Agency Q&A: Brazil

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Brazil-specific information concerning the key legal and commercial issues to be considered when appointing an agent.

This Q&A provides country-specific commentary on *Practice note, Agency: Cross-border overview*, and forms part of *Cross border commercial transactions*.

Definition and authority

1. How is the relationship between agent and principal defined under national law?

Agency agreements are regulated by the following laws:

- Law no 4.886/1965 (Agency Law), which regulates the commercial representative (agent).
- Articles 710 to 721 of the Brazilian Civil Code (Law no 10 406/2002) (BCC).

If there is a conflict between the two laws, the general rule is that the most favourable to the agent will prevail, since it is deemed as the most vulnerable party (see *Question 3*, for an exception to this rule).

Both the Agency Law and the BCC define the relationship between agent and principal as one where the agent (either a legal entity or natural person) must promote the principal's product or service on behalf of that principal (or multiple principals) within a specified territory by intermediating proposals. The key characteristic of the agency agreement is that the agent will act as an intermediary, presenting offers and/or proposals, but will not generally conclude any agreements with clients on behalf of the principal. In return, the agent receives remuneration, which is usually a commission or equivalent payment calculated over the sales concluded due to the agent's intermediation or within the territory (in case of exclusivity).

2. What authority under national law does an agent have to bind the principal by its acts? How far can an agent bind its principal to third parties, when it does not have express authority from the principal to do so?

In an agent and principal relationship, the agent arranges offers and purchase orders from customers on behalf of the principal (but the agent can only participate in the execution of the actual sales if the principal has expressly authorised this). It is common in Brazil for an agent to have as their sole responsibility the marketing of products and services on behalf of the principal. The agent will then transmit any orders to the principal who will close the deals.

The parties can indicate in the agency agreement that the agent has the authority to conclude contracts on the principal's behalf. The agent's powers to bind the principal must be expressly agreed by the parties (*Article 710, sole paragraph, BCC*).

However, even without written authorisation granting the agent the power to enter into contracts on the principal's behalf, it would be very difficult for the principal to argue that it is not bound by a transaction concluded by the agent on its behalf if both:

- The agent consistently and habitually concludes contracts on the principal's behalf.
- The principal accepts the transactions entered into by the agent on its behalf, without restriction.

This is based on the principle of good faith and a principle known as the "appearance theory". Therefore, it is advisable to expressly regulate the agent's powers to bind the principal in the agency agreement, and to monitor the agent's day-to-day transactions on the principal's behalf.

Regulation and legal formalities

3. Are agencies specifically regulated by national law? Is any legislation pending, which is likely to affect agency arrangements? Are there any formalities that a principal must comply with when appointing an agent, for example, any registration or disclosure requirements?

The BCC and the Agency Law regulate agency agreements (see *Question 1*). As a general rule, an agent must be registered with the Council of Commercial Representatives (CORE) to perform its activities (*Article 2, Agency Law*).

However, case law has consistently held that a lack of registration with the CORE is a mere irregularity and consequently the rules of the Agency Law would still apply to an unregistered agent (see for example, *REsp 1539465, STJ, 14/09/2016, Justice Moura Ribeiro; AC 70075363135, TJRS, 16th Civil Court, 08/11/2018, Judge Rapporteur Niwton Carpes da Silva; AC 0020848-43.2016.8.26.0100, TJSP, 20th Private Civil Chamber, 09/04/2018, Judge Rapporteur Maria Salete Corrêa Dias*).

In a recent 2018 (isolated) precedent, one of the sections of the Superior Court of Justice (STJ) held that the lack of registration with the CORE would not prevent an agent from receiving commissions, but the provisions of the Agency law would not apply (including with regard to indemnification), and the case would be interpreted based on the BCC. Considering this is a new and divergent understanding from previous cases, the decision was questioned and will be heard *en banc* (that is, before the entire bench) (*REsp 1678551, STJ, 3rd Section, 06/11/2018, Justice Paulo de Tarso Sanseverino*).

Competition law

4. Are there any national laws or regulations that would affect the following business practices:

- Grant of exclusive territory?
- Tied selling?
- Territorial restrictions?
- Customer restrictions?
- Resale price maintenance?
- Refusal to deal?
- Imposition of minimum and maximum prices?
- Imposition of minimum sales targets?

National law does not prohibit the granting of exclusive territory, or the imposition of territorial or customer restrictions. In fact, exclusivity is the norm for agency agreements, as Article 711 of the BCC presumes exclusivity whenever there is no written agreement between the agent and principal. This presumption of exclusivity can be contractually changed by the parties. The STJ has recognised the presumption of exclusivity in cases where there is no express provision stating the contrary in the agency agreement and there is proof (by other means, such as witness testimony) that the agent acted with exclusivity (see for example *REsp 1634077, STJ, 3rd Section, 09/03/2017, Justice Nancy Andrighi*).

Despite the express provision in the BCC and the precedents from the STJ, lower courts tend to interpret the exclusivity presumption restrictively or even apply the rule under Article 31 of the Agency Law stating that exclusivity is not presumed. Unless some form of written agreement or document between the parties stipulates exclusivity, lower courts have been reluctant to apply the terms of Article 711 of the BCC to agents (see for example *AC 70075586677, TJRS, 15th Civil Court, 25/04/2018, Judge Rapporteur Otávio Augusto de Freitas Barcellos; TJSP; AC 1000382-10.2017.8.26.0477, TJSP, 16th Chamber of Private Law, 08/11/2018, Judge Rapporteur Coutinho de Arruda*).

In relation to resale price maintenance, refusal to deal and the imposition of minimum and maximum prices the STJ has held that these practices may be restricted if the principal has market power or a dominant position in the relevant market (or is part of a group of resellers or an economic group), or if such practices somehow limit or damage competition (*Law no 12 529/ 2011*).

The relevant market can be determined by assessing:

- The relevant product/service being offered (duly identified in its segment and in comparison, to its competitors).
- The principal's market share in comparison to its competitors.
- The territory it exerts over its activities.
- The actual power it exerts.

There may be a breach of competition law whenever an entity with a dominant position (usually considered as having at least 20% of the relevant market share) imposes the following measures on the sale of goods or services to distributors, resellers, or agents, in relation to transactions carried out with third parties:

- Resale prices.
- Terms and conditions of payment.
- Minimum or maximum orders.
- Profit margins.
- Any other sales conditions (*Article 36, paragraph 3, IX, Competition Law*).
- Tied selling (*Article 36, paragraph 3, XVIII, Competition Law*).
- Refusal to deal (*Article 36, paragraph 3, XI, Competition Law*).
- Division of markets or clients (*Article 36, paragraph 3, I, c, Competition Law*).

There are cases when such practices may be considered legitimate, but this will depend on a detailed case-by-case analysis.

A principal may establish minimum sales targets for the agent, and it is highly recommendable that these targets are expressly set out in the agency agreement or in another document executed by both parties. The relevant document must also state the consequences of a failure to meet sales targets (for example, contractual breach, termination, loss of exclusivity, and so on).

However, minimum sales targets may be used by agents as further evidence of the existence of an employment relationship between the agent and the principal under the Consolidation of Labour Laws (CLT) (see *Question 6*). If such employment relationship is established, the principal will have to comply with all the obligations related to the employment relationship (including, for example, 13th salary, 1/3 additional for paid vacation, mandatory pension fund payment and so on).

5. Are there any laws or regulations relating to restrictive covenants or covenants not to compete during the agency agreement? To what extent is it possible to continue the restrictions after the agreement has expired? In particular, to what extent does the geographical extent and or the length of time of the restriction affect its enforceability?

If the relationship between the parties is of a commercial nature, it is possible to agree and to enforce a non-compete covenant during the term of the agency relationship. Article 711 of the BCC presumes that the agent will not engage in any business that is similar to that of the principal. Brazilian law does not specify which activities can be restricted, allowing the parties to freely agree upon such matter, and the courts tend to respect written clauses. When there are no written clauses, the courts analyse on a case-by-case basis if the activity has the potential to harm the principal's businesses or to mislead customers. Nevertheless, activities such as selling, marketing, or manufacturing products similar to those of the principal are likely to be included in these restrictions.

Post-termination restrictions are more controversial. These restrictions may be allowed if the agent was duly compensated. To minimise the risk of courts finding this clause abusive and, therefore, not enforceable, the parties should expressly define the activities subject to restrictions, the geographical area of the non-compete obligations and a period of time in which such obligation is enforceable (up to five years).

Employment issues

6. Is there a risk that an agent may be treated as an employee of the principal?

Yes. In Brazil, any individual who provides services on a regular basis for compensation, under the orders/coordination of a company could be considered as an employee. This risk derives from the "principle of reality" applied to labour law matters under which facts prevail over form. Therefore any agreement signed by the parties is superseded by the reality of their day-to-day dealings (*Articles 9 and 442, CLT*). For example, an agent can claim recognition of an employment relationship and they will be considered as an employee by the labour court if there was subordination to the principal (see for example, *case RO 0000774-34.2017.5.13.0006 PB, 21/05/2019, Judge Rapporteur Eduardo Sergio de Almeida, Regional Labour Court* (TRT)*; and case AIRR 0010598-23.2015.5.01.0070, 10/05/2019, Superior Labor Court* (TST)).

Evidence to support the existence of an employment relationship may include situations where the principal has control over the agent's work schedule and working hours, and the existence of performance targets (see *Question 4*). Although permitted in agency relationships, the imposition of sales targets is likely to be considered as evidence of subordination if the agreement can be terminated or the agent loses exclusivity if the targets are not met. In addition to subordination, the following factors must be present for an employment relationship to exist:

- Personal nature of the relationship of the parties (the contractor is hired specifically because of its personal characteristics).
- The agent is dependent on the principal.
- Continuity (as opposed to the agent being hired occasionally, therefore, relying on the contract).
- The agent is paid a salary (or any form of habitual compensation)

Tax

7. Will a foreign principal that appoints an agent directly in the national territory be regarded as carrying on business for tax purposes in that territory?

If the agent acts as an intermediary for the principal by, for example, obtaining or forwarding requests or proposals, or other acts necessary to mediate between the principal and a third-party buyer, the principal will not be regarded as carrying on business for tax purposes in Brazil.

However, if the agent (resident or domiciled in Brazil) of a legal entity domiciled abroad has the power to enter into agreements or sales on the principal's behalf in Brazil, the foreign entity will be regarded as carrying on business for tax purposes in Brazil. If the foreign entity is considered domiciled in Brazil, it will be subject to the applicable tax rate, a percentage of its gross revenues that varies from 9,6% up to 38,4%, depending on the type of business it carries out.

There are also rules on the determination and taxation of income earned in Brazil by branches, agencies or representatives of foreign companies authorised to operate in the country.

8. Are any withholding or other taxes levied in the territory on remittance monies? When and by whom are they payable?

Withholding tax is levied on remittance monies, the amount of which varies depending on the activity involved.

Where an agent acts as an intermediary for a foreign principal, the remittance of monies abroad and the withholding or tax payable arises when products or services are imported by a Brazilian company. If the goods or services are purchased directly from a foreign company, that company issues an invoice to the customer and the withholding or tax payable will depend on the type of the imported product or service.

The agent receives a commission for the services they provide to the principal. The agent must pay the following taxes in Brazil on that commission:

- Income tax.
- Services tax.
- Various social security contributions such as:
    - Contribution for the Social Integration Programme (*Contribuição ao Programa de Integração Social*) (PIS); and
    - Federal Contribution for Social Security Financing (*Contribuição para o Financiamento da Seguridade Social*) (COFINS).

An agent or representative of a foreign company that is authorised to operate in Brazil could, in theory, be treated as a branch of that legal entity and may be required to pay income tax on the entity's behalf.

9. Will there be any difficulties in a domestic agent making payment to a foreign principal, either in local currency or in the currency of the principal's country? Are there any exchange controls in operation?

No. However, the Brazilian Central Bank requires both:

- A written agreement in relation to a payment to a foreign principal.
- A declaration concerning the specific purpose of the payment.

A bank only transfers a foreign payment where the proper documents, including the proof of payment of the applicable taxes, if any, are presented.

Duties of the agent

10. What duties does national law impose on an agent?

An agent must act with diligence and observe the instructions given by the principal (*Article 712, BCC*). In addition, an agent must supply detailed information to the principal regarding the business under its care, dedicate itself to expanding the business and promote the sale of the principal's products or services. The duty to supply detailed information should be set out in the contract. If there is no such provision, the information must be presented when requested by the principal (*Article 28, Agency Law*).

The agent also has a duty to register with the CORE (see *Question 3*).

The following actions by the agent will be considered as a breach of its duties:

- Harming, intentionally or by negligence, the interests trusted to its personal care.
- Helping or facilitating, by any means, the performance of the profession (that is, of an agent) by those who are forbidden, prevented or unsuitable to exert it.
- Promoting or facilitating unlawful business, as well as any transactions, which may undermine the interests of the Tax Authority.
- Violating professional secrecy.
- Not accounting to the principal for any accounts, receipts or documents that may have been given to it for any purpose.
- Refusing to present its professional card, when requested.

(*Article 19, Agency Law*.)

Duties of the principal

11. What obligations does national law impose on a principal?

A principal must pay an agent's commission within 15 days of payment of the relevant sales invoice by the third-party buyer (*Article 32, Agency Law*). The agent must also send a commission invoice to the principal so it can make the payment.

Remuneration

12. How does national law regulate the payment of remuneration to the agent? Does national law contain any compulsory provisions concerning the level of remuneration?

An agent is entitled to remuneration once the third-party customer pays for the relevant good or service (*Article 32, Agency Law*) (see *Question 10*). While the law does not set any other rules specifically related to payment (such as minimum or maximum amounts), it does provide that the principal cannot change any terms of the agency agreement that would result in a direct or indirect reduction of the agent's average remuneration obtained over the last six months of the agreement (*Article 32, paragraph 7, Agency Law*). The principal cannot, for instance, alter the agreement to reduce the agent's percentage commission rate unless it increases the territory or gives the agent other means to maintain its average remuneration.

13. How does local law regulate corrupt gifts and secret commissions?

Brazilian law does not specifically regulate acts of private corruption. However, secret commissions could generate, for example, tax penalties if they are not duly declared and the applicable taxes paid.

The issue of corrupt gifts only arises where national or foreign public entities are involved. In these cases, the principal can be held liable for agent's acts, depending on the circumstances of the case, if these gifts are given to obtain a benefit for, or in the interest of, the principal (*Article 1, paragraph 2, Law no 12 846/ 2013*).

Duration

14. What term is commonly agreed for an agency? Does national law regulate the length of notice periods to terminate an agency agreement?

The term usually agreed for an agency agreement is one to two years, or an indefinite term. Any renewal (expressly in writing or tacit) of a fixed-term agreement will be automatically deemed to be for an indefinite term (*Article 27, Paragraph 2, Agency Law*).

The required notice period for termination of an indefinite term agreement is at least 90 days (see *Question 17*). If the required notice is not given, and the agreement has been in force for more than six months, the agent will be awarded specific indemnification of one third of the remuneration (commissions) received in the three months before termination (in addition to any other indemnification that may be due, see *Question 17*).

Rights of Ownership

15. Where the agent holds stock or money or other property belonging to the principal:

- Can the principal assert its rights of ownership against third parties, in the event of insolvency of the agent and in the event that the agent has dishonestly disposed of them to third parties?
- To what extent do these rights extend to enable the principal to take the proceeds of sale of that property disposed of by the agent, where the sale was authorised by the principal and where the sale was not authorised by the principal?
- Where the agreement states that the agent shall not become the owner of any goods supplied by the principal, are there any local laws which might override this provision?

Issues of ownership do not commonly arise in Brazil in relation to money because payment is usually made directly to the principal, since the agent usually does not conclude the business on the principal's behalf.

In relation to stock held by the agent, the question of rights of ownership depends on how the agent came to be in possession of the stock. If the stock was sent as a consignment or as some form of temporary loan, then the principal could assert its rights of ownership against third parties. If the third party acted in good faith, it is possible that the agent will be held liable for such a transaction if it exceeded the powers granted, or the instructions issued by the principal. Therefore, the products should be easily identifiable by a serial number, bar code or model number. If the goods are commingled, such as commodities, the transfer of the property must meet specific formal requirements.

Where the agent holds money on the principal's behalf, the issue of ownership rights is more complicated. The difficulty lies in proving that the money paid or delivered to third parties belonged to the principal.

The principal is always able to recover its property and money from its agent, and even claim an indemnity against it. However, in relation to third parties, the ability to recover an asset depends on the nature of that asset and the format in which the transaction was carried out.

There are no special rules applicable to agency and insolvency. Credits or debits are considered regular credits unless they have some special form of guarantee.

If the principal did not authorise a sale, the agent can be held personally liable for the damages caused for exceeding its powers.

Regarding the transfer of property of the goods, agents do not become the owner of the goods supplied by the principal (*Article 710, BCC*). They merely take possession over them before delivering them to the final clients. Under the agency agreement, goods may be sent and delivered directly from the principal to its final clients, limiting the agent's intervention to:

- Obtaining purchase orders.
- Closing deals.
- Receiving commission for this service.

Distributors, on the other hand, obtain property rights over the goods bought from the principal and subsequently sold directly from the distributor to its final clients. Therefore, if the agreement states that the agent will not become the owner of the goods, this provision would be compatible with local laws.

Termination

16. What events will be regarded in law as justifying termination of the agency agreement? Do any statutory obligations arise on termination? What provision is usually made in the agreement for termination?

Under the Agency Law, the principal can lawfully terminate the agency agreement for the following reasons:

- The agent's carelessness in complying with obligations assumed under the agreement.
- Acts that affect the principal's commercial image, especially those that discredit its brand, products or the principal itself.
- Breach of, or lack of compliance with, any of the fundamental obligations of the agreement.
- Final conviction of the agent for a serious crime.

(*Article 35, Agency Law*.)

It is not clear at present whether the list in Article 35 is an exhaustive list of just causes for terminating the agency agreement. An example of what case law has accepted as instances of breach of obligations under the agreement allowing for termination with cause is when the contractually stipulated goals are not met and this non-compliance is duly documented, as long as termination is carried out according to the good faith principle and this right of the principal is not applied in an abusive manner (see for example *AC 70078597515, TJRS, 16th Civil Court, 22/11/2018, Judge Rapporeur Deborah Coleto Assumpção de Moraes and AC 0031463-80.2012.8.26.0602, TJSP, 20th Chamber of Private Law, 07/08/2017, Judge Rapporteur Maria Salete Corrêa Dias*) (please note this can generate labour liability if other elements of an employment relationship are present, see *Question 6*).

The Agency Law also lists the reasons that would allow the agent to terminate the agreement with just cause:

- The reduction of the sphere of activity of the agent in breach of the clauses of the agreement.
- The direct or indirect breach of the exclusivity obligation, if foreseen under the agreement.

- The practice of abusive pricing in the agent's territory, with the exclusive means to prevent its regular activity.
- Non-payment of the agent's compensation when it is legally due.
- Force majeure.

(*Article 36, Agency Law*.)

The agreement usually includes other reasons for termination, or expressly defines actions that are deemed to be a fundamental breach of the agreement. For example, violation of anti-corruption regulations would be deemed as a fundamental breach.

17. What rights does the agent have to compensation or indemnity upon termination of the agency agreement or discontinuation of supply of the products? How is compensation or indemnity for termination / discontinuation of supply calculated? Are there any formalities which must be complied with for lodging a claim for compensation or indemnity?

If the principal terminates an indefinite term agreement without just cause (see *Question 16*), it must give the agent the required notice of termination (see *Question 14*).

The BCC also stipulates that indefinite term agreements cannot be terminated until sufficient time has elapsed for the agent to recover the investments made to execute the agreement (*Article 720, BCC*). Therefore, it is advisable to include information in the agreement on the approximate amount invested by the agent (if any) and a provision estimating the time to recover that investment.

Even if adequate prior notice is given, the agent is entitled to receive indemnification equivalent to one-twelfth of the total remuneration paid during the term of the agreement, adjusted for inflation (*Articles 27, paragraph 1 and 33, paragraph 3, Agency Law*). If the agent claims that it should have received commissions for other sales not paid during the term of the agreement (such as sales made by the principal within the agent's exclusive territory) those amounts should also be included in the indemnification calculation.

If the agreement has a fixed term under Article 27, paragraph 1, of the Agency Law, while not a legal requirement, it is also advisable to give 90 days' prior notice of any termination of the agreement. On termination of a fixed-term agreement, the agent must receive indemnification equivalent to the monthly average of the remuneration obtained until the date of termination, multiplied by half the number of months of the agreement term. If a fixed-term agreement succeeds another within a period of six months, the latter agreement will be converted to an indefinite term agreement (*Article 27, paragraph 3, Agency Law*).

There are no formalities for lodging a complaint for indemnification. If any of these situations are found to have occurred, the principal has a duty to make the relevant payment. If no payment is made, the agent can claim the amount of indemnification due at court or in arbitration proceedings.

It is common for the parties to sign a bilateral termination document (*distratos*), in which the agent releases the principal from any further liability in return for the amount of indemnification specified in the document.

If the supply of a product is discontinued because the supplier ceases to manufacture that product, the agent will not have any rights to compensation. This is permitted because this would justify the reduction of the agent's average remuneration.

If, conversely, the supplier decides to discontinue intermediation of certain products or services by the agent, choosing to continue selling the product through other means, even directly, the agent will be entitled to compensation for the reduction of its commissions earned on an average basis during the last six months of the agreement's term. This reduction is strictly prohibited (*Article 32, paragraph 7, Agency Law and Article 715, BCC*), which gives the agent cause for termination under Article 36 of the Agency Law. (For further information, see *Question 12*.)

On termination with cause by the agent, it will be entitled to the indemnification of one twelfth of the total remuneration paid during the entire term of the agreement, adjusted for inflation (*Article 27, paragraphs 1 and 33, paragraph 3, Agency Law*).

The agency agreement

18. Are any particular formalities required in relation to agency agreements?

No particular formalities are required for the agency agreement to be valid. If the parties choose to have a written agreement, it is advisable to initial all pages of the agreement and sign at the end. It is common for the parties' signatures to be notarised, but this is not a requirement for the validity of the agreement. Note that the agreement does not necessarily need to be written. See *Question 3* for the requirement to register with the CORE.

The agent needs no formal authorisation from the principal to perform the agreement. The agreement's terms and conditions are sufficient to regulate its activities.

19. Where the agent is required by the principal to enter into a guarantee of the debts to the principal of customers that it finds for the principal (*del credere* guarantee) or that it concludes contracts with on behalf of the principal, what formalities and documentation are required to ensure that the guarantee is legally binding? Is any special set of words required for such a guarantee?

Brazilian law prohibits *del credere* guarantees by agents and these clauses are null and void.

20. What are the parties called in your jurisdiction?

Under the Agency Law, the agent is known as "commercial representative" and the principal "represented party" (*representado*) or they can also be referred to as contractor and contracting party (*contratado* e *contratante*).

Under the BCC, the principal is known as "offeror" (*proponente*) and the agent "agent".

21. In your jurisdiction, would it be standard practice for an agent to be obliged to:

- Store the principal's products and, if so, to store them separately from other goods at the agent's own cost?
- Insure the principal's property at the agent's own cost?
- Give the principal access to the agent's premises to carry out inspections of the agent's books and records or for inspecting or taking stock of the principal's property?
- Contract with customers on the principal's standard terms and conditions? Would the agent receive protection under local law allowing it to deviate from any such requirement?
- Stock adequate volumes of products and to deliver the products to the customer?

Under Brazilian law, no provisions require agents to store the principal's products, nor is it common practice, considering the nature of the agreement is the mere intermediation of proposals, but this may be stipulated freely by the parties in the agreement, as in *Standard document, Agency agreement: Cross-border: clause 3.17*. The parties may include this obligation, as well as the conditions in which the goods are to be stored and the party responsible for bearing storage costs.

There are no legal provisions that regulate whether the agent bears the cost of insuring the principal's property at its own expense. If the agent undertakes to store the principal's goods, the agreement should expressly define the term of delivery of those goods from the principal to the agent. If Incoterms 2010 are used, responsibility for insurance costs will depend on the form of Incoterm the parties choose. The parties can also freely determine who will bear insurance costs once the goods are delivered to the agent and are under its possession.

The agent is not legally obliged to give the principal access to its premises to inspect the agent's bookkeeping or to inspect stock. The parties can freely decide this in the agreement.

An agent is engaged by a principal to close deals on its behalf, therefore, receiving purchase orders based on the principal's terms and conditions, and relaying the orders to the principal. The details of this mechanism must be expressly defined in the agreement, since there is no legal provision regulating this specifically. Article 1 of the Agency Law defines the agent as someone who may or may not practice acts related to carrying out deals. It is also important to remember that agents must have a certain autonomy vis-à-vis the principal to ensure the relationship is not perceived to be one of employment.

The agent is not obliged, under statute, to stock certain or specific volumes of a product and deliver that product to the customer. Therefore, the parties could freely decide on such a provision in the agency agreement.

22. Are there any obligatory statutory requirements in relation to commission payments to agents in your jurisdiction or the time limits when the commission payments must be made to agents by the principal?

The agent is entitled to commissions for all deals concluded in the territorial zone for which it is responsible. This right applies even if the principal or third parties close the deals directly with the clients in case of an exclusive agency agreement (*Article 31, Agency Law*). The amount of the commission is calculated based on the total value of the products (*Article 32, paragraph 4, Agency Law*), which should include applicable taxes over the amount invoiced to client (on the issue of the mandatory use of the gross value of the invoices as a basis for commissions see *AC 70066355918, TJRS, 13/07/16, Judge Rapporteur Otávio Augusto de Freitas Barcellos; AC 0012115-45.2011.8.26.0462, TJSP, 36th Civil Chamber, 11/09/2017, Judge Rapporteur Hélio Nogueira and AgInt nos EDcl no AREsp 269.483/SP, 4th Cahmber, STJ, 29/09/2016, Justice Maria Isabel Gallotti*).

Agents must be paid commission within 15 days after the final client pays the relevant invoices to the principal, as long as the agent presents in a timely manner the invoices related to the services provided (commissions) prior to payment (*Article 32, Agency Law*).

Despite the express prohibition of payments in foreign currency in force in Brazil and the set-off of the difference between foreign currency and local currency, payments can be agreed to in foreign currency when related to contracts that refer to the import or export of goods (*Article 318, BCC and item I, Article 2, Decree No 857/69*). This is only applicable if the foreign currency is converted into local currency at the applicable exchange rate on the payment date.

23. Would it be possible in your jurisdiction to include a clause which:

- Makes commissions only payable by the principal to the agent in respect of contracts concluded *during the term* of the agreement only?

- Provides for a different (lower) rate of commission to be payable to the agent where the principal makes a direct sale to certain customers in the agent's territory?
- Excludes payment of commissions for product sales made by previous agents but which are concluded after the current agent's appointment?
- Provides for the principal to send a statement of the commission due to the agent in a specific period? If so, please confirm what the period must be under any applicable legislation.
- Provides a right for the agent to retain commission out of the sale proceeds?
- Provides for each party to keep accounts and records of all transactions and allow the other party to inspect such accounts and records and take copies of them?
- Provides that all records held by either party referred to in previous bullet point belong to the principal?

If the principal terminates the agreement for convenience, the agent will receive commissions for deals it initiated (even if not concluded) before termination, plus the indemnification provided in the Agency Law (see *Question 17*).

If termination was for cause, the agent will only receive compensation for the services actually rendered to the principal until termination (*Article 717, BCC*). However, it is not common that courts award damages in such instances to agents.

Whenever the principal grants the agent exclusivity, the agent receives commissions even when the principal or third party makes a direct sale to certain customers in the territory, as if the agent closed the deal (*Article 31, Agency Law*).

Standard document, Agency agreement: Cross-border: clause 6.3 could be freely inserted in the agreement by the parties. There is no restriction to exclude commission payments for sales by previous agents.

There is no statutory term for the agent to send the principal the purchase orders from the clients. *Standard document, Agency agreement: Cross-border: clause 6.10* would be permitted.

Brazilian law does not regulate the agent's rights to retain commission from sale proceeds. Usually, the principal receives payment from the clients and sends the agent its corresponding commission. Nevertheless, the agreement could stipulate that the agent receive payment on the principal's behalf and send the principal the price amount with the deduction of its commission. *Standard document, Agency agreement: Cross-border: clause 6.11* would be permitted.

Under Article 28 of the Agency Law, the agent has a duty to provide detailed information about the progress of the businesses at the principal's request or as established in the contract. The parties are free to establish a bilateral obligation to keep accounts and records of all transactions held during the agreement. *Standard document, Agency agreement: Cross-border: clause 6.13* would be permitted.

Ownership of the records is not specifically regulated by law, but it could be freely agreed on by the parties.

24. In your jurisdiction, would it be permissible to mandate that any dispute on the amount of commission payable must be referred to the principal's auditor for settlement (to the exclusion of the agent having access to the courts)? If so, does the principal's auditor need to be registered in the agent's home jurisdiction?

No, access to the courts in any dispute between the parties concerning matters related to the agreement (such as the amount of commissions due) cannot be excluded. The dispute must be resolved in court or in arbitration, in accordance with the parties' contractual choice.

25. Does the trust concept and the role of "trustee" exist in your jurisdiction? If not, how should the practical matter of separate bank accounts be reflected in clause wording?

There are no equivalents of the common-law concepts of "trust" and "trustee" in the Brazilian legal system. As agents do not usually receive payments on the principal's behalf, the problem of separating bank accounts does not frequently arise. The parties are free to create an investment fund for the principal's benefit if the parties wish to establish separate funds to collect money from sales.

26.In your jurisdiction, are there competition / anti-trust law implications of an agent agreeing to spend its own money on advertising the principal's products?

There are no immediate implications of an agent spending its own money on advertising. In fact, agency agreements usually provide that the agent will spend its own money not only on advertising the products, but also in relation to other costs that may arise from its activity. Indeed, this is the default rule in Brazil under Article 713 of the BCC. However, the parties are free to stipulate otherwise. Competition law implications arise whenever a party demands or grants exclusivity in relation to advertisements in mass media, which is prohibited under Article 36, paragraph 3, VI of Law 12.529.

27. Is it common practice in your jurisdiction for the principal to provide the agent with an indemnity in respect of any product liability claim? Does "damage" to property in any indemnity include harm to intangible property such as profits and reputation?

Under Article 34 of the Consumer Defense Code (CDC), agents and suppliers are jointly and severally liable towards the consumer in product or service liability claims. Because of the passive solidarity existent between agents and suppliers, the consumer can sue all parties in the supply chain for product defects (*Article 18, CDC*). Therefore, as the agent only acts on behalf of the principal (*Article 710, BCC*), it is common for the agreement to stipulate an indemnity due from the principal to the agent if the agent is sued for product defects.

28. What limitations and exclusions of liability might be appropriate?

There are no legal provisions that specifically regulate liability limitations and exclusions in agency agreements. General contract law applies in this case.

The duty to indemnify (even if contractual) derives from statute. Contractual liabilities can be limited under the agreement. If there is no limitation of liability clause in the agreement, contractual liability will be limited to the extent of the actual damages suffered (*Article 389, BCC*). According to Article 944 of the BCC, the indemnity is measured by the extension of the damage. If there is an excessive disproportion between the damage caused and the fault of the agent, the judge may reduce the indemnity proportionally. In order to measure the indemnity, it is necessary to calculate the losses and damages actually suffered. That is, direct damages, which are those proven to be directly caused by the breaching party, and the profits the aggrieved party reasonably lost due to the damage as a direct and immediate consequence (*Article 402, BCC*). Lost profits must be sufficiently proven in court. This is usually a difficult task, as the aggrieved party must produce evidence of the profits it normally would have earned, and show a causal link between the breaching party's actions and the failure to achieve those profits. Punitive damages are not permitted under Brazilian law.

Regarding tort (non-contractual liability), gross negligence and willful misconduct are classified as illegal acts under Brazilian law, demanding adequate compensation. This liability can never be excluded contractually (*Article 186 and 927, BCC*).

Moreover, the agency agreement cannot limit or exclude product liability in relation to the final customer. Both the agent and the principal (and any other parties in the supply chain), are jointly and severally liable for any consumer claims relative to the purchased products (*Article 12, CDC*). Therefore, the courts do not enforce any limited liability clauses that exempt one of the parties' responsibility towards the consumer in cases of product defects. According to Article 25 of the CDC, it is prohibited to establish in a consumer contract a clause which precludes, limits or

exonerates the obligation to indemnification for vices or defects of the services and/or products. It also states that the legal warranty of a product or a service does not depend on an express term and it is forbidden to exclude this warranty with a contractual clause (*Article 24, CDC*). These will be considered abusive and null and void by courts, even if stated by the parties' free expression of will (*Articles 24, 25, and 51, CDC.*)

However, there is an exception of sorts to this general rule. If the consumer is a legal entity the supplier's liability can be limited, but not excluded, if the limitation clause is very visible, that is usually in bold and capital letters (*Article 51, I, CDC*). This ensures that the consumer understands its terms clearly. Whether such clause in enforceable depends on the circumstances of each case and in particular on the consumer's business activities. It is important to state that even this exception only applies if the situation justifies the limitation of liability. Brazilian courts tend to be quite restrictive in accepting this exception.

29. Is the term "exclusive" agency agreement recognised in your jurisdiction? Does local law provide for automatic exclusivity?

Under the Agency Law, the term "exclusive" primarily means that the agent is entitled to commissions for all the business conducted in the territory defined in the contract. Therefore, the principal can still directly market or sell to customers in that territory, but the agent is entitled to commissions, even if it did not participate in the transaction (*Article 31, Agency Law*). The parties can agree to total or partial exclusivity of the territory and the duration of the exclusivity (*Article 27, (e), Agency Law*).

Legislation does not clearly specify if exclusivity is automatic or not (see *Question 4*). Under the BCC, if not expressly agreed otherwise, the principal cannot appoint other agents in the same territorial zone at the same time as an existing agent. The agent cannot work in the same zone for other principals that sell products of the same type as the principal's (*Article 711, BCC*). By contrast, there is no presumption of exclusivity under the Agency Law in the absence of express agreement by the parties. The STJ has adopted a different approach in *REsp 1634077* deciding that exclusivity is presumed if the agreement does not expressly rule it out and if there are other elements that demonstrate its existence in practice. However the matter is still controversial as the majority of case law understands that exclusivity cannot be presumed. (For more information, see *Question 4*.)

The agency agreement can also define bilateral exclusivity. This means that the agent is only able to market and sell the principal's goods in the specified territory.

30. Is the term "sole" agency agreement recognised in your jurisdiction?

The term "sole" agency agreement has no correlation in the Brazilian jurisdiction. The agency is deemed exclusive whenever the principal cannot appoint other agents in a territory and the agent will still receive commission if the principal directly markets or sells to customers in the agency zone (*Article 71, Agency Law*). (For more information, see *Question 29*.)

31. Is the term "non-exclusive" agency agreement recognised in your jurisdiction?

Brazil recognises the term "non-exclusive" agency agreement. The principal is entitled to appoint other agents and directly market and sell to clients in the specified territory, as well as appoint other agents in the same territory, without being obligated to pay commissions to an agent when that agent did not participate in closing a deal.

32.Will any customs duties be payable under the agreement for any products that are received by an agent in your jurisdiction?

Normally, the agent does not receive the products because it is paid for promoting sales from the supplier to customers. Therefore, the supplier normally sends the products directly to the customers. The distributor may also act as an agent, providing agency services and receiving commission as consideration.

In this case, the Brazilian distributor, as an importer of the goods, must pay customs duties corresponding to that import on customs clearance at the moment of the registration of the Import Declaration. These customs duties are ordinarily as follows:

- State Value Added Tax on Sales and Services (ICMS): the rate depends on the Brazilian state to which the goods will be imported to.
- Import Tax: the rate depends on the NCM code under which the product is classified.
- Excise Tax (IPI): the rate depends on the NCM code under which the product is classified.
- PIS/PASEP-Import (Federal Contribution for the Social Integration Programme levied on imports): the rate is ordinarily 2.1%.
- COFINS-Import (Federal Contribution for Social Security Financing levied on imports): the rate is ordinarily 10.65 %.

In addition to these customs duties, there is also the Additional Tax for the Renewal of the Merchant Marine (AFRMM), which is a tax levied on sea freight fees on imports. The rate is 25% (on freight fees).

For customs clearance, the importer must present the following documents to the Brazilian Federal Revenue Service for assessment:

- Original copy of the Bill of Lading or equivalent document.
- Original copy of the invoice signed by the exporter.
- Packing List, if applicable.
- Proof of payment of the Additional Tax for the Renovation of the Merchant Marine (AFRMM), which applies when the goods arrive by sea and are unloaded from a ship.
- Other documents, depending on the country of origin of the goods, considering the relevant bilateral treaties signed between the countries (if any) or authorisation from government regulatory agencies.

33. Are there any compliance obligations on either party under your local laws?

Anti-bribery or anti-corruption clauses are common in all types of commercial contracts. These clauses normally survive the term of the agreement, for a duration that is to be determined in court according to the specifics of the particular relationship between the parties. Brazilian law does not specifically regulate these clauses in relation to agency agreements. All legal entities incorporated in Brazil (including branches and subsidiaries) must abide by Brazilian Anti-Bribery Law No 12,846/13. Therefore, parties to any contract, not only agency agreements, are implicitly obligated to comply with the Brazilian Anti-Bribery law, whether a clause is expressly included in the document or not.

34. In your jurisdiction, to what extent can an agent incur personal liability to a customer?

Whether an agent can incur personal liability to a customer depends on the nature of the relationship between the agent and customer.

The general rule according to the CDC is objective liability, which does not depend on the proof of fault of the agent. Therefore, one understanding is that, in consumer relationships, where the customer is the final consumer of the product or service, the agent can be personally liable for defects in the product or service. The agent is considered as part of the chain of supply, meaning that the customer could seek indemnity against the agent and from the principal, because of the passive solidarity existent between them (*Articles 18 and 34, CDC*). Statute also states that the provider will be held responsible for the vices of quality of goods and services even if it is not aware of them

(*Article 23, CDC*). Nevertheless, the agent could seek reimbursement from the principal and the agency agreement could stipulate this indemnity, based on the fact that the agent is only acting on behalf of the principal.

On the other hand, courts have also deemed the agent to be a mere intermediator of the sales, especially in commercial relations (non-consumer) based on the fact that the agent assumes, in a non-habitual and autonomous manner, the obligation to promote, at the expense of the principal, the performance of a certain business, in exchange for a remuneration (*Article 710, BCC*). Therefore, the agent would only be responsible for the quality of the intermediation service, meaning the approximation between the principal and the customer. The agent has the obligation to act with all the diligence expected, attending to the instructions given from the principal (*Article 712, BCC*).

Despite this divergence, the agent can be personally liable for the problems in the businesses when it does not fulfil essential activities under its responsibility (such as failure or delay in delivery when the agent was responsible for arranging the transportation).

Therefore, depending on the court and the specifics of the case, the level of the agent's personal responsibility can be more restricted or expanded.

Nevertheless, the agent is personally liable for illicit conduct performed against the principal's orders.

It is uncommon for an agent to obtain insurance to cover personal liability.

35. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to the agency agreement?

Agreements executed and to be performed in Brazil (that is for goods or services sold in the Brazilian territory) are as a general rule governed by Brazilian law and/or the local courts will be deemed to have at least concurrent jurisdiction to deal with the case, if also submitted to a foreign court. According to Article 39 of the Agency Law the forum for resolving disputes should be the city where the agent is domiciled. However, there have been several precedents that have accepted (within Brazil) choice of other locations by the parties to resolve disputes (the STJ deems this a case of relative jurisdiction), as long as the change in location does not greatly hinder the ability of the agent to defend itself in court and/or have access to the judiciary (see for example: *REsp 1076384/DF, 4th Chamber, STJ, Justice Antonio Carlos Ferreira, 18/06/2013*).

Please note that the matter of choice of forum is not uniformly treated by the courts, for example, several recent precedents by the TJSP have deemed the provision of the Agency law as a case of absolute jurisdiction, that could not be changed by the parties (see for example: *AI 2237248-89.2017.8.26.0000; 11th Chamber of Private law, TJSP, Judge Rapporteur Renato Rangel Desinano, 11/10/2018*).

There are some isolated precedents where courts have allowed a foreign choice of governing law in international transactions over Brazilian law. However, the majority of case law does not support this and the application of a foreign governing law varies depending on the court's interpretation.

Nonetheless, the parties can elect a different governing law and jurisdiction by submitting any disputes arising from the agreement to arbitration. The parties can choose the law applicable to the arbitration proceedings, if the foreign law or its provision(s) does not breach public policy and good moral values (*Article 2, paragraph1, Arbitration Law (Law No 9,307/1996)*).

36. Does the agreement need to be in a language other than English to be valid and enforceable?

An agreement does not need to be executed in any particular language to be considered valid or enforceable in Brazil. However, it must be accompanied by an official translation when submitted to a Brazilian court. This also applies to any other document presented in court (*Article 192, CPC*).

It is common for agreements executed between parties from different countries to be written in two languages (two columns), with a clause providing that one of the versions will prevail in the event of inconsistencies or divergence.

37. How does this agreement need to be executed to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

There are no execution requirements for the agreement to be valid and enforceable in Brazil.

Nevertheless, to be enforceable directly through execution proceedings, without the need for a cognizance procedure before the execution proceedings, the contract must be signed in the presence of two witnesses. Additionally, if the agreement is executed abroad and enforced in Brazil, it must be apostilled in a notary office abroad, according to the manner specified in the Hague Apostille Convention (if the foreign country is also a member). A Portuguese sworn or court-appointed translation must also be apostilled.

Registration formalities

There are no registration requirements for an agency agreement to be valid and enforceable.

38. Are there any clauses in the agency agreement that would not be legally enforceable or not standard practice in your jurisdiction?

Standard document, Agency agreement: Cross-border: clause 13.2 must take into account the list of situations that are considered cause for termination by the supplier in Article 35 of the Agency Law (see *Question 16*). Force majeure is one of the events considered cause for either party to terminate.

There is no equivalent in Brazilian Law to "material breach". A breach of any obligation undertaken by the parties is simply treated as a contractual breach. The consequences of the breach vary according to the type of obligation that was not complied with. Therefore, the cure period provided in *Standard document, Agency agreement: Cross-border: clause 13.2(a)* would usually be applied to any type of breach of contract.

Furthermore, it is uncommon for the principal to maintain product liability insurance (as in *Standard document, Agency agreement: Cross-border: clause 11.2* and *clause 12.2(b)*) and this liability cannot be limited or excluded in consumer cases (*Articles 25 and 51, CDC*).

Regarding *Standard document, Agency agreement: Cross-border: clause 11.4*, it is the supplier's duty to inform local authorities and consumers in the event of recall, by public announcements in the media. It must also bear all related costs (*Article 10, CDC*).

Misrepresentation is considered a breach of good faith and fair dealing in Brazil. The closest concept to negligent misrepresentation in Brazil would be accidental misconduct (*dolo acidental*). In this case, even without misrepresentation, the innocent party would have still entered into the agreement, merely in different circumstances (*Article 146, BCC*). This only entitles the innocent party to damages, to be determined by the court, as opposed to annulment of the agreement in case of wilful misconduct. Therefore, *Standard document, Agency agreement: Cross-border: clause 17.3* would not be enforceable in Brazil.

39. Are there any other clauses that would be usual to see in an agency agreement and/or that are standard practice in your jurisdiction?

There are no other clauses that would be usually provided in the agreement.

Brexit

40. From the point of view of your jurisdiction, what points do you anticipate might arise in relation to an agency agreement which either:

- contains an express choice of English law as the governing law; or
- has a UK-incorporated principal or agent as a party and is governed by the laws of your jurisdiction, if, during the life of the agreement, the UK were to cease to be a member of the European Union?

If the UK ceases to be a member of the European Union during the term of an agency agreement that applies English law (or where one of the parties is a UK-incorporated company), from the Brazilian law standpoint, there would be no necessary changes to the agreement.

Regardless of the UK's membership of the European Union, if agency services were to be rendered in Brazil, Brazilian law would apply to the agreement. An exception to this would be if the parties had chosen arbitration as the dispute resolution method, with the law of England and Wales as the governing law to the agreement and arbitration proceedings, in which case the agreement would only be affected if the law of England and Wales were to suffer changes.

41. In relation to any points identified in *Question 41*, would you recommend that any adjustment should be made now to the standard document if it were to be used as an agreement governed by the law of your jurisdiction, in order to address those points in advance?

No adjustments would be required.

END OF DOCUMENT

