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CONFLICTS IN COMMERCIAL DISTRIBUTION: SPECIAL MEASURES OF CAUTION

LITIGATION AND ARBITRATION

In the modern Consumer Society, direct distribution has practically been replaced by other methods of indirect distribution, driven by specialized intermediates working as a link between manufacturers and final consumers. This increasing decentralization fastens and rationalizes the movement of goods, thereby smoothing the conquer of new markets by installed and specialized operators with credibility before the local buyers, and enabling the transfer to third parties of expenses and risks that the manufacturer would, otherwise, have to support by himself. Such a distribution model masterfully combines the advantages of the intermediation activity traditionally conducted by commercial agents with a reduction of the manufacturer/supplier's obligations regarding the products' disposal.

Notwithstanding, despite their growing occurrence and commercial relevance, and similarly to what occurs in most worldwide legal systems, distribution agreements still lack specific regulation under Portuguese law, therefore qualifying as *legally atypical* contracts.

The exception lies in the, increasingly rare, agency agreements, specifically and directly ruled by Decree-Law no. 178/86, of 3 July, as amended by Decree-Law no. 118/93, of 13 April (which transposed Council Directive 86/653/EEC of 18 December 1986).

This raises numerous difficulties and gives rise to several disputes related to the interpretation and definition of the legal regime applicable to this category of contracts.

In view of the abovementioned, **in the last few decades, one can easily detect a solid tendency towards the analogous application of the agency agreement's termination rules to other similar agreements lacking specific regulation, as franchise and distribution contracts**. This trend has been followed and supported by our higher courts, in almost all related case law, and by the majority of our doctrine.

Far from being a purely academic and theoretical discussion, the matter is of undeniable practical relevance.

One can easily detect a solid tendency to the analogous application of the agency agreement's termination rules to other distribution agreements

In fact, it should be noted that, in practice, the so-called *legally atypical* contracts are mainly ruled according to the parties' agreement, within the limits of their private autonomy.

On the contrary, a different scenario is posed if the agency agreement's termination rules set forth in Decree-Law no. 178/86 are applied by analogy to a certain distribution agreement. In this case, those rules will necessarily apply, as mandatory rules, even if the parties did not include them in the contract and, moreover, even if the parties explicitly ruled them out.

This imperativeness of the agency agreement's legal regime is often ignored by commercial traders, who, lacking timely and appropriate legal advice, recurrently conform to illicit contract terminations – simply by not being aware of the existing legal mechanisms to react to those behaviors in court, by claiming adequate compensation (even if they inadvertently resigned to it in advance, in the contract).

In this context, within the rights possibly granted to distributors as a result of the said analogous application, the following are definitely noteworthy:

- **the right to *goodwill compensation* ("*indemnização de clientela*")**, limited by the equivalent to the annual average of the distributor's profit margin over the latest five years, as a reward for the promotion and distribution activity developed by the latter during the commercial relationship;
- **the right to *compensation for eventual damages caused by the lack of prior notice of termination***, which may be calculated upon the monthly average of the distributor's profit margin over the preceding year, multiplied by the missing time until completion of the (statutory, contractual or judicial) prior notice.

However, one should also note that all previously addressed problems and legal solutions may significantly differ according to jurisdiction and law applicable to the case.

The imperativeness of the agency agreement's legal regime is often ignored by commercial traders

Therefore, especially before international commercial relationships (which are increasingly often), special caution is advised, namely by means of a thorough analysis of the related contractual clauses, usually called "*midnight clauses*". As a matter of fact, it is known (and to some extent understandable) that, at the beginning of a commercial relationship that is naturally expected to be long-lasting and fruitful, the

The distributor's rights largely depend on the jurisdiction and law applicable to the contract

parties pay special attention to the agreement's commercial conditions. These will probably have more impact in the short term and, thus, usually seem more critical in that initial stage. That is why, most times, only upon the inevitable termination of the contract, do the parties realize the significant amounts they could have won or saved (as appropriate), if they had timely sought proper legal advice.

And the truth is that – although our agency regime is similar to most European ones, also transposing the said EU Directive – as long as the parties agree in ruling the distribution agreement according to a legal system that does not accept the analogous application of the mentioned regime, it is likely that the courts of that place (provided that they have jurisdiction over the case, under legal or conventional grounds) will not only refuse to accept the imperativeness of Decree-Law 178/86 and to grant the distributor the rights therein contained, but also agree to an anticipate waiver to those rights.

Once again, the solution rests in prevention, namely by seeking timely legal advice

Once again, the solution seems to rest in prevention.

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