



# German-Australian-Pacific Lawyers Association

## German Commercial Agency Law at a Glance

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The distribution of goods and services in Germany via commercial agents is very popular among both domestic and foreign companies. The reasons for this are obvious: as an independent trader, the commercial agent does not receive any salary from the entrepreneur, but only earns commission if he successfully procures business. This success-oriented remuneration makes German commercial agents particularly interesting for foreign companies who want to avoid personnel costs for the market launch of their products in Germany.

The aforementioned is reason enough to shed light on German commercial agency law from the perspective of an Australian company:

### **I. Concept and delimitation of the commercial agent**

The term commercial agent is regulated in section 84 of the German Commercial Code (GCC). According to this regulation, a commercial agent is anyone who, as an independent trader, is permanently entrusted with promoting business for another entrepreneur or concluding business transactions on behalf of the latter. The German commercial agent is therefore self-employed and bears the entrepreneurial risk alone, which distinguishes him from the so-called employed traveller. The only decisive factor for the status as commercial agent is the actual nature of the commercial agent's activity. How the parties designate the commercial agent is just as irrelevant as regulations in the agreement, which are not actually lived between the parties.

Another important differentiation is to be made with regard to the so-called authorised or proprietary dealer. Unlike the commercial agent, the authorised dealer typically purchases goods on the basis of a permanent agreement with the supplier, which he then resells in Germany in his own name and for his own account. The authorised dealer therefore earns a margin and no commissions. He does not act as an intermediary for the entrepreneur, but always in his own name. Nevertheless, under certain conditions, the German commercial agency law may also apply to the authorised dealer, if the authorised dealer is integrated into



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the supplier's sales organisation and there is a contractual obligation to transfer the customer base when the agreement is terminated.

Additionally, the delimitation between a commercial agent and a commercial broker can be difficult. This is due to the fact that the commercial broker also concludes business transactions for an entrepreneur in the name of a third party. In contrast to a commercial agent, a commercial broker has no contractual obligation to act as an intermediary. The broker rather promotes business "on occasion".

Especially in international sales, franchise systems are often used. The relationship between franchisee and franchisor is usually regulated by comprehensive franchise agreements and manuals, which regulate the mutual rights and obligations of the parties. As a rule, the franchisor provides the franchisee with a distribution concept (often including intellectual property such as trademarks and patents) in order to facilitate distribution for the franchisee. In contrast to a commercial agent, however, the franchisee also acts in his own name and for his own account - similar to an authorised dealer.

## **II. Types of commercial agents**

The German commercial agency law knows different types of commercial agents.

### 1. District agent

The commercial agent in the form of the district agent is very common. The district agent is assigned either a certain geographical area (e.g. a postcode area) or a certain customer group (e.g. all retailers) for processing. It is important to note that the allocation of a district does not in principle prohibit the entrepreneur from also operating in this district. However, particular attention should then be paid to the question, of whether the district agent is also entitled to commission for such transactions. In principle, the district agent receives commission for all transactions concluded by the entrepreneur in his district.



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## 2. Sole agent

The entrepreneur often grants district agents exclusive distribution rights. If this is the case, the entrepreneur may neither act himself nor through third parties in the district of the sole agent.

## 3. Intermediary agent

Unlike the district agent, the intermediary agent is not assigned a specific area or customer group, but is only charged with promoting business transactions on a flat-rate basis. As a rule, the agent is only entitled to a commission, if he himself has concluded a transaction actively and causally.

## 4. Multi-company or single-company agents

Whereas in the past it was more common for commercial agents to only act as representatives for a single entrepreneur, the multi-company agent has now become the standard. The multi-company agent is a commercial agent, who works for several companies. However, the multi-company agent only represents companies that are not in competition with each other, otherwise the multi-company agent may violate his contractual non-competition clause. This is not the case, if the agent has obtained the necessary authorisations.

### **III. Duties of the commercial agent**

German commercial agency law regulates a number of obligations for commercial agents, some of which cannot be waived by contrary contractual regulations.

#### 1. Obligation to mediate

Pursuant to section 86 subsection 1 GCC, the commercial agent is obliged to promote the business of the principal by either acquiring customers or concluding purchase agreements on the principal's behalf. This is the main obligation of the commercial agent. It is his original



task for the entrepreneur to build up a customer base, be it by advertising new customers or increasing turnover with existing customers.

## 2. Duty to safeguard interests

Another statutory requirement is that the commercial agent must always protect the interests of the entrepreneur when performing his activities. This - very general - duty to safeguard interests has been substantiated by German case law.

One consequence of the duty to safeguard interests is that the commercial agent must in principle comply with the product- and activity-related instructions of the entrepreneur, provided that they do not call into question the independence of the commercial agent. For example, the principal may specify with which advertising materials a product is to be sold, but not at what time the commercial agent may take leave and at what time he must visit customers.

It is also part of the commercial agent's duty to safeguard interests to check the creditworthiness of customers, although this obligation does not go so far as to obtain credit information on customers at his own expense.

The prohibition of competition, which also results from the commercial agent's duty to safeguard interests according to settled German case law, is regularly the subject of court disputes. Accordingly, the commercial agent is subject to a prohibition of competition activities during the contractual relationship even without a special agreement. The commercial agent may therefore not promote any competing products in the business area of the principal without the principal's consent. However, this contractual non-competition clause only applies until the contract is terminated. After the end of the contract, the commercial agent is basically free and can also promote and sell products of competitors. If the entrepreneur wishes to avoid this, it is advisable to agree a post-contractual non-competition clause in the agency agreement. Here, however, certain conditions laid down by law must be complied with. For example, the post-contractual non-competition clause may not exceed two years and the commercial agent must be paid appropriate



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compensation in cash (so-called waiting compensation). The agreement of a post-contractual non-competition clause should therefore be carefully considered.

### 3. Reporting obligations

The commercial agent must immediately inform the principal about every promoted transaction and every conclusion of a transaction, about breaches of contract and about all other important circumstances.

### 4. Rights of the commercial agent

German law grants the commercial agent a whole series of rights and claims, the most important are listed below.

### 5. Entitlement to commission

Probably the most important right of the commercial agent is his right to payment of commissions.

The amount of the commission can be freely determined by the parties and depends very much on the respective industry.

According to the legal model, the commission claim does not arise with the conclusion of the promoted business transaction (e.g. conclusion of the sales contract between the entrepreneur and the customer), but only when the promoted transaction has also been executed (e.g. by delivery of goods). With conclusion of the promoted business, however, the commercial agent is already entitled to a commission expectancy, which cannot be waived contractually. However, this expectancy does not apply again, if it is certain that the transaction will no longer be executed, for example because the customer has become bankrupt.



## 6. Billing and book extract

Pursuant to section 87c subsection 1 GCC, the entrepreneur must in principle settle accounts on a monthly basis, whereby this must be done by the end of the following month at the latest. However, the accounting period can also be contractually extended up to three months.

In order to be able to check the accounts of the entrepreneur, the commercial agent is entitled to a whole series of control rights. Particularly feared by the entrepreneur is the claim of the commercial agent on production of a book excerpt in accordance with section 87c subsection 2 GCC. In such a book excerpt, comprehensive information about all business is to be given, for which the commercial agent can be entitled to commissions. German case law is very generous in favour of the commercial agent, so that those transactions for which an obligation to pay commission is in dispute must also be included in the book extract. The book extract must reflect the entire business relationship between the entrepreneur and the customer, which regularly confronts the entrepreneur with considerable factual difficulties. It is therefore urgently recommended to ensure a complete and recognised preparation of a book excerpt already at the beginning of the relationship with the commercial agent by EDP. This is due to the circumstance that in case the entrepreneur is not able to furnish the owed book excerpt, the commercial agent can assign a third party with the production at expense of the entrepreneur. Costs in the 5-digit euro range can quickly be incurred for this.

## 7. Claim for goodwill indemnity

It is often overlooked by foreign entrepreneurs that the German commercial agent has a contractual claim to payment of a goodwill indemnity upon termination of the agency agreement. This claim for compensation may amount to up to an annual average commission. It is important to note that this claim cannot be contractually excluded under German law. With regard to the prerequisites for a claim and the circumstances of exclusion, we refer to our overview entitled "The Commercial Agent's Claim for Goodwill Indemnity under German Law", which you can also find here on the GAPLA website.



#### IV. Termination of the commercial agency relationship

##### 1. Ordinary termination

Unless the parties have agreed otherwise, the agency agreement may be terminated by either party, subject to the statutory periods of notice. These are as follows:

In the first contract year:	1 month
In the second contract:	2 months
In the third to fifth contract year:	3 months
From the sixth contract year:	6 months

Notice of termination must be given by the end of the respective month. The parties may also agree on other notice periods. However, the law stipulates that the notice period applicable to the principal must not be shorter than that applicable to the commercial agent.

##### 2. Fixed-term contractual relationship

Of course, the commercial agency contract can also be concluded for a limited period of time from the outset. It then ends automatically at the end of the fixed term, without the need for a separate termination. In this case, however, it is essential to ensure that the contractual relationship is actually terminated when the time limit expires. According to section 89 subsection 3 sentence 1 GCC, a fixed-term commercial agent relationship which is continued by both parties after expiry of the time limit is deemed to have been extended for an indefinite period. Therefore, there is a high risk for the entrepreneur to enter into a contractual relationship with the commercial agent for an indefinite period of time.

##### 3. Extraordinary termination

The commercial agency relationship may also be terminated by either party for good cause. Such good cause exists, if adherence to the contract until proper termination would be unreasonable for the party giving notice. This is usually only the case, if there is a serious



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breach of duty (e.g. breach of the contractual non-competition clause, poaching of customers).

As a rule, a warning must be issued before an extraordinary notice of termination is given in order to give the contractual partner the opportunity to remedy the breach of contract.

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