Key Agency Considerations: Overview (Switzerland)

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A Practice Note providing an overview of key issues for foreign counsel of a manufacturer or supplier of goods to consider when entering into an agency arrangement for the sale or purchase of goods and services in Switzerland including applicable laws and regulations, important considerations for appointing an agent, key provisions in agency agreements, and termination considerations.

An agent in the context of the sale or purchase of goods, services, or both in Switzerland is typically an intermediary with authority to negotiate the terms of the sale on behalf of another person (the "principal") but not to buy goods for resale or contract with customers on its own account. In Switzerland, this type of agent is called a "commercial agent" (while the term "agent" is also used for the party providing services within a simple mandate or agency agreement). The terms "agent" and "agency" as used in the remainder of this Note refer to commercial agents in the context of the sale or purchase of goods and the provision of services.

The appointment of an agent is a commonly used channel for the sale of goods and services in Switzerland and has many benefits for a foreign principal, including that the principal benefits from the agent's knowledge of local laws, trading conditions, and customs. However, counsel to a foreign principal planning to appoint an agent to sell its products or services in Switzerland should consider a number of risks and requirements that may arise.

This Note discusses:

- Key legal and regulatory requirements governing the appointment of an agent to market goods and services on behalf of a foreign principal in Switzerland including:
    - legal formalities;
    - tax requirements;
    - competition laws; and
    - product regulatory requirements and product liability laws.
- Key considerations for appointing an agent and structuring the agency relationship in Switzerland, including:
    - types of agent;
    - relationship of the parties;

  - import requirements;
  - intellectual property issues; and
  - online sales considerations.

- Key provisions in the agency agreement.
- Issues related to the termination of an agency relationship in Switzerland.

For an overview of agents and other participants in the global supply chain, see Practice Notes, Global Supply Chain: Overview and Practice Note, Sales Intermediaries in the Supply of Goods: Overview (International).

Governing Legislation and Regulation

Legal Framework

Introduction to Swiss Contract Law

The principle of freedom of contract is fundamental to Swiss contract law. This principle reflects the freedom of each person to decide whether and with whom to enter a contract, and the content and type of contract. Parties are not limited by the list of specific contracts provided by Swiss law, known as named contracts. They can conclude contractual relationships outside of this list, which are often referred to as unnamed contracts.

While parties have wide room to tailor their agreement, the Swiss Code of Obligations, 220 (CO) regulates contractual relationships and commercial enterprises. For example, the CO requires the parties to:

- Respect the limits set by law (Article 19, CO). This applies to:
  - mandatory provisions from which the parties cannot validly derogate; and
  - provisions that are partially mandatory, meaning that either a specific form is required or amendments to the detriment of one party are not valid.
- Sign contracts by hand unless an exemption applies (Articles 12 to 15, CO).

CO divides contract law into two main parts:

- General Provisions (Articles 1 to 183, CO).

- Types of Contractual Relationships, which sets out the specific contracts regulated by law (that is, named contracts) (Articles 184 to 551, CO).

The Swiss CivilCode, 210 (Civil Code) also applies to contracting and requires for example the parties to exercise their rights and perform their obligations in good faith.

Laws and Regulations Governing the Commercial Agency Contract
In Switzerland, parties to a commercial agency contract are subject to the general provisions of the CO and to specific provisions for commercial agency contracts in Articles 418a to 418v of the SCO. These articles cover both goods and services.

The section of the CO dedicated to commercial agency contracts is comprehensive. It covers:

- General rules (Articles 418a-b, CO).
- The agent's obligations (Articles 418c-d, CO).
- The agent's power of representation (Article 418e, CO).
- The principal's obligations (Articles 418f-o, CO).
- Termination of the contract (Articles 418p-v, CO).

Certain types of agents are also governed by other articles of the CO in addition to the articles applicable to commercial agency contracts generally:

- The provisions of the CO applicable to brokerage contracts, Articles 412 to 418, apply to agents acting as intermediaries (that is, negotiating agents).
- The provisions of the CO applicable to commission contracts, Articles 425 to 439, apply to agents acting as proxies (also known as stipulating agents).

(Article 418b, CO.)

The CO also regulates:

- Simple agency contracts or mandate agreements (Articles 394 to 406, CO).
- Employment contracts regarding the prohibition of competition (Article 418d, paragraph 2, CO).

Legal Formalities

Commercial agency contracts do not need to be in writing, although in practice parties should conclude written agreements as a best practice.

A written contract signed by all parties, either by hand or with an authenticated electronic signature, is required when the parties intend to differ from certain partially mandatory provisions. For example:

- Where the agent carries on its activity as a secondary occupation, the parties can exclude, within certain limits and by written agreement, some legal provisions (Article 418a, paragraph 2, CO).
- Where the parties enter into agreements that substantially increase the agent's duties or that reduce their rights, the agreement generally must be in writing (Article 418c, paragraphs 2 and 3, Article 418f, paragraph 3, and Article 418g, CO).

Authority of Agent

Swiss law recognises two kinds of agents:

- Negotiating agents who canvass customers, approach them, and, if necessary, obtain orders from them.
- Stipulating agents who have the additional power to conclude deals and act as direct representatives of the principal.

(Article 418b, CO; Federal Supreme Court, First Civil Chamber, BGE 108 II 118, 23 April 1982, at 120.)

The difference between the two types of agents determines the extent of the agent's powers of representation. There is a presumption that agents are negotiating agents authorised only to facilitate transactions, without the power to conclude them in the name and for the account of the principal (Article 418e, paragraph 1, CO). This is a rebuttable presumption, and it is important for the parties to specify an agent's powers of representation. For more information on the types of agents under Swiss law, Types of Agents.

Powers made known to the client in good faith are decisive, independent from any presumption regarding the agent's powers (Article 33, paragraph 3, and Article 34, paragraph 3, CO). As a result, if the principal allows the client to infer in good faith that the agent is a stipulating agent, the principal is bound by the acts of the agent (Pierre Tercier and Blaise Carron, *Les contrats spéciaux*, p. 842, no. 5177 (Schulthess Verlag, 2025) (Tercier)).

Agents are presumed to have certain supplementary powers of representation, including:

- The agent's right (and duty) to receive notices of defects and other declarations.
- The agent's right to exercise the principal's rights to secure evidence.

(Article 418e, paragraph 1, CO.)

Conversely, an agent must have a special power of attorney for certain activities. Without the special power of attorney, the agent does not have powers of representation. Some examples include:

- Accepting payments from clients.
- Granting payment deadlines.
- Agreeing on amendments to the contract.

(Article 418e, paragraph 2, CO.)

Liability of the Agent

Under Swiss law, when an agent presents themselves as a representative without authority to do so, the agent's legal acts have no effect on the principal. Similarly, the agent is not bound because the contract is not in the agent's name. In this situation, the law permits the client to sue the agent for damages. However, if the client knew or should have known that the agent lacked authority, the agent is not liable. (Article 38, paragraph 1, and Article 39, paragraph 1, CO.)

An agent's liability depends on the extent of their fault. If the agent acted while knowing or while they should have known that they did not have the powers of representation, their liability is significantly greater than where the agent acted without knowing that they lack the power of representation. Therefore, where the agent is at fault, the court may order the payment of further damages on grounds of equity (Article 39, paragraph 2, CO).

The payment of damages by the agent to the third party does not prohibit a possible action for unjust enrichment (Article 62 to 67, CO). This action remains against the person who has been enriched to the detriment of the third party by the act performed without authority, that is, either the agent who received the performance intended for the principal, or the principal who received the performance (Article 39, paragraph 3, CO).

Agent's Duties Implied by Law

The agent's main obligation is to negotiate or enter contracts. Articles 418c and 418d of the CO detail additional obligations of the agent.

Duty of Diligence

The agent must safeguard the principal's interests with the diligence of a prudent businessperson (Article 418c, paragraph 1, CO).

This duty of diligence is reflected in certain obligations:

- The agent must be active in maintaining, renewing, or increasing the number of the principal's clients and the order volume (Dominique Dreyer, "Article 418c," no. 3, *Commentaire romand – Droit des obligations I* (Helbing Lichtenhahn Verlag, 3rd ed. 2021) (Dreyer)), but is free to determine how to organise their work (Federal Supreme Court, First Civil Chamber, BGE 122 III 66, 21 December 1995, at 69).
- The agent must provide the principal with all necessary available information on:
    - the market, including competition, consumer trends, technological developments, and marketing techniques;

- their activity; or
- the products they promote, including control tests, legal regulations, and product liability.

(Tercier, page 839,no. 5157.)

- The agent must perform the contract in accordance with what was agreed and must comply with reasonable instructions given by the principal. Unless otherwise agreed, the principal cannot require the agent to:
  - apply a commercial strategy against their will;
  - become part of a sales organisation; or
  - use auxiliaries or sub-agents.

(Federal Supreme Court, First Civil Chamber, BGE 136 III 518, 7 October 2010, at 520-22.)

Duty of Loyalty

The agent has an obligation to carry out their activity in the interests of the principal and must be faithful to the principal. Despite this duty, the agent is not prevented from working for several principals during the term of the contract, unless the contract provides otherwise in writing (Article 418c, paragraph 2, CO).

The duty of loyalty prohibits the agent from negotiating or concluding contracts for a competitor of the principal, unless the principal consents (BGE 136 III 518 at 520-22). This duty also requires the agent to avoid conflicts of interest or, if a conflict exists, to give preference to the principal's interest. In particular, the agent must avoid double representation, which includes receiving a commission from both the principal and the client. (BGE 136 III 518 at 520-22.)

The agent cannot validly conclude a contract with themself. With the principal's consent, the agent can acquire goods that are listed on the stock exchange or have a current price or goods intended exclusively for their own use. (Kurt Pärli, "Article 418c," no. 5, *Basler Kommentar – Obligationenrecht I* (Helbing Lichtenhahn Verlag, 7th ed. 2020) (Pärli).)

Duty of Discretion

Agents must not exploit or reveal the principal's trade secrets, including the secrets the agent has been entrusted with or becomes aware of due to the agency relationship. The agent's obligation extends beyond the end of the commercial agency contract. (Article 418d, paragraph 1, CO.)

A trade secret is any fact falling within the principal's private economic sphere about which the agent must acknowledge the principal's intention to keep secret (Pärli, "Article 418d," no. 1). To qualify as a trade secret, the knowledge must relate to specific technical, organisational, or financial matters that the principal wants to keep secret. It cannot be knowledge that can be acquired in all companies in the same industry. (Federal Supreme Court, First Civil Chamber, BGE 138 III 67, 10 January 2012, at 70-71.) Information about clients who, the agent has canvassed with their personal skills is not covered by business secrecy (Federal Supreme Court, First Civil Chamber, BGE 44 II 56, 1 January 1918, at 58-60).

The obligation of discretion continues after the end of the contract and is not limited in time. It is only extinguished if the principal no longer wants to keep the secret, or if the interest in maintaining it has disappeared. (Dreyer, Article 418d, no. 5.)

Principal's Duties Implied by Law

Obligation to Assist the Agent

The principal must do everything in their power to enable the agent to carry out their activity successfully (Article 418f, paragraph 1, CO). This obligation is justified by the long-term nature of the agent's activity, which entails an economic dependence on the principal (Dreyer, Article 418f, no. 1). The obligation to assist means that the principal must help the agent so that the agent can negotiate or conclude as many contracts as possible (BGE 122 III 66, at 70).

Once the negotiating agent has negotiated a contract, the principal must conclude it in good faith. Once the stipulating agent has concluded a contract, the principal must perform it in accordance with its content. (Federal Supreme Court, First Civil Chamber, BGE 95 II 143, 8 May 1969, at 146-147.)

The obligation to assist also means that the principal must refrain from anything that might prevent the agent from carrying out their activities successfully. This duty also includes:

- The obligation to immediately inform the agent if the principal anticipates that the number or volume of transactions is likely substantially smaller than what was agreed or expected.
- The obligation to make necessary documents available to the agent to carry out their activity successfully (Article 418f, paragraphs 1 and 2, CO).
- The obligation to respect the agent's exclusivity where a particular area or clientele is allocated to the agent, unless otherwise agreed in writing (Article 418f, paragraph 3, CO). The principal may conclude contracts directly with clients of the assigned clientele or area, but the agent is entitled to their usual commission (Article 418g, paragraph 2, CO).

If the principal breaches the obligation to assist the agent, the agent may claim damages under Article 97, paragraph 1 of the CO (BGE 122 III 66, at 71).

If the principal is at fault in preventing the agent from earning the volume of commission that was agreed or expected, the principal must pay the agent appropriate compensation. The agent cannot waive their right to compensation in advance. (Article 418m, paragraph 1, CO.)

Other Pecuniary Obligations

The principal must pay the agency commission (see Regulation of Agent Commission). In addition, the principal has, or may have, other financial obligations during the term of the contract. These include the obligation to:

- Pay a collection provision (Article 418*l*, CO).
- Reimburse costs and expenses (Article 418n, paragraph 1, CO).

- Pay compensation for the obligation not to compete (Article 418d, paragraph 2, CO).

Bribery and Corruption

The Swiss Criminal Code, 311.0 (CrC) provides for a custodial sentence of up to three years or a financial penalty for any person who offers, promises, or gives an employee, partner, agent, or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party so that the person carries out or fails to carry out an act in connection with its official activities that is contrary to their duties or dependent on their discretion (Article 322 octies, CrC).

The same consequences apply to anyone who, as an employee, partner, agent, or any other auxiliary of a third party in the private sector, demands, secures the promise, or accepts the undue advantage (Article 322 novies, CrC).

Articles 322 octies and 322 novies of the CrC became effective 1 July 2016. Before then, only Article 4a, paragraph 1 of the Federal Act on Cartels and other Restraints of Competition, 251 (Cartel Act) regulated private corruption that may constitute unfair conduct. Article 4a, paragraph 1, of the Cartel Act continues to apply in conjunction with the CrC.

Articles 322 octies and 322 novies of the CrC specifically mention the agent as a potential target of active and passive private corruption. Agents must be very attentive to Swiss corruption regulations and should not accept any advantage that would put their interests above of those of the principal. (Article 322, CrC.)

Regulation of Agent Commission

Principle
Because a commercial agency contract is always for valuable consideration, the principal's main obligation is to pay the agent the commission that is due. This form of remuneration has the economic purpose of motivating the agent to procure business by rewarding them according to the results obtained (Federal Supreme Court, First Civil Chamber, BGE 128 III 174, 19 March 2002, at 176). The agent's right to the agreed or customary commission is mandatory for all transactions that the agent facilitated or concluded for the principal during the term of the contract (Article 418g, paragraph 1, CO).

If the agent has not directly influenced the conclusion of a contract with a client during the term of the contract, meaning they are neither the negotiating agent nor the stipulating agent, but the agent has nonetheless procured the client, then the agent is still entitled to a commission (Article 418g, paragraph 1, CO).

An acquiring agent (see Types of Agents) procures a customer if the agent creates a general interest in the principal through their promotional activity, without the agent having to directly influence the conclusion of the contract (Federal Supreme Court, First Civil Chamber, BGE 121 III 414, 14 September 1995, at 416).The agent can waive the right to commission in written form.

Under Article 418t, paragraph 1 of the CO, and unless otherwise provided by agreement or custom, the agent is entitled to commission on orders placed by a client acquired by the agent during the agency relationship only if the orders are placed before the end of the commercial agency contract (Article 418t, paragraph 1, CO). Agents cannot assert claims to commissions by invoking their promotional activity regarding orders clients placed after termination of the contract (Federal Supreme Court, First Civil Chamber, BGE 84 II 542, 27 November 1958, at 545-46).

An exclusive agent is entitled to the agreed commission for all contracts concluded in their area or with their clientele, regardless of the role the agent played (Article 418g, paragraph 2, CO). However, the exclusive agent can waive in writing payment of

the commission for transactions concluded directly by the principal with clients belonging to the agent's exclusive clientele or area (BGE 121 III 414, at 417-18).

Conditions for Entitlement to Commission

Absent any conflicting written agreement, the principal's obligation to pay the commission to the agent is subject to the following conditions:

- The contract concluded by the principal, respectively by the stipulating agent, is formally and materially valid (Article 418g, paragraph 3, CO).
- The agent has carried out their activity during the contract, meaning either having negotiated the contract or concluded it on behalf of the principal.
- There is a causal link between the agent's activity and the conclusion of the contract. An agent's "psychological link" is considered satisfactory. This means that the commission is due not only when the negotiation has essentially or primarily caused the conclusion of the contract, but also when the negotiation has contributed to the third party's determination to enter into a contract with the principal. Therefore, the conclusion of the contract does not need to be the immediate consequence of the activity of the negotiating agent to justify a commission. (BGE 84 II 542, at 549.)
- The parties can agree that the agent is entitled to a commission for any contract concluded, even if it would not have been procured by the agent's activity (BGE 128 III 174, at 177).
- An agent's right to a commission lapses when the execution of a concluded transaction is prevented for reasons not attributable to the principal (Article 418h, paragraph 1, CO).
- An agent is not entitled to any commission when no consideration is given in return for the principal's performance, or when consideration is so limited that the principal cannot reasonably be expected to pay any commission (Article 418h, paragraph 2, CO).
- An agent loses their right to a commission if they have acted in disregard for the rules of good faith or if their actions are to the detriment of the principal's interest (Tercier, page 848, no. 5212).

Amount of the Commission

The amount of the commission is determined by either the parties' agreement or, in the absence of an agreement, by custom. Custom is determined by the activity in question, the usual practices, and the location where the agent carries out the activity. (Article 418g, paragraph 1, CO.) In the absence of custom, the court determines the amount of commission for the agent's activity (Article 1, paragraph 2, Civil Code).

In general, the amount of the commission is set as a percentage of the price stipulated in the contracts negotiated or concluded with the clients. Depending on the applicable practice, this may be the gross price or the net price. (Federal Supreme Court, First Civil Chamber, BGE 127 III 449, 17 July 2001, at 451-52.) Net price is determined after deduction of any transport costs, rebates, discounts, or other related expenses (Pärli, Article 418g, no. 7).

Under the freedom of contract principle, the parties may agree to a certain minimum commission, a fixed minimum amount with a commission, a commission per sold good, or other commission.

Terms and Conditions

The agent's commission is due at the end of the calendar half-year in which the transaction was concluded. The parties are free to agree on another due date without having to comply with any special forms. (Article 418i, CO.)

The termination of the commercial agency contract brings forward the due date to the moment of termination of the contract for all claims of the agent arising before that moment. A later due date may be agreed to in writing for commission on transactions to be performed either in full or in part after the agency relationship has ended. (Article 418t, paragraphs 2 and 3, CO.)

The principal must provide a statement of accounts for each due date and present it to the agent with a sufficiently precise statement of account showing the business for which commissions are payable, unless otherwise agreed in writing (Article 418k, paragraph 1, SCO; Federal Supreme Court, First Civil Chamber, 4A_92/2013, 25 September 2013, at recital 7). The agent also has the inalienable right to inspect the books and documents used to calculate the commission (Article 418k, paragraph 2, CO).

As the commission is a periodic fee, the claim is time-barred after five years (Article 128, paragraph 1, CO). An agent who uses their right of retention keeps the right to enforce their commission in the presence of a time-barred claim (Articles 140 and 418***o***, CO).

Tax Requirements

Under the Federal Act on Federal Direct Tax, 642.11 (LIFD), Switzerland levies a federal tax on the income of individuals and on the profits of legal entities.

Individuals who are neither domiciled nor resident in Switzerland are subject to this tax based on their economic connection when gainfully employed in Switzerland as independent or dependent parties. Therefore, if a foreign principal carries out an activity in Switzerland through an agent, the income derived from this activity is subject to the Swiss income tax.

Companies based abroad are also subject to value-added tax (VAT) if they provide services or products in Switzerland. However, they are exempt from taxation if they exclusively provide tax-exempt services or products.

VAT is an indirect tax, usually 8.1%, collected by the Federal Tax Administration on nearly every purchase or sale of product or service. It is a general consumption tax that is charged directly to customers on the goods they consume or the services they use.

In the specific context of the commercial agency agreement, when a person acts in the name and on behalf of another, under certain circumstances, the service is deemed to be provided by the person represented (Article 20, paragraph 2, Federal Act on Value Added Tax, 641.20). If the agent acts in the name of and for the account of the principal and fulfils the requirements of Article 20 of the Federal Act on Value Added Tax, the agent is within the framework of direct representation for VAT purposes (Federal Administrative Court, First Administrative Chamber, A-4783/2015, 20 February 2017).

Competition Laws

The main Swiss competition law is the Federal Act on Cartels and other Restraints of Competition, 251 (Cartel Act). It applies to practices that have effects in Switzerland, even if they originate in another country. The Federal Competition Commission (ComCo) is the independent federal authority responsible for applying the Cartel Act.

On 28 June 2010, the ComCo issued a Notice on the Competition Law Treatment of Vertical Agreements, last revised 12 December 2022 (Verticals Notice). The Verticals Notice provides guidance for harmony with different aspects of EU competition law (Silvio Venturi and Christoph Vonlanthen, "Accords de distribution et droit de la concurrence,"*Les accords de distribution* (CEDIDAC, p. 125, no. 19, Gilliéronand Ling, eds., 2005) (Venturi and Vonlanthen)).

The Verticals Notice is not a formal legal act and is not binding for courts in the interpretation of competition law rules. However, it provides practical guidance, especially for agents that are often part of the distribution chain.

Agency contracts are considered illegal as vertical agreements if:

- They significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency (Article 5, paragraphs 1 and 2, Cartel Act).
- They eliminate effective competition (Article 5, paragraphs 1, 3, and 4, Cartel Act).

(Article 4, Cartel Act.)

A restriction on competition is presumed:

- In the case of agreements between parties at different levels of the production and distribution chain regarding fixed or minimum prices.
- Where sales into territories are not permitted due to agreements in the distribution contract allocating specific territories where goods or services must be sold.

(Article 5, Cartel Act.)

The presumption that competition is restricted applies only to contracts involving the distribution of goods or services and to contracts with a prohibition on passive sales, for example when the agent cannot satisfy unsolicited requests from individual clients or from operators located outside the territory assigned to them by the principal (Christoph Müller, "Les contrats de distribution,"*Droits de la consommation et de la distribution: les nouveaux défis* (Blaise Carron and Christoph Müller, eds., no. 31, Helbing Lichtenhahn Verlag 2013) (Müller, "Les contrats de distribution")). Contractual prohibitions of passive sales into exclusive territories (absolute territorial protection) are therefore unlawful.

However, ComCo has specified that a non-competition clause with a term of less than five years that prohibits the agent from competing by also distributing competing products does not, in principle, represent a qualitatively significant restriction on competition (section 15, lit. g, Verticals Notice).

For additional information on competition laws, see Practice Note, Competition Issues for Distribution and Supply Agreements in Switzerland.

Non-Compete Covenants

An agent may agree to refrain from competing with the principal after the end of the contract (Article 418d, paragraph 2, CO).

The validity of the non-compete clause is subject to the same conditions applicable in an employment contract. This clause must:

- Be in writing.
- Be appropriately restricted regarding place, time, and scope.
- Not jeopardize the economic future of the agent.

(Articles 340 and 340a, CO.)

In contrast to employment contracts, a non-compete clause in an agency agreement gives the agent an inalienable right to adequate special remuneration (Article 418d, paragraph 2, CO). This remuneration is due even if the agent terminates the contract in the ordinary way. However, the agent may lose their right to renumeration if their conduct gives the principal just cause for an extraordinary termination, but the agent anticipates an extraordinary termination by its own ordinary termination (BGE 95 II 143, at 149-50).

The contract may expressly provide that the principal can waive the non-compete prohibition of competition by observing an appropriate period of notice and that the agent loses its right to remuneration (Federal Supreme Court, Second Civil Court, 5A_89/2019, 1 May 2019, at recital 5.2.1).

In principle, the parties are free to determine the amount of compensation. However, in the event of a dispute, courts have broad discretionary power to verify the fairness of the compensation. (Article 4, Civil Code.) In doing so, courts consider the commissions that the agent can realise through a new activity (BGE 95 II 143, at 152-53).

For additional information on competition laws, see Practice Note, Competition Issues for Distribution and Supply Agreements in Switzerland: Exclusivity.

Product Regulatory Requirements and Product Liability Laws

The Federal Act on Product Liability, 221.112.944 (LRFP) regulates the requirements a product must meet to be placed on the Swiss market and defines liability for damages when a defective product causes:

- Death or bodily injury to a natural person.
- Damage to property.

(Article 1, LRFP.)

The producer is usually the actual or apparent manufacturer of a product or the commercial importer of the product who is jointly and severally liable with the actual or apparent manufacturers. (Articles 2 and 7, LRFP.) A Swiss agent who imports products for sale on behalf of a foreign principal is in principle jointly and severally liable in the event of a defect in the product in question. The client (the victim of the defect) can bring an action against the agent, the principal, or both.

The parties can provide for a different allocation of liability. For example, they can establish that the principal assumes the obligations regarding the conformity and safety of the product and is fully responsible if the product is deformed, has a latent defect, or is otherwise defective, or if there is a problem regarding the product's safety.

The agent can agree to immediately communicate to the principal any information relating to the safety and conformity of the product of which they have knowledge, though agents already have this obligation as part of their duty of diligence.

Appointing an Agent and Structuring the Agent Relationship

Types of Agents

In Switzerland, the parties to a commercial agency agreement are the agent and the principal. Both parties can be natural or legal persons.

The terms agency and agents are used in practice in ways that do not always correspond to the legal definition. Often, agents are legally employees or exclusive representatives. Parties may also use other terms to enter a contract that meets the definition of agency. For this reason, it is not the name or the wording of the contract or of the parties that is decisive, but their actual intention and the obligations under the contract (Article 18, paragraph 1, CO).

While the CO formally recognises two kinds of agents, negotiating agents and stipulating agents, in practice commercial agency agreements frequently combine these two forms of agencies.

In addition, the CO refers to:

- An acquiring agent, who procures customers for the principal without negotiating or concluding the contract.
- An exclusive agent, for specific areas or clientele.

(Article 418g, paragraph 1, CO.)

Del Credere Agents

The agent may assume liability for the client's payment or any other type of performance of the client's obligations or for all or part of the costs of recovering receivables (Article 418c, paragraph 3, CO). This is known as a del credere guarantee. The del credere guarantee can only result from a written undertaking by the agent, who is then entitled to special, adequate, and mandatory remuneration, known as the del credere commission. The agent has the status of a simple guarantor when it only incurs liability after a lawsuit against the principal has failed.

Swiss legal commentators disagree about the legal effect when no restriction has been placed on liability for payment. The Swiss Federal Supreme Court has not yet settled this question, which has significant practical consequences. Some Swiss legal authors consider the del credere guarantee as a contract of surety (Articles 492 to 512, CO; Kaveh Mirfakhraei, *Les indemnités de fin de contrat dans le contrat d'agence et le contrat de distribution exclusive*, p. 18 (Collection Genevoise, 2014)). Other authors do not share this view and believe that the agent is a guarantor in the sense of a guarantee of performance by a third party (Article 111, CO; Tercier, page 869, no. 5322).

The most important concerns are the differences between the independent guarantee and the accessory guarantee (Articles 111 and 492, CO). In an independent guarantee, the del credere agent cannot raise exceptions or objections that arise from the legal relationship between the principal and the client. In an accessory guarantee, the agent's obligation to pay depends on the basic contractual relationship between the principal and the client. If the principal debt is null and void, the guarantee has no effect.

If the parties agree to a del credere guarantee, they should specify precisely the nature of the guarantee and be cautious of the legal form required to enter the guarantee.

Employment Risks

In practice, it can be difficult to distinguish between a commercial agency contract and a commercial traveller's contract. The distinction has substantial practical consequences for the conclusion of the contract and the rights of each party.

The commercial traveller undertakes to broker or conclude all manners of transactions on behalf of the owner of a trading, manufacturing, or other type of commercial company off the employer's business premises in exchange for payment of a salary (Article 347, paragraph 1, CO).

The agent and the commercial traveller perform the same economic function. They represent their co-contractor by establishing and maintaining links with the clientele. (Federal Supreme Court, First Civil Chamber, 4A_86/2015, 29 April 2015, at recital 4.1.) However, the commercial traveller is bound by an employment relationship, but the agent acts in an independent capacity, without being bound to the principal by a subordinate relationship (Federal Supreme Court, BGE 129 III 664, 5 September 2003, at 668-669).

To establish a subordinate relationship, the representative must:

- Respect constraints imposed in the organisation of their work and their time.
- Follow strict instructions and guidelines, including:
    - providing periodic reports;
    - visiting a required number of customers; or
    - achieving a minimum turnover.

(No. 4A_86/2015, at recital 4.1.)

Another indication is who bears the costs and disbursements resulting from the usual exercise of the requested activity. An agent, who is independent, is in principle required to bear the costs of doing so (No. 4A_86/2015, at recital 4.1).

Import Requirements

In Switzerland, customs duties are indirect taxes levied on goods brought into the Swiss customs territory. They must be paid to the Federal Office for Customs and Border Security and normally arise when the office accepts the customs declaration. Customs duties depend on the condition of the goods, their weight, their material, and their use.

Under Article 70, paragraph 2 of the Federal Customs Act, 631.0 (LD), the persons liable to pay customs duties are:

- The person who drives or causes the goods to be driven across the customs border.

- The person subject to the obligation to declare, or their agent.
- The person on whose behalf the goods are imported or exported.

The parties liable to pay customs duties are jointly and severally liable for the customs debt (Article 70, paragraph 3, LD).

The customs procedure is based on the principle of self-declaration. The taxable person must take the necessary measures to ensure that the goods imported and exported across the border are correctly declared, and if in doubt, ask the authorities for information. (Articles 18 and 25, LD.)

Regarding the commercial agency contract, even if the agent imports goods on behalf of the principal and pays customs duties, the principal must reimburse the agent for their costs, unless the parties agree otherwise in writing (Article 418n, paragraph 1, CO).

Intellectual Property Issues

Intellectual property law is regulated by the Federal Act on the Protection of Trade Marks and Indications of Source, 232.11 (TmPA).

The right to a trade mark comes from registering the trade mark in Switzerland. It is the entry in the trade mark register that confers on the owner the exclusive right to use the registered trade mark. (Article 5, TmPA.)

For a trade mark to be effective, the trade mark must be used in connection with the goods or services registered. The use of the trade mark can be made by a licensee, an agent, an authorised importer, and an exclusive or non-exclusive licensee, but only with the owner's consent. (Article 11, paragraphs 1 and 3, TmPA.)

The owner can assign or license their trade mark. Trade mark assignment agreements must be written (Article 17, paragraph 2, TmPA). There are no formal requirements to license a trade mark, and the owner can grant a licence by conclusive acts. (Articles 17 and 18, TmPA.)

An agent does not need to be the user or owner of the principal's trade mark to import goods or market them in Switzerland. However, the agent needs the consent of the foreign principal who owns the trade mark. The parties can also agree that the agent has a licence right to the trade mark owned by the principal. They most often do this explicitly in their contract, and agree for security reasons that, at the end of the contract, the agent must stop all use of the trade mark.

The rightful owner of the trade mark is protected against misappropriation by providing that trade marks registered without the consent of the owner, in the name of an agent,representative, or other authorised user, are not protected(Article 4, TmPA).

Online Sales Considerations

Electronic commerce in Switzerland is governed by the Federal Act Against Unfair Competition, 241 (UCA) and the Ordinance Price Indication, 942.211 (OPI).

When a person offers goods, works, or services by electronic commerce, the person must:

- Indicate clearly and completely their identity and contact address, including for electronic mail.

- Indicate the different technical steps leading to the conclusion of a contract.
- Provide the appropriate technical tools to detect and correct input errors before sending an order.
- Confirm the customer's order by email without delay.

(Article 3, paragraph 1(s), UCA.)

Violation of these requirements may lead to criminal sanctions (Article 23, paragraph 1, UCA).

In addition, the OPI ensures that prices are clear, that they are comparable and that misleading price indications are prevented, especially online.

Internet sales are passive sales for purposes of competition law. According to the ComCo, online sales can be lawfully restricted only in very specific circumstances. (Franz Hoffet and others, "New Vertical Restraints Notice of the Swiss Competition Commission,"*Homburger Bulletin* (2010), page 275.)

The Agency Agreement

Agency agreements generally address many issues, including those related to the terms for the supply of goods and services between the principal and end-user clients. While all provisions in the agency agreement are important, counsel should pay particular attention to those provisions specific to the agency relationship.

Marketing, Promotion, and Advertising

Marketing and promotional responsibilities are generally addressed in commercial agency contracts, and the parties often provide that the agent undertakes to devote the necessary resources to the serious promotion of the product's sales.

Unless otherwise provided by agreement or custom, the agent is not entitled to reimbursement of costs and expenses incurred in the normal performance of their duties. This includes the costs of advertising, which must in principle be borne by the agent. (Article 418n, paragraph 1, CO.)

However, the agent is entitled to full reimbursement of the costs and expenses they pay under special instructions from the principal. These costs include, for example, costs resulting from market studies or advertising campaigns ordered by the principal. (Tercier, page 851, no. 5226.)

Storage of Principal's Products

The CO does not govern storage of the principal's products. In practice, the parties mainly specify the principal's obligations regarding the manufacture, availability, and delivery of the goods to make sure that the agent is not impeded by a lack of available goods to perform their sale activities. The parties are free to add specific clauses on storage of goods, especially when the products' shelf life is short or the storage conditions are particularly strict.

Agent Commission

The CO regulates in detail the terms of the commission due to the agent. However, the parties may deviate in certain respects from these regulations. Agency agreements commonly include a provision relating to the agent's commission.

It is permissible and common to include a clause regarding the agent's commission that:

- Excludes payment of commissions for transactions concluded directly by the principal with third parties relating to the agent's exclusive clientele or territory.
- Excludes payment of commissions for product sales made by previous agents but concluded after the current agent's appointment.
- Entrusts the agent with the responsibility of collecting the amounts due. In this case, the agent is entitled to a collection commission. (Article 418***l***, CO.)

The parties may also include clauses that:

- Provide a different or lower rate of commission to be payable to the exclusive agent, where the principal makes a direct sale to certain customers in the agent's territory.
- Require the agent to send a statement of the commission due to the agent within a specific period. The principal already must do this at each due date. (Article 418k, paragraph 1, CO.)
- Provide that any dispute on the amount of commission payable must be referred first to the principal's auditor for settlement. In this case, however, the principal cannot prevent the agent from going to ordinary or arbitral courts.
- Allow the principal to offset or deduct from payments of commission due to the agent any amount the agent owes to the principal under the agency agreement.

See Regulation of Agent Commissionfor more information on legal requirements related to the agent's commission in Switzerland.

Term of the Agreement

Article 418q of the CO regulates the duration of the term and the periods of notice regarding commercial agency contracts not concluded for a fixed term as follows:

- During the first year, the time limit is one month from the end of a month (that is, one month of notice, with the contract to end on the last day of the month). The parties can shorten this period, only in writing, or extend it, without any specific form.
- From the second year onwards, the notice period is two months from the end of a calendar quarter. This period cannot be shortened, but the parties may agree, without any specific form, on a longer period or another term.

The notice period must be the same for both the principal and the agent (Article 418q, paragraph 3, CO).

For information on terminating agency agreements, see Terminating the Agency Agreement.

Compliance with Laws and Principal's Policies

If the parties agree that Swiss law governs their agreement, both parties must comply with mandatory Swiss laws and regulations regardless of their places of residence. However, even if the contract is subject to Swiss law, the agent often operates in another jurisdiction, or the principal may not reside in Switzerland. In this case, the parties often agree that the agent undertakes to comply with all the laws in force in the territory where the agent will carry out their activities. If the agent fails to do so, the principal can claim damages. Also, the principal may require the agent to comply with the principal's policies in addition to any other applicable rules.

Confidentiality and Protection of Personal Data

The agent has a duty of discretion regarding the principal's trade secrets, even after the termination of the contract (Article 418d, paragraph 1, CO). By virtue of their contractual freedom, the parties can extend this duty to all information that may be considered confidential. The parties should specify what information is considered confidential to avoid any dispute in this regard.

The Federal Act on Data Protection (FADP) regulates private persons' processing of personal data pertaining to natural persons and legal persons.

Transfers of personal data abroad are permitted if the destination country is recognised as providing an adequate level of protection (by decision of the Federal Council), or if appropriate safeguards are put in place when no adequacy decision exists(Article 16, paragraphs 1 and 2, FADP).

The agency contract may add further obligations pertaining to data protection in addition to mandatory obligations under the FADP and the EU General Data Protection Regulation (*(EU) 2016/679*) (EU GDPR).

For more information on data protection in Switzerland, see Country Q&A, Data Protection in Switzerland: Overview.

Choice of Law and Forum

The Federal Act on Private International Law, 291 (PILA) allows parties to an international agency contract to choose the law governing their contractual relationship (Article 116, PILA).

The parties can agree that a legal system other than Switzerland's governs their relationship. If the parties make this agreement and Swiss courts have jurisdiction to resolve the dispute, the Swiss courts must apply foreign law, which, in practice, is not ideal. (Articles 112 and 113, PILA.) In this case, the parties may have to collaborate in establishing the applicable foreign law, that is, by providing at the judge's request information regarding rights, objections, and exceptions under the applicable foreign law (Article 16, PILA). If application of foreign law would lead to a result incompatible with Swiss public policy, Swiss courts will not apply the foreign law (Article 17, PILA).

In the absence of a choice of law, the agency contract is subject to the law of the state with which it has the closest connection. This connection is presumed to exist with the state of habitual residence or establishment of the party that performs the characteristic obligation under the agreement (in this case the agent). (Article 117, PILA.)

As to the forum, the parties can agree on the court which is to decide a dispute arising or to arise from their contract. This agreement can be made in writing, by telegram, telex, telefax, or any other means of communication that allows it to be proved by written text (Article 5, paragraph 1, PILA).

In the absence of a choice of forum, Swiss courts of the domicile or, in the absence of a domicile, those of the defendant's habitual residence, have jurisdiction to hear actions arising from the agency contract. Also, if the characteristic performance of the contract is to be performed in Switzerland, the action may also be brought before the Swiss court of the place where it is to be performed (Articles 112 and 113, PILA).

The parties may also decide to submit any dispute arising out of their contract to an arbitral tribunal.

Terminating the Agency Agreement

Legal and Contractual Obligations on Termination

Ordinary Causes of Termination of the Contract

Contract concluded for a fixed term. Where the commercial agency contract is concluded for a fixed term or its duration is limited by its purpose, it ends without notice on expiration of that term(Article 418p, paragraph 1, CO).

Where the parties tacitly maintain and continue their relationship past the expiration of the term of the contract, the CO treats the contract as tacitly renewed for a fixed term, not an indefinite term. This fixed term is the term of the previous contract, but for a maximum of one year. This one-year term can itself be tacitly renewed. (Article 418p, paragraph 2, CO.)

Article 418 is not mandatory. The parties can agree that the agreement cannot be tacitly renewed or agree on another extension period. (Federal Supreme Court, First Civil Chamber, 4C.277/2001, 4 February 2002, at recital 1a.)

Where the termination of the fixed term contract is subject to a party giving prior notice by a certain date, the contract is renewed in its entirety if neither party gives notice within the agreed period (Article 418p, paragraph 3, CO).

Contract concluded for an indefinite duration. A contract concluded for an indefinite duration can be terminated without any particular form, and without giving any reason, but in compliance with the prescribed terms and deadlines of Article 418q of the CO (see Term of the Agreement).

Although the commercial agency contract is a special agency agreement, the parties do not have the right to terminate it at any time like a simple agency contract (Article 404, CO; Federal Supreme Court, First Civil Chamber, 4C.270/2002, 11 February 2003, at recital 2.4).

Extraordinary Causes of Termination of the Contract

Termination for good cause. The principal and the agent can at any time terminate the contract with immediate effect for good cause (Article 418r, paragraph 1, CO). Termination for good cause applies to both fixed-term and indefinite-term commercial agency contracts. The breach of contract must be serious or repeated. (Federal Supreme Court, First Civil Chamber, 4A_241/2017, 31 August 2018, at recital 4.1.)

Situations likely to constitute good cause for termination include:

- Non-payment of commissions due to the agent.
- Repeated delays in calculation and payment of commissions.
- Repeated violations of the exclusivity clause.
- Immediate termination of the contract by the other party without good cause.
- Revenues below minimum subsistence for an exclusive agent.
- Death, incapacity, or dissolution of the other party.
- Breach of a loyalty obligation, including non-compete and confidentiality.
- Agent's inactivity.
- Default by the agent.

(Article 418r, CO.)

If the termination is exercised in good faith, it is effective from the date of its receipt. The contract is terminated, even if the termination is not ultimately based on good cause. In this situation, the rules of employment contracts apply. (Articles 337 to 339d and Article 418r, paragraph 1, CO.) In particular, the principal must compensate the agent for the damage within the meaning of Article 337c of the CO.

Death, disability, or bankruptcy. An agency relationship ends on the death or incapacity of an agent, bankruptcy of the principal, or death of the principal where the agency relationship was entered into primarily because of the principal as a person (Article 418s, CO).

Article 418s is not mandatory. The termination of the contract occurs without the need for a declaration of termination, including for legal persons, because removal from the commercial register is tantamount to the death of the legal person.

Liquidation of the Contractual Relationships

The termination of the contract requires each party to return everything received in performance of the contract, subject to the parties' rights of retention. The contracting parties' lien rights are unaffected. (Article 418v, CO.)

All claims for advance payments and reimbursement of disbursements are immediately due on termination of the contract, regardless of other rules (Article 418t, paragraph 2, CO).

Agent's Rights to Compensation on Termination or Failure to Renew

An agent may have a claim for compensation at the termination of the agency contract where the agent has substantially expanded the principal's clientele and considerable benefits accrue to the principal after the end of the agency relationship (Article 418u, paragraph 1, CO). According to the Federal Supreme Court, the compensation for the increased clientele does not constitute additional remuneration for services provided by the agent during the contract. Rather, this compensation gives

the agent a counter-performance for the profit that the principal makes, even after the end of the agency contract, because of the increase in the number of its clients due to the agent's activity. (BGE 122 III 66, at 72-73.) This compensation is mandatory. The agent can waive it, but only after the termination of the contract. (Federal Supreme Court, First Civil Chamber, BGE 134 III 497, 22 May 2008, at 507.)

Swiss law does not define what it means to have a substantial expansionin the number of clients of the principal, but legal doctrine and courts have defined its contours. The Federal Supreme Court has, for example, accepted that an increase from 85 to 123 clients in 17 months is a substantial expansion of the clientele. (Federal Supreme Court, First Civil Chamber, BGE 84 II 164, 1 April 1958, at 166.)

The Swiss Supreme Court considers the condition of considerable benefits fulfilled when:

- The income from the relevant clientele exceeds the costs generated by this same clientele.
- The clientele likely will remain loyal to the principal, requiring regular replenishment to satisfy the clientele's needs.

(Federal Supreme Court, First Civil Chamber, 4A_335/2009, 16 October 2009, at recital 3.3; Federal Supreme Court, First Civil Chamber, 4A_544/2015, 17 March 2016, at recital 4.1.)

The amount of compensation is limited to the amount of the agent's net annual earnings from the agency relationship, calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract (Article 418u, paragraph 2, CO).

The award of compensation must be equitable. The judge has broad discretion to reduce or even refuse compensation that could be considered unfair. Compensation is not due where the agency relationship has been dissolved for a reason attributable to the agent (Article 418u, paragraph 3, CO).

An agent's claim arises with the termination of the contract and is time-barred after ten years (Articles 127 and 418t, paragraph 3, CO).

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