alliance "e-iure".- As a member of ILFA-e-IURE LR Law Firm has close links with top-tier law firms throughout the world.

Breakdown of work %:

Real estate 20

Corporate, commercial and insolvency 35

Litigation 20

Private client 5

Employment 20

Contacto: Jesús Castellano Gallego. **E-mail:** j.castellano@lrabogados.com

Address:

Paseo de la Castellana 144, 3º

Edificio Feygon I. 28046

Madrid – Spain.

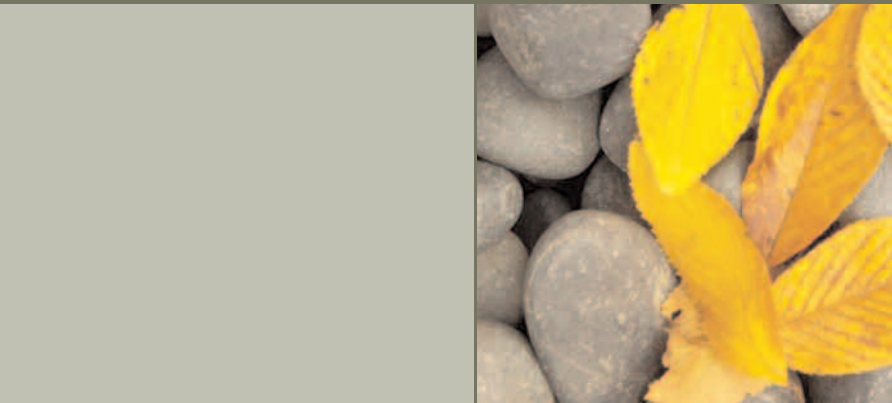
Tel.: +34- 91 458 1877

Fax: +34- 91 457 5332

E-mail: info@lrabogados.com

Web: www.lrabogados.com

SPAIN



 e-iure.com

 LR ABOGADOS
MEMBER OF ILFA|ETIURE

Desing by: neonlightsdesigns@yahoo.es / 2006

web: info@lrabogados.com
mail: www.lrabogados.com
phone: +34- 91 458 1877