Austria

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Introduction

The Austrian laws governing the rights and obligations of commercial agents entered into force as the Federal Act of 1 March 1993. The official title of the statute is *Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter* (*Handelsvertretergesetz* — HVertrG 1993)[1] (Federal Act on the rights and obligations of self-employed commercial agents (Commercial Agents Act)). With minor exceptions, the HVertrG has replaced the former statute of 1921, ie, BG of 24 June 1921.[2]

The primary purpose of the proposed change of law was to adapt Austrian agency law to the relevant European Community (EC) law.[3] In general, the position of the commercial agent has been strengthened by the statute.[4]

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1 BG (German abbreviation for *Bundesgesetz*/Federal Act) of 11 February 1993, 'BGBI'1993/88. ('BGBl' is the German abbreviation for *Bundesgesetzblatt*/*Federal Gazette*). The official (German) abbreviation of the new statute is 'HVertrG', whereas 'HVG' was the commonly used, but not official, abbreviation for the former statute of 1921.

2 BGBI 1921/348, as amended. Of this statute, only the legal provisions applicable to intermediaries who negotiate or conclude transactions on behalf of and in the name of others without having continuing authority have remained in force. For details on the respective scope of application of the two statutes, see Weilinger, *Zum Anwendungsbereich der zwei Handelsvertretergesetze*, RdW (*Recht der Wirtschaft*) 1993, at p 202.

3 Council Directive Number 86/653/EEC of 18 December 1986 on the coordination of the laws of the European Community Member States relating to self-employed commercial agents, OJ L (382) 17.

4 Schima, *Bunt Gemischtes aus dem neuen HV ertrG* (Various aspects of the new Commercial Agents Act), *ecolex* (an Austrian legal periodical), 1993.

In presenting the Austrian law on agency in this chapter, the official terminology contained in the English version of the EC Directive has been used as often as possible since, to a large extent, the text of the statute follows the Directive word for word.[5]

General Environment for Agents

Statutory Definition and Types of Agent

The *Handelsvertretergesetz* (HVertrG) defines 'commercial agent' (*selbständiger Handelsvertreter*) as an independent contractor (a self-employed businessman) whose permanent business is either to act as an intermediary in bringing about direct legal relations between his principal and the third party (*Vermittlungsvertreter*) or to enter into binding agreements on behalf of and in the name of the principal (*Abschlussvertreter* — underwriting agent).[6] The key element defining the existence of an agency relationship is that the agent is entrusted by his principal on a permanent and continuing basis, meaning that the agent has continuing authority.

The substantive scope of transactions negotiated or concluded by an agent is very broad. As a general rule, it is not restricted to any specific fields of trade or commerce.[7]

The substantive scope of transactions includes any transaction except for those related to immovable property[8] and, therefore, covers all 'commercial

5 Council Directive Number 86/653/EEC of 18 December 1986 on the coordination of the laws of the European Community Member States relating to self-employed commercial agents, OJ L (382) 17.

6 HVertrG, para 1.

7 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987). This fundamental commentary on Austrian agency law refers to the legal situation as it existed in 1987 under the Commercial Agents Act of 24 June 1921, *Bundesgesetzblatt* (*Federal Law Gazette*) (BGB1) 348, as amended. However, the new statute to a large extent maintains the previous legal situation. In many instances, only the numbering of the relevant provisions has been changed. Therefore, the commentary by Jabornegg may still be regarded as a most valuable and, in many instances, still up-to-date source of information on Austrian agency law. On the new statute, no commentary has been published until now (March 2007). Weilinger, *Handelsvertretergesetz* 1993 (1993) (Commercial Agents Act), in which the new statute is printed together with the explanatory remarks from the draft law (*Erläuternde Bemerkungen zur Regierungsvorlage*); Schima, *Bunt Gemischtes aus dem neuen HVertrG* (various aspects of the new Commercial Agents Act), *ecolex* 227 (1993); Schima, *Ergänzende Annerkungen zum HVertrG* 1993 (Additional Remarks on the Commercial Agents Act 1993), *ecolex* 374 (1993); Viehböck, *Der Ausgleich- sanspruch nach dem neuen Handelsvertretergesetz* (Indemnity under the new Commercial Agents Act), *ecolex* 221 (1993); Schima, *Haftung des Handelsvertreters* (Liability of the Commercial Agent), *ecolex* 448 (1993).

8 HVertrG, para 1(1). HVertrG, para 1(1).

transactions',[9] transactions in movable property (chattel) rights, and transactions related to the performance of contract.

Not included under the term 'agent' are representatives who are employed by their principals, whether on a fixed or a commission basis. They are expressly excluded from the application of the HVertrG.[10] In addition, intermediaries who act only in isolated transactions, such as commercial brokers (*Handelsmakler*)[11] or real estate brokers (*Immobilienmakler*), are not considered agents in the sense of the HVertrG. The HVertrG expressly states that legal relationships of such brokers are excluded from the application of the HVertrG.[12]

In view of this inconsistency and the somewhat incoherent statutory regulation of the different types of agents and brokers, one must carefully examine the underlying legal relationships and the applicable body of rules before assessing specific agency and related issues under Austrian law.

To complete the picture, it also should be noted that the *Kommissionär*,[13] a dealer who permanently buys and sells goods in his own name for the account of another, as well as distributors (*Vertragshändler*), do not fall under the term of agent or, as a general rule, under the application of the HVertrG. However, the application by analogy of certain provisions of the HVertrG (eg, the indemnification rule)[14] is often discussed in legal literature[15] and, in very limited cases, is admitted by the courts, ie, for indemnification upon termination of the agency.[16] The same is true for franchise agreements.[17]

Prevalence of the Agency Form

Increasingly, the aforementioned types of intermediaries (*Kommissionär*, distributor, or franchisee) have carried out the distribution of goods or services in Austria. In many respects, these intermediaries do not fall under the statutory rules laid down for agents or under other specific rules.

This has increased the discussion over analogous application of existing rules, as well as the demand and need for an act by the legislature which has yet to

9 In the meaning of paragraphs 343 *et seq* of the *Handelsgesetzbuch* (Commercial Code), 1897 *Deutsches Reichsgesetzblatt* (*dRGBl*) 219, a German statute of 1897, which was introduced in Austria in 1938. For an English translation of the *Handelsgesetzbuch*, see Andreewitch, *The Austrian Commercial Code* (1987).

10 HVertrG, para 28(1).

11 See *Maklergesetz* of 1996 (BGBI 1996/262), governing the rights and obligations of commercial brokers.

12 HVertrG, para 28(1).

13 HGB, paras 383 *et seq*.

14 HVertrG, para 24.

15 See, eg, Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at pp 65 and 68.

16 Judgment of 30 August 2006, OGH 70b 122/06a.

17 Schlemmer, *Recht der Wirtschaft* (RW) 1984, 298.

respond.[18] On the contrary, the government bill expressly mentions that the development of law in this area should, for the moment, be left to case law.[19]

Government Attitude

Austrian civil and commercial law is fundamentally based on the principle of private autonomy. Everybody is, in principle, free to enter into any obligation or contractual agreement. In many fields of the law, however, where the legislature assumes that true freedom of contract is distorted by factual imbalances of powers, special protection is afforded to the weaker party. In agency law, it can be said that the HVertrG, as well as case law, are aimed at achieving a fair balance of rights and duties between agents and their principals.

This is becoming especially evident in the regulation on the termination of the contract and related indemnity. As a general rule, the principal is free to terminate the agency relationship; however, under certain circumstances he might have to pay the agent a certain amount of indemnity,[20] regardless of what has been otherwise stipulated.[21]

General Business Climate

In General

Austria is, in terms of its economy, one of the most stable and prosperous countries in Europe. In 2005, Austria, with 8.23 million inhabitants, had a gross domestic product of EUR 245.1 billion. Austria also ranks sixth among the EU Member States in employment with an unemployment rate of 5.2 per cent.

Austria's geopolitical location as a neighboring state of the former Eastern Bloc countries may have contributed to the fact that its share of imports from, as well as exports to, the Eastern European countries lies considerably above the corresponding EC average.

Austria became a member of the EU in 1995, having previously been a member of the European Free Trade Association (EFTA).[22]

Business and Trade Licensing

An agent is always an entrepreneur (*Unternehmer*) within the meaning of the Commercial Code.[23] His classification as such derives from his business and not from registration in the Firm Register (*Firmenbuch*). Duty to register will

18 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p XXIX.
19 See government bill, at p 10.
20 HVertrG, para 24.
21 HVertrG, para 27.
22 The European Free Trade Association was established in 1960.
23 *Unternehmensgesetzsbuch* (UGB), para 1.

depend upon the size of the agent's business turnover and the legal form in which it is carried out, such as by a natural person, partnership, or corporation.

Since 1 August 2002, the agency business is a so-called 'free trade' in the meaning of the Austrian Industrial Code (*Gewerbeordnung*).[24] For exercise of a 'free trade', it is necessary to fulfill some general requirements and to register at the Trade Supervisory Office.[25] Therefore, with regard to a free trade the proof of qualification is not required.[26]

Citizens of EU or EEA countries are allowed to carry on a trade like an Austrian. Non-EU or non-EEA citizens are allowed to be tradesmen like Austrians, if it is stipulated in a treaty. If there is no stipulation in a treaty, the right to carry on a trade is dependent on the legal abidance in Austria.[27] It is not prescribed any more to provide evidence of reciprocity.

If the agency business is conducted by a partnership, or if a corporation, eg, a company with limited liability (GmbH) or a stock cooperation (AG), is owner of the agency business (*Gewerberechtlicher Geschäftsführer*), a manager responsible for the observance for the Industrial Code must be appointed.[28]

Product Licensing

The production of certain goods, such as pharmaceutical products or firearms, is subject to specific regulations set forth in the relevant statutes.[29] Likewise, trade in these products is regulated, either by the Industrial Code or by specific Acts.

Customs and Duties

Even before the entry into force of the EEA Agreement and Austria's accession to the EU, most goods originating from EC and EFTA Member States were imported into Austria without any customs or duties. This was due to the Free Trade Agreements of 1972 concluded between Austria and the EC, and the EFTA Convention of 1960.[30]

Exchange Control

Austria had a very restrictive foreign exchange law which dated to 1946.[31] The Austrian National Bank has gradually liberalized these strict regulations by divesting its general authority for most transactions.

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24 Industrial Code (*Gewerbeordnung*), BGBl 1994/194, as amended.
25 Industrial Code, art 5(1).
26 Industrial Code, art 5(2).
27 Industrial Code, art 14.
28 Industrial Code, paras 9 and 39.
29 For pharmaceutical products, see, eg, *Arzneibuch*, BGBI 1980/195.
30 For an English version of the Free Trade Agreements as well as of the EFTA Convention (also known as the Stockholm Convention) see, eg, EFTA Secretariat, the European Free Trade Association (1987).
31 *Devisengesetz* 1946 (Foreign Exchange Act), BGBI 1946/112, as amended.

It must be observed, however, that transactions that do not adhere to the relevant provisions are deemed null and void under Austrian law, and the parties to the agreement may be subject to prosecution.

Tax Regime

In general terms, Austria's tax regime may be regarded as being quite favorable to setting up businesses by either Austrian or foreign enterprises. Subject to taxation are a (juridical or natural) person's net wealth and income, commercial transactions of goods, services, and capital, and the use of certain specified goods.

Formation of Agency Relationship

In General

To conclude a valid agency agreement, both parties to the agreement must possess full legal capacity. Natural persons reach full legal capacity at the age of 18. Persons of limited legal capacity may, in principle, enter only into transactions which confer a legal benefit upon them; other transactions require the consent of their statutory representatives.[32]

Where a party to an agreement is not a natural person, but a partnership or a corporation, transactions have to be concluded by the company's officers on behalf of the company. As a general rule, the so-called *ultra vires* doctrine is not accepted in Austria.[33]

Principal

The law does not establish any special requirements for the principal. The principal may either be a natural or a juridical person. It is not necessary that the principal be an entrepreneur in the meaning of the Commercial Code.[34]

The principal's qualification as an entrepreneur will have an impact, however, on the extent to which the rules of the Commercial Code apply, in addition to the rules of the HVertrG. According to the law, the principal may also be an agent himself, thus making the agent a sub-agent.[35]

Agent

Although most agents are natural persons, they need not be according to the law. An agent also can be a partnership, corporation, or other forms of business which are being increasingly used by commercial agents.[36]

32 Koziol-Welser, *Bürgerliches Recht I*, 64 (10th ed.).
33 Koziol-Welser, *Bürgerliches Recht I*, 64 (10th ed.).
34 HGB, para 1.
35 HVertrG, para 1(2).
36 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 20.

There are two elements which are essential to the application of the HVertrG, namely:

- The agent must act as a self-employed person; and
- The agent's business activity must be conducted for profit and be designed to continue for some time.[37]

Express or Implicit Agreements and Course of Trading

The conclusion of an agency agreement is not subject to any formal requirements. Agency agreements may, therefore, be concluded orally or in writing, expressly or implicitly.[38]

An implicit agreement is often concluded where an agent is entrusted by another person (the principal) with a mandate to act as an intermediary in repeated cases. However, it must be established beyond reasonable doubt[39] that both parties are proceeding on the assumption that a continuing business relationship is envisaged. In practice, this will often be the case where an agency agreement, originally concluded for a fixed period, is executed by the parties beyond that period.[40]

The law expressly provides that an agency contract for a fixed period, which continues to be performed by both parties after that period has expired, shall be deemed to be converted into an agency contract of an indefinite period.[41] Silence to an offer of contract, as a general rule, is not deemed to be acceptance of the offer.

Formalities

Concluding an agency agreement in writing is necessary only where the parties have stipulated that otherwise their agreement shall not be binding.[42] However, it must be kept in mind that, even where such a clause has been concluded, this clause may be derogated from in any manner accepted by general civil law, including oral or even tacit agreements. In such cases, the party claiming such derogation bears the burden of proof for this allegation.[43]

No attestation, notarization, or registration procedures are necessary to validly conclude an agency relationship. It has been observed that courts generally tend to readily accept the tacit (implicit) conclusion of agency agreements.[44]

It is important to note, particularly in the case of a tacit or oral conclusion of an agency contract, that both the agent and the principal are entitled to receive from

37 HVertrG, para 1(1).
38 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 28.
39 ABGB, para 863.
40 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 28.
41 HVertrG, para 20.
42 ABGB, para 884.
43 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 171.
44 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 172.

the other on request a signed written document setting out the terms of the contract, including any terms upon which the parties subsequently agreed.[45] Waiver of this right is not permitted.[46]

Mandatory, Prohibited, or Reserved Activities

The activities of an agent within the meaning of the HVertrG include all transactions, other than those involving immovable property.[47] Brokers, ie, real estate agents, therefore, do not fall under the statute.

Operational Aspects

Agency Authority

In General

The HVertrG deals expressly with the scope of an agent's authority.[48] In addition to these rules designed specifically for the relationship of an agent and his principal *vis-à-vis* third parties, the general civil law rules on representation,[49] as well as the relevant commercial law rules,[50] where applicable, enter into consideration. The law distinguishes between:

- Underwriting agents, ie, agents with authority to enter into binding agreements on behalf and in the name of the principal (*Abschlussvertreter*); and
- Agents acting only as intermediaries in bringing about direct legal relations between the principal and the third party (*Vermittlungsvertreter*).

The statute expressly states that an agent may conclude a contract on behalf and in the name of the principal only where he is authorized to do so.[51] This must be interpreted to mean that the law rebuttably presumes that the agent does not have power of direct and immediate representation. For the third party, this means that, where the third party is in doubt about the agent's authorization, he should demand from the agent suitable evidence as to the scope of his powers,[52] especially if the third party wants to conclude a contract with the agent whereby the agent is acting on behalf of and in the name of the principal.

45 HVertrG, para 4.
46 HVertrG, para 27(2).
47 HVertrG, para 1(1).
48 HVertrG, paras 2 and 3.
49 ABGB, paras 1002 *et seq* and 1029.
50 Fourth Introduction Decree to the Commercial Code (EVHGB) art 8, nos 9–11, dRGBl 1939 I, at p 23, as amended.
51 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 101.
52 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 101.

Authority can be conferred upon a person either expressly or tacitly according to the rules of general civil law.[53] The authority may be declared by the principal *vis-à-vis* the agent or *vis-à-vis* the third party. If a person apparently acts as somebody else's (the principal's) agent without having due authorization, this may constitute authority by estoppel. If the principal knew or, in exercising due care, could have known and prevented such conduct, he will have to accept liability for any agreements entered into by the agent on his behalf.[54]

Scope and Limitations

The scope of an agent's authority depends upon the content of the principal's (oral or written, express or implied) declaration or, as mentioned above, upon the outward appearance as long as it is attributable to the principal. If the principal wants to limit the agent's authority, he must take care that the third party takes notice of such limitations.

Clauses relating to general terms and conditions, standard form contracts, and order forms, stating that oral supplements to the agreement or oral stipulations by the agent have no binding effect unless confirmed in writing by the principal, are regarded as limitations of the agent's authority.[55] According to case law, such a clause is valid only if the third party took notice of it or negligently failed to do so.[56]

Consumer Contracts

Even stricter rules apply to consumer contracts. If the principal wants to avoid being bound by *ultra vires* declarations of his agent, he must rescind the contract with the consumer immediately after taking notice of the fact that the agent exceeded his authority.[57]

Exceeding Authority

An agent exceeds his authority where he has been entrusted only with negotiating transactions but concludes a contract on behalf of and in the name of the principal (unless the outward appearance attributable to the principal indicates the contrary). However, the contract will not be totally invalid but only provisionally. According to general civil law, it will enter into full force if the principal either approves of it or accepts any advantage resulting from it.[58]

53 ABGB, para 863.
54 ABGB, para 1029; Koziol-Welser, *Bürgerliches Recht I*, 64 (10th ed.), at pp 169 *et seq*.
55 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 104.
56 Judgment of 15 July 1969, OGH, SZ 42/112.
57 *Konsumentenschutzgesetz* (Act on the Protection of Consumers) (KSchG), para 10, BGBI 1979/140, as amended.
58 ABGB, para 1016.

Agency law adds to this the special rule that silence by the principal may also amount to approval of the contract.[59]

If the principal refuses to approve the contract, the agent may be held liable for damages to the third party.[60] In the case where the principal does not declare in due time that he refuses to approve the contract and is, therefore, bound by the contract, the agent may be held liable for damages to his principal. Contributory negligence on the principal's side will be taken into account.[61]

Collection of Payments

The basic rule is that the agent may accept payments on behalf of the principal only if he is authorized to do so.[62] Unless otherwise specified, authorization to accept payments does not include authority to alter the agreed conditions of payment or to allow discounts.[63]

A traveling salesman who has authority to conclude contracts on behalf of his principal[64] is deemed to have authority to collect payments for the sales which he has concluded and to set a term of payment.[65] The principal is free to limit this authority. However, the principal will have to declare this limitation in such a manner that is unmistakable to the third party.[66]

Client's Statements

Statements by clients, especially notices of defects of goods, may be validly declared *vis-à-vis* the agent.[67] Limitations on this authority are possible, but should be expressed very clearly.[68]

Quality Inspections

The agent is authorized to inspect goods on behalf of his principal.[69] If a commercial buyer wants to protect his claims under warranty, it is essential that he make a complaint with respect to a defect within due course upon receipt of the goods.

It is likely that, where inspection and complaint are executed not by the principal himself but by his agent, those strict requirements will be fulfilled as well. One

59 HVertrG, para 2(2).
60 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 116.
61 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 114.
62 HVertrG, para 3(1).
63 HVertrG, para 3(2).
64 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 123.
65 HVertrG, para 3(3).
66 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 124.
67 HVertrG, para 3(4).
68 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 126.
69 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 128.

may even argue that it is the agent's duty to inspect the goods received immediately to protect his principal's rights under warranty.[70]

Disclosed and Undisclosed Agency

The law makes it clear that only a person who acts in the name of another is regarded as an agent.[71] Where an agent does not disclose that he is representing his principal, the third party may assume that the agent is acting in his own name.[72]

Remuneration and Commission

In General

The commission is the typical form of remuneration for the agent's services. It is due even where no remuneration has been stipulated, unless the parties expressly agreed that the agency should be without remuneration.[73] Where the amount of commission has not been fixed, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of the agency contract are customarily allowed in the place where the agent carries on his activities.[74]

Usually, the commission is a percentage of the turnover of the transaction negotiated or concluded by the agent. As a general rule, it is due only where the agent's activity actually led to the conclusion of a transaction.[75] Unless otherwise agreed, no remuneration is owed to the agent for his services and efforts as such.[76] On the other hand, the commission is due irrespective of the amount of effort involved, as long as the transaction has been concluded as a consequence of any useful activity by the agent.[77] Some legal provisions governing the agent's commission are peremptory and some are not. It is, therefore, advisable to determine in each individual case whether the parties may depart from the statutory regulation.

Without a specific agreement to the contrary, the agent cannot be held liable for the *del credere*, ie, compliance by the third party with the terms of the transaction negotiated or concluded by the agent. Where such *del credere* liability is agreed to between the principal and the agent, the agent is entitled to additional remuneration, the *del credere* commission. Agency agreements

70 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 128.
71 HVertrG, para 1(1).
72 Koziol-Welser, *Bürgerliches Recht I*, 64 (10th ed.), at p 162.
73 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 153.
74 HVertrG, para 10(1).
75 HVertrG, para 8(2); see Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 155.
76 See Judgments of 9 April 1952, OGH, SZ 25/90 and July 1981, MietSlg 33.557.
77 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 155.

conferring such liability upon the agent without due remuneration may, at least in part, be contrary to public policy and may be void.[78]

In addition to or instead of a commission, an agency agreement may provide for a fixed remuneration.[79] A fixed salary, however, may be a strong indication of an employment rather than an agency relationship. An agency agreement always requires that the agent be an independent entrepreneur, rather than a salaried employee.[80]

Where a minimum commission is guaranteed, one must distinguish between agreements in which commissions actually earned are charged against the guaranteed amount (genuine guarantee) and agreements stipulating a combination of commission and fixed remuneration.[81]

No commission is owed for the mere naming of a third party, unless there exists a specific trade custom to the contrary.[82] Unless otherwise stipulated, the agent also is entitled to a commission on direct transactions, ie, transactions which the principal effects directly for the duration of the agency agreement with customers assigned to or acquired by the agent.[83]

Exclusive Agents

The entitlement to a commission on direct transactions also applies *mutatis mutandis* where the agent has been appointed as sole or exclusive agent for a specified territory or clientele and where, without any activity from the agent's side, transactions have been entered into by or on behalf of the principal with a customer belonging to that area or group.[84]

Due Date

The right to commission arises, in principle, as soon as the transaction between the principal and the third party has been concluded and has become legally binding. The commission becomes due as soon as and to the extent that one of the following circumstances has been fulfilled:

- The principal has executed the transaction;
- The principal should, according to his agreement with the third party, have executed the transaction; or

78 ABGB, para 879; Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 157.
79 HVertrG, para 8(1).
80 HVertrG, para 28(1), judgment of 26.3, 1997, ARD 4859/19/97.
81 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 159.
82 HVertrG, para 8(2).
83 HVertrG, para 8(3).
84 HVertrG, para 8(4).

- The third party has executed the transaction.[85]

The commission becomes due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction as he should have.[86] The right to commission is extinguished if and to the extent that:

- It is established that the contract between the third party and the principal will not be executed; and
- The fact is due to a reason for which the principal is not to be blamed.[87]

The commission must be paid on the date when, according to the agency agreement or statutory provisions, the agent's accounts are to be settled.[88] This rule is not peremptory; however, the (peremptory) statutory provisions on advance payments must not be circumvented.[89]

Frequency and Scope of Commission Statements

Unless otherwise stipulated, the agent may draw up a quarterly statement of the commission. If the agency agreement is terminated before the end of a quarterly period, the account is to be settled within one month.[90]

Advance Payments

Even before the end of the accounting period, the agent is entitled to an advance payment corresponding to those claims (for commission and expenses) which have already arisen.[91] This statutory provision cannot be overruled by contract, unless it is to the agent's advantage.[92]

Allowable Deductions

Discounts granted by a principal to a third party may be deducted in determining the amount of the commission only if such discounts were stipulated at the time the transaction was concluded or if there is a trade custom allowing for such a deduction.[93]

85 HVertrG, para 9(1).
86 HVertrG, para 9(2); Judgment of 12 January 1996, OLG, 8 Ra 1155, 95, ARD 4796/20/96.
87 HVertrG, para 9(3); Judgment of 18 August 1995, OGH, 8O6A23-1/95, ARD4744/ 39/96.
88 HVertrG, para 15.
89 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 380.
90 HVertrG, para 14(1).
91 HVertrG, para 14(2).
92 HVertrG, para 27(1).
93 HVertrG, para 10(2).

Clawback of Commission Already Paid

Overpayment of commission can be recovered pursuant to civil law provisions relating to unjust enrichment.[94] According to these rules, a person who obtains a benefit without legal justification at the expense of another must restore such benefit to that person. No defense against such clawback can be founded on the labor law principle of *bona fide* consumption, at least not for self-employed agents.[95]

Profit Sharing

Another type of agents' remuneration regulated by the statute is the sharing of the principal's profits.[96] In practice, profit-sharing is sometimes provided for in agency agreements in addition to, and rarely ever instead of, a (turnover) commission.[97] Where profit-sharing is stipulated, accounting takes place at the end of every fiscal year.[98]

Reimbursement of Agent's Expenses

The agent is not entitled to a reimbursement of the general costs and expenses that go along with his business as such.[99] These will include all overhead costs relating to the agent's business premises, personnel, office equipment, and transportation.[100]

On the other hand, the principal must reimburse the agent for all costs generated as a consequence of specific mandates by the principal.[101] The burden of proof for the existence of a claim for reimbursement is on the agent.[102]

Principal's Accounting Duties

The agent's commission must be calculated at least every quarter year, not later than the last day of the month following the quarter in which the commission became due.[103]

According to case law,[104] the obligation is on the principal to prepare a survey (list) of all commissions earned by the agent. This survey does not need to be a

94 ABGB, paras 877, 1431, and 1435.
95 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 293.
96 HVertrG, para 17.
97 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 417.
98 HVertrG, para 17.
99 HVertrG, para 13(1).
100 Jabornegg, *Handelsvertreterrecht und Maklerrecht,* 4 (1987), at p 371.
101 HVertrG, para 13(2).
102 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 375.
103 HVertrG, para 14(1).
104 Judgment of 28 January 1953, OGH, SZ 26/25; Judgment of 23 October 1962, OGH, SZ 35/108; Judgment of 9 October 1957, OGH, SZ 30/54.

formal and lengthy rendering of accounts. However, it must be clear and detailed enough to enable the agent to verify the account on the basis of his own documents.[105] The account must include the agent's expenses, to the extent they are reimbursable.[106] Of course, it is up to the agent to notify the principal of such expenses.[107]

The account must include all commissions earned by the agent without further reservation. It need not include commissions which are still subject to the conclusion of a pending transaction (which has not yet been finalized) or to the receipt of payment.[108]

Case law holds that the principal's obligation to render account is to be interpreted within the formal meaning of the word 'accounting', in that this obligation is fulfilled when the principal claims that the statement of accounts is complete.[109] In contrast, it has been argued that a true and complete accounting may be demanded by the agent and that a breach of this obligation by the principal may entitle the agent to damages and to immediate termination of contract.[110]

The agent's claim for accounting by the principal is enforceable by legal action.[111] Under prevailing case law, the agent's claim can be enforced by filing a so-called action by stages (*Stufenklage*), whereby the claim for accounting may be combined with an at first unspecified claim for payment according to the outcome of the account.[112]

An agent is entitled to demand that he be provided with all necessary information and, in particular, an extract from the principal's books, in order to check the amount of the commission due to him.[113] In case such extract is not provided by the principal or if it is plausible that the extract is incorrect or incomplete, the agent may file a document request at the local district court.[114] The agent also may apply for a court order requiring the principal to provide additional information to the extent that such information is necessary for the calculation of the commission due.[115] The judge may then grant the agent the right to inspect the

105 Judgment of 23 October 1962, OGH, SZ 35/108.
106 Judgment of 5 July 1960, OGH, EVB1 1961/8.
107 Jabornegg, *Handelsvertreterrecht und Maklerrecht,* 4 (1987), at p 387.
108 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 388.
109 Judgment of 28 January 1953, OGH, SZ26/25; Judgment of 10 January 1962, OGH, HS 3293/4.
110 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), p 389.
111 Judgment of 3 February 1962 OGH, HS 5682.
112 Judgment of 17 December 1992, OGH, *JBl*, at p 249; Judgment of 27 October 1993, OGH/ *ecolex* 1994, at p 92; Judgment of 12 June 2003, 12.334.
113 HVertrG, para 16(1).
114 HVertrG, para 16(2).
115 HVertrG, para 16(2).

books and even to take an extract from these books.[116] If the principal objects to (personal) inspection by the agent, the court may appoint an auditor.[117]

Provision of Publicity Materials

The statute expressly obliges the agent to look after his principal's interests 'with the (due) diligence of a prudent merchant'.[118] The principal, on the other hand, is obliged to assist his agent in the performance of his activities.[119]

A principal must, in particular, provide his agent with the necessary documentation and obtain for his agent all relevant information.[120] The statute obliges the principal to pay damages, if he prevents the agent, contrary to the terms and substance of the agency agreement, from earning commissions in an amount reasonably to be expected under the terms of the agency agreement.[121]

Sales Quotas

From the agent's duties 'to strive for the negotiation or conclusion of transactions' and to look after his principal's interests,[122] as well as from the provision that a substantial lack of activity on the agent's side gives rise to the principal's right to immediately terminate the contract,[123] it follows that the agent is obliged to actively pursue his principal's business.[124] The effective goal of this obligation, eg, the achievement of defined sales quotas, can be determined only according to the terms of the agency agreement.[125]

Case law holds that a decrease of sales as such, which is not due to the agent's negligence, does not in itself constitute a cause for premature termination of the agency agreement.[126]

Likewise, a slow-down in sales for a period of two months due to the agent taking a few days' sick leave would not constitute a reason for termination.[127] The same is true when one of many agents of one principal has fewer sales than the others.[128]

116 HVertrG, para 16(3).
117 HVertrG, para 16(4).
118 HVertrG, para 5.
119 HVertrG, para 6.
120 HVertrG, para 6(2), no 1.
121 HVertrG, para 12(1).
122 HVertrG, para 5.
123 HVertrG, para 22(2), no 3.
124 Judgment of 3 April 1962, OGH, SZ 35/41.
125 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 461.
126 Judgment of 25 October 1978, OGH, 8 Ob 555/78, HS 11.728.
127 Judgment of 27 November 1984, OGH, 406 125/84, ARD 10.431.
128 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 463.

Failure to Exploit Agency and Indemnity

The statute gives the principal the right to terminate the contract immediately before the agreed period of time if, among other reasons, the agent becomes or turns out to be incapable of pursuing the stipulated activity,[129] if he fails for a substantial period of time to actively pursue his business,[130] or if he refuses to do so.[131]

As a consequence of the agent's breach of his obligations, the principal may, in addition to terminating the contract, be entitled to indemnity.[132] As in nearly all claims for damages under Austrian law, it is up to the injured party to demonstrate that he has suffered damage, that the defendant's conduct was the cause of the damage, and that it was contrary to a legal obligation.[133] As a general rule and except for specific cases of strict liability, the party claiming damages also will have to prove that there has been fault on the other party's side.[134]

However, in breach-of-contract situations the burden of proof shifts to the defendant. Once the plaintiff has established that there has been a breach of contract, it is the defendant who will have to prove that this breach occurred without fault on his part.[135]

Statute of Limitations

All claims resulting from the agency relationship are subject to a three-year limitation period.[136] With regard to claims for commission which were duly included in the principal's account, the limitation period commences at the end of the year when the accounting took place.

With respect to commissions omitted from the account, the period of limitation starts to run at the end of the year in which the agency agreement was terminated. With respect to claims accountable only after termination, the limitation period does not commence until the end of the year in which the accounting should have been carried out.[137] Once the agent has notified his principal of the claim, the statute of limitation is suspended until the receipt of the principal's written answer.[138]

129 HVertrG, para 22(2), no 1.
130 HVertrG, para 22(2), no 3, 1st alternative.
131 HVertrG, para 22(2), no 3, 2nd alternative; Judgment of 20 April 1995, HS 2361/74.
132 Judgment of 28 September 1966, OGF, HS 5655/49; Judgment of 21 May 1981, OGH, MietSlg 33.562.
133 ABGB, paras 1293 *et seq*.
134 ABGB, para 1295.
135 ABGB, para 1298.
136 HVertrG, para 18(1).
137 HVertrG, para 18(2).
138 HVertrG, para 18(3).

Termination

Fixed or Indefinite Term and Express or Implied Renewal of Term

In General

The agency agreement is a contract for the performance of a continuing obligation. Therefore, it does not end upon the performance of one or more specific obligations. Rather, it ends by means typical for such contracts, such as:

- Expiration of a fixed period;
- Termination by mutual agreement; or
- Unilateral constitutive declaration, ie, ordinary termination (by notice) or immediate termination for cause.[139]

Expiration of Time

An agency agreement concluded for a fixed period ends automatically after expiration of that time.[140] Notice of termination is not necessary.[141] Unless otherwise stipulated, an agency agreement for a fixed period cannot be terminated before expiration of that time through ordinary termination.

If such agreement continues to be performed by both parties after that period has expired, it is deemed to be converted into an agency contract for an indefinite period.[142]

Ordinary Termination by Notice

Ordinary termination by notice is the constitutive declaration by one party to a contract, expressing that party's intent to end the contractual relationship. It becomes complete only upon receipt by the other party.

Termination by notice is available to both agent and principal. A specific cause for termination need not be identified. Termination can be expressed in any form, either written or orally, expressly or impliedly. Formal requirements may, however, be stipulated in the agency agreement.[143]

Where an agency contract is concluded for an indefinite period, either party may terminate it upon one month's notice. The period of notice shall be two months for the second year commenced, three months for the third year commenced, four months for the fourth year commenced, five months for the fifth year

139 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 435.
140 HVertrG, para 20.
141 Judgment of 24 March 1931, OGH, SZ 13/59.
142 HVertrG, para 20.
143 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 438.

commenced, and six months for the sixth year commenced and subsequent years.[144]

To the extent that the parties agree on shorter periods, such agreement is void.[145] If the parties agree on longer periods, the period of notice to be observed by the principal must not be shorter than that to be observed by the agent. In case of non-observance of this rule, the longer period of notice to be observed by the agent also must be observed by the principal.[146] Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.[147]

Immediate Termination for Causes

Either party may terminate the agency relationship without notice, ie, immediately, for good cause, irrespective of whether it has been concluded for a fixed or an indefinite period.[148]

It is essential that the party who wants to invoke such right act without delay, ie, declare termination of the contract shortly after having taken notice of the relevant cause. Otherwise, the right to terminate without notice is forfeited. Only where the reason for termination continues to exist may termination be declared at any time.[149]

Breach of Contract

Termination by Principal

In General. The reasons for termination without notice by the principal are provided in the statute as a non-exhaustive list.[150]

Agent's Incapability. The principal may terminate the agency if the agent becomes incapable of carrying on his business.[151]

Lack of Reliability. The principal may terminate the relationship without notice if the agent commits an act which causes the principal to lose confidence in his abilities. Examples of this include:[152]

- Accepts, contrary to express statutory provisions, from a third party any commission or reward;

144 HVertrG, para 21(1).
145 HVertrG, para 21(2).
146 HVertrG, para 21(3).
147 HVertrG, para 21(4).
148 HVertrG, para 21(1).
149 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 453.
150 HVertrG, para 22(2).
151 HVertrG, para 22(2), no 1.
152 HVertrG, para 7.

- Forwards orders to his principal which have, in reality, not been placed; or
- Deceives the principal in important business matters.[153]

Not merely actions but also forbearance may result in a loss of trustworthiness.[154] Again, what matters is a question of whether the agent's conduct is of such nature that it would be unreasonable to require the principal to continue the relationship. A mere breach of legal obligations alone, without fault on the agent's side, would not constitute a ground for termination under section 22(2), number 2, of the HVertrG. However, where the breach is of a contractual nature, the burden of proof shifts in favor of the agent.[155] Thus, the principal will have to demonstrate that there has been a breach, whereas the agent will have to demonstrate, as an excuse, that there was no fault on his side.

As a general rule, any degree of fault, be it intentional or negligent, is sufficient to constitute lack of confidence.[156] However, as an indispensable element, the culpable act or omission must have been of such gravity that it would be unreasonable to expect the principal to continue the agency contract.

The agent also is responsible for the conduct of all persons employed or used by him in the performance of his obligations.[157] Culpably negligent actions (or omissions) committed by the agent's employee may, therefore, lead to termination of the agency agreement without notice by the principal as well.[158] According to court rulings, the following actions have been found to constitute a reason for immediate termination of the agency relationship:

- Misrepresentation with respect to payments received;[159]
- Defamation of principal's reputation;[160]
- In spite of repeated reminders, delay in payment for goods delivered to the agent for resale in the agent's own name and account, combined with defamatory statements about the principal;[161] and
- Presentation of the principal's products together with the products of a competing firm contrary to express statutory provisions.[162]

Violation of Duty to Be Active. The principal may terminate the agency without notice if the agent fails to perform his obligation to actively pursue the principal's business for a substantial period of time.[163] The same applies if the

153 HVertrG, para 22(2), no 2.
154 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 458.
155 ABGB, para 1298.
156 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), p 459; HS 3296/22.
157 ABGB, para 1313a.
158 ImmZ 1976, 233/17.
159 EvB1 1954/171.
160 Judgment of 18 May 1995, OGH, art 6, 236.
161 HS 3295/39.
162 Judgment of 27 June 1996, OGH 8 Ob A 2118/96, ARD 4832/17/97.
163 HVertrG, para 22(2), no 3, 1st alternative.

agent refuses to do so. However, the agent is not bound to fixed working hours.[164]

Although not expressly stipulated by the statute, it is likely that such reason for termination is not justified where the agent has a lawful excuse for his inactivity or refusal.[165]

Case law holds that this reason is not fulfilled by mere forbearance, but only by unlawful and culpable conduct.[166]

According to court rulings, a mere decrease in sales, which is not caused by the agent's negligence, does not constitute a reason for termination without notice.[167] The same has been held with respect to a decline in sales over a period of two months, caused by the agent's sick leave for a few days.[168] By contrast, the courts confirmed the principal's right to immediate termination where the agent refused to work because the principal had reduced advance payments due to the agent's debt balance.[169]

Other Fundamental Breaches. The principal also may terminate the agency relationship without notice if the agent commits other fundamental breaches of the agency agreement beyond those described above.[170]

Again, it must be kept in mind that only culpable actions or omissions by the agent and only such actions that would make it appear unreasonable to require the principal to continue the agency relationship constitute a sufficient reason for immediate termination.[171]

Courts have held that an infringement of a non-competition clause may constitute such reason, regardless of whether any damage occurred.[172]

Assault or Defamation. The principal may terminate the agency without notice if the agent commits acts of violence or defamation against the principal.[173] Again, the agent's acts must be culpable to constitute a cause for termination.[174]

164 Judgment of 8 September 1995, OLG Wien, 10 Ra 65/95, ARD 4727/20/96.

165 Jabornegg, *supra*, s 2, no 2, at p 461; but see Grünberg and Mayer-Mallenau, *Bundesgesetz vom 24. Juni 1921, BGBI Nr. 348, über die Rechtsverhältnisse der Handelsagenten* (*Handels- agentengesetz*) *mit Erläuterungen* 89 (1921).

166 Judgment of 24 July 1996, OGH 8 Ob A 2083/96, JBL 1997, 262.

167 Judgment of 25 October 1978, OGH, 8 Ob 555/78; ImmZ 1976, 233/17.

168 Arb 10-431.

169 Judgment of 17 December 1957, OGH, art 6, 788.

170 HVertrG, para 22(2), no 3, 2nd alternative.

171 Judgment of 10 May 1961, OGH, HS 795/35. Judgment of 10 May 1961, OGH, HS 795/35.

172 Judgment of 10 May 1961, OGH, HS 795/35.

173 HVertrG, para 22(2), no 4.

174 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 464.

The courts have judged that an assault by the agent on the principal was justified because it was in defense of his property against an unlawful deprivation by the principal.[175] A defamation must be substantial to give reason for immediate termination.

Agent's Bankruptcy. Whereas the principal's bankruptcy terminates the agency relationship *ipso iure*,[176] the agent's bankruptcy does not have this automatic effect. However, the initiation of bankruptcy proceedings against the agent's property gives the principal the right to terminate the agreement without notice.[177]

Termination by Agent

In General. The statute also contains a non-exhaustive list of situations which entitle the agent to terminate the agency relationship without notice.[178] These reasons are discussed below.

Agent's Incapability. The agent's incapability to perform his obligations under the contract gives rise to a right to the agent, as well as to the principal, to terminate the agency relationship.[179]

Violation of Principal's Duty to Pay Commission. If the principal, without justification, reduces the agent's commission or withholds it as a whole, the agent may terminate the agency agreement without notice.[180] However, there must have been fault on the part of the principal.[181]

Since the obligation to pay a commission is a contractual one, it is left to the principal to demonstrate that the violation occurred without fault.[182] A mere lack of funds does not constitute a sufficient excuse.[183]

Unless otherwise agreed, the principal is not obliged to send the agent his commission. According to general civil law, if the place of performance cannot be determined, obligations are to be performed at the place of business (or residence) of the debtor.[184] A principal's refusal to send the agent the commission was not regarded by the courts as a sufficient ground for

175 Judgment of 8 January 1997, ASG Wien 5 Cga 224/93h, ARD 4882/36/97.
176 HVertrG, para 26(1).
177 HVertrG, para 22(2), no 5.
178 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 468.
179 HVertrG, para 22(3), no 1(m).
180 HVertrG, para 22(3), no 2(a), HVertrG, 1st alternative.
181 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 468.
182 ABGB, para 1298.
183 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 468; see ABGB, para 905.
184 ABGB, s 905.

termination in a case where accounting and payment of commission were regularly executed in the principal's place of business.[185]

Other Fundamental Breaches. Other violations of fundamental contract terms also entitle the agent to terminate the agreement without notice.[186] The principal's refusal to reimburse the agent for his expenses, the principal's violation in his accounting duty, or the agent's rights to receive adequate information (extract from the principal's books, right to inspect the principal's books) and, generally, any substantial violation in the principal's obligation to act dutifully and in good faith *vis-à-vis* the agent may constitute such reasons for termination.[187]

Again, the principal's conduct must be of a culpable manner and, additionally, of such significance that it would be unreasonable to require the agent to continue the relationship.[188]

Assault or Defamation. The agent may terminate the relationship without notice if the principal commits acts of violence or defamation against the agent.[189] The provision is a mirror image of section 22(2), number 4, of the HVertrG.

Cessation of Agent's Branch of Principal's Business. If the principal shuts down the branch of his business which had been the primary field of the agent's activity, the agent may terminate the agency relationship without notice.[190] No such reason is given where only one of many branches in which the agent was doing his business is closed.[191]

Supervening Impossibility

Agent's Incapability

Both the agent and the principal may terminate the agency immediately if the agent becomes incapable of carrying on his business.[192]

It is generally accepted that, although the wording of the statute speaks of 'becoming incapable', an incapability that existed since the beginning of the agency relationship also constitutes a cause for termination.[193]

185 Judgment of 30 August 1961, OGH, HS 796/52.
186 HVertrG, para 22(3), no 2(a), 2d alternative.
187 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 469.
188 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 469.
189 HVertrG, para 22(3), no 2(b).
190 HVertrG, para 22(3), no 2(c).
191 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 469.
192 HVertrG, para 22(2), no 1.
193 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 456.

Incapability must be interpreted to be of such kind that it prevents the agent from performing his obligations under the contract. Since the agent, being an independent trader, is, unless otherwise stipulated, not obliged to perform his services in person, he may, if he becomes personally incapacitated, avoid being deemed incapable within the meaning of the statute by using employees or sub-agents.[194]

The incapability also must be either a permanent one or at least of such duration that it would be unreasonable to require the principal to continue the agency relationship.

Finally, the incapability must be attributable to the agent's domain, although there need not be fault on the agent's side. The agent's incapability due to illness or accident, imprisonment, or even a call for military service may constitute a sufficient reason,[195] whereas a mere lack of commercial success, such as a decline in turnover, does not constitute such cause.[196]

Cessation of Agent's Branch of Principal's Business

Supervening impossibility may also be found where the agent is prevented from continuing his activities by reason of the principal having shut down the branch of business which had been the primary field of the agent's activity.[197]

Prevention of Earnings

The agent is entitled to compensation if the principal, contrary to his obligations under the agency contract, prevents the agent from earning commission in the amount agreed upon or in an amount which could reasonably be expected.[198]

The same applies *mutatis mutandis* if the principal prevents such earnings by reason of selling his business or changing the method by which he distributes his products to a joint sales outlet.[199]

Termination Indemnity

In General

The regulation governing an agent's right to indemnity after termination of an agency contract (*Ausgleichsanspruch*) is one of the core elements of the new Austrian law on agency.

194 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 457.
195 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987).
196 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 458.
197 For details, see text relating to cessation of agent's branch of principal's business.
198 HVertrG, para 12(1).
199 HVertrG, para 12(2).

By aligning Austrian law with the relevant EC Directive, the requirements for obtaining termination indemnity have, in some instances, been reduced, thus making it easier for the agent to fulfill the conditions for such indemnity.

Conditions for Entitlement to Indemnity

After termination of the agency contract, the agent is entitled to an indemnity if and to the extent that:

- He has brought the principal new customers or has significantly increased the volume of business with existing customers;[200]
- It may be reasonably expected that the principal or his legal successor (successor in title) will continue to derive substantial benefits from the business with such customers;[201] and
- The payment of this indemnity is equitable with regard to all of the circumstances, in particular to the commission loss by the agent on the business transacted with such customers.[202]

Entitlement to this indemnity also shall arise where the agency contract is terminated as a result of the agent's death, provided that the conditions established under section 24(1) of the HVertrG, as described above, are fulfilled.[203]

Exclusion of Indemnity

The indemnity is not payable:

- Where the agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal (even if they would not constitute a cause entitling the agent to immediate termination under section 22 of the HVertrG)[204] or on grounds of age, infirmity, or illness of the agent, as a consequence of which he cannot reasonably be required to continue his activities;[205]
- Where the principal has terminated the agency contract because of fault attributable to the agent, justifying immediate termination under section 22 of the HVertrG;[206] or
- Where, with the consent of the principal, the agent assigns his rights and duties under the agency contract to another person.[207]

200 HVertrG, para 24(1), no 1, Judgment 18 March 1997, OGH, 406 83/976.
201 HVertrG, para 24(1), no 2.
202 HVertrG, para 24(1), no 3.
203 HVertrG, para 24(2).
204 See text relating to termination by agent.
205 HVertrG, para 24(3), no 1.
206 HVertrG, para 24(3), no 2, Judgment 27 June 1996, ARD 4832/17/97.
207 HVertrG, para 24(3), no 3.

Amount of Indemnity

The notion of indemnity is based on the idea that even after termination of the agency, the principal will typically receive benefits from the market build up by the agent (ie, regular customers acquired by the agent) while the agent will no longer receive any commission in exchange after termination of the agency.

Evaluating the amount of indemnity requires two steps. First, it must be established that the principal is expected to receive substantial benefits for a certain time period (in the absence of other evidence, Austrian courts assume regularly four years of benefit) after termination of the agency.

This result may be reduced by virtue of movement of customers and other factors lowering the principal's benefits (reason for termination of agency, customer's attachment to the brand, decrease of turnover due to the agent's failure to service customers).

Second, the agent's average annual remuneration over the preceding five years must be computed in order to establish the maximum amount (ceiling) of indemnity. If the contract goes back less than five years, the indemnity will be calculated accordingly as an average of the actual periods. These rules are peremptory to the extent that they may not be derogated from by contract, except to the agent's advantage.[208]

Statute of Limitations

The agent loses his entitlement to indemnity if, within one year following termination of the contract, he has not notified the principal that he intends to pursue his claim.[209] Within three years, an action must be filed with the competent court.

Commission on Post-Termination Sales

The agent is entitled to commission on commercial transactions concluded after the agency contract was terminated if:

- The transaction is mainly attributable to the agent's efforts during the period covered by the agency contract and the transaction was entered into within a reasonable period after the agency contract had been terminated;[210] or
- A binding statement of the third party declaring his intent to conclude the transaction reached the agent or the principal before the agency contract was terminated.[211]

208 HVertrG, paras 24(4), 27(1).
209 HVertrG, para 24(5).
210 HVertrG, para 11(1), no 1.
211 HVertrG, para 11(1), no 2.

An agent is not entitled to commission if this commission is payable to the previous agent, unless it is equitable for the commission to be shared between the agents because of the circumstances.[212]

Goodwill

Compensation for goodwill is covered by termination indemnity. No further rules exist under Austrian agency law with respect to goodwill interests and payments.

Return of Materials

On termination of the agency contract, the agent must return to his principal all stock, samples, publicity materials, and documents belonging to the principal.

In order to secure his claims against the principal, the agent has the right to withhold the principal's property. The conditions for the exercise of such right of retention are regulated by commercial law.[213] Under commercial law, goods, for the use of which the other party (the owner) has given specific instructions upon or before delivery, may not be retained.[214]

Under agency law, however, the right of retention of samples remains even when the agency agreement has been terminated. However, the agent is obliged to return the samples immediately after the principal deposits an amount at the court corresponding to the sample's value or the agent's claim or provides securities otherwise.[215]

Agent's Rights and Duties upon Principal's Bankruptcy

The initiation of bankruptcy proceedings against the principal's estate terminates the agency contract *ipso iure*. In the case of imminent danger, however, the agent is obliged to continue his activity until a substitute can be procured.[216]

If the bankruptcy terminates an agency contract of a fixed period before this period has expired or if a period of notice was stipulated in the agency contract, the agent is entitled to compensation for the damages suffered from the termination.[217]

With respect to termination indemnity, case law holds that no indemnity payment is due if, as a consequence of the liquidation of the principal's business, no further benefits can be derived from the agent's previous efforts.[218] However, since this risk lies exclusively within the principal's domain, it is

212 HVertrG, para 11(2).
213 HGB, paras 369 *et seq*.
214 HGB, para 369(3).
215 HVertrG, para 19.
216 HVertrG, para 26(1).
217 HVertrG, para 26(2).
218 Judgment of 5 October 1971, OGH, HS 8572.

arguable that such situation may be treated like any other termination by the principal giving rise to indemnity.[219]

Principal's Property Held by Agent and Agent's Bankruptcy

In contrast to the principal's bankruptcy, the initiation of bankruptcy proceedings against the agent's estate does not terminate the agency contract automatically.

Rather, it gives the principal a reason for immediate termination.[220] If the principal chooses this option, he is entitled to separate and recover all of his property from the agent's estate.[221]

Intellectual Property

Governing Law

Austrian intellectual property law is embodied in the following federal acts:

- The Patent Act (*Patentgesetz*);[222]
- The Trademark Protection Act (*Markenschutzgesetz*);[223]
- The Copyright Act (*Urheberrechtsgesetz*);[224] and
- The Act on Protection of Designs (*Musterschutzgesetz*).[225]

No special rules exist in Austrian agency law with respect to intellectual property, its use, protection, infringements, or interest in new intellectual property generated. However, from the general description of an agent's duties as stipulated in section 5 of the HVertrG, in particular from the agent's duty to look after his principal's interest dutifully and 'with the due diligence of a prudent merchant', one may conclude that the agent must pursue his activities in such a manner that his principal's rights under intellectual property are not infringed.

Furthermore, an agent is obliged to comply with reasonable instructions by his principal, in so far as this does not change his status as a self-employed businessman.[226] Such instructions also may relate to intellectual property.

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219 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 494; Laufke, *Rabels Z* 1952, at p 52.

220 HVertrG, para 22(2), no 5.

221 *Konkursordnung* (Bankruptcy Act), para 44, RGBI 1914/337, as amended.

222 *Patentgesetz* (Patent Act), BGBI 1970/259, as amended.

223 *Markenschutzgesetz* (Trademark Protection Act), BGBI 1970/260, as amended.

224 *Urheberrechtsgesetz* (Copyright Act), BGBI 1936/111, as amended.

225 *Musterschutzgesetz* (Act on Protection of Designs), BGBI 1990/497, as amended.

226 In contrast to the EC Directive, article 3(2)(b), the Austrian statute does not expressly mention this obligation since it is regarded to be already implied in the statutory definition of agent.

Infringement of Agent's Duties

If the agent infringes his duties to his principal, be it with regard to intellectual property or otherwise, he is subject to sanctions ranging from the loss of his entitlement to commission to immediate termination of the agency contract.[227] Additionally, he may be liable for damages.[228]

The Acts regulating intellectual property in Austria[229] afford special protection to any holder of patents, trademarks, and copyrights. Sanctions for the infringement of these rights are provided not only in the civil law (eg, compensation for damages, duty to pay royalties, enrichment levy, and claim for forbearance) but in the criminal law as well.

National Competition Law

In General

As with the assessment of agency contracts under EU or EEA competition law, 'genuine' agency contracts will not fall under Austrian competition law because a genuine agent is not held to be an independent undertaking. 'Genuine' agency contracts may be deemed to be those between a principal and an agent who does not bear any responsibility for the financial risks involved in the principal's transactions other than the normal *del credere* guarantee in which the agent stipulates to indemnify the principal against failures to pay by customers.

By contrast, where an agent is more of a distributor, ie, where he maintains a considerable stock of goods as his own property or where he determines the prices at which he sells or determines other terms of business, competition law may have to be applied.

Austrian Cartel Act

Austrian competition law is mainly regulated by the Cartel Act of 2005.[230] Among other types of anti-competitive behavior, the Cartel Act covers price restrictions, resale price maintenance, and all other horizontal or vertical marketing restrictions. The legal consequences of forming such cartel may be far-reaching. The following discussion covers only a few basic principles of Austrian competition law.

As a general rule, agreements between enterprise which have the object or effect of restricting competition are prohibited if no particular exemptions apply.[231] Implementation is prohibited before such authorization is granted. To the extent

227 HVertrG, para 22(2), no 2.
228 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 80.
229 See text relating to intellectual property.
230 *Kartellgesetz* (Cartel Act), BGBI 1988/600, as amended.
231 Cartel Act, para 23.

that a cartel agreement is prohibited, it is also void, ie, unenforceable in civil law terms.[232]

European Competition Rules

With entry into force of the EEA Agreement in Austria and Austria's accession to the EU,[233] the competition rules of the EEA and the EU[234] competition rules[235] must be taken into account.

Separation of Markets

As mentioned above, an agreement restricting an agent to the prices set by his principal will not fall under either European or national competition law as long as a genuine agency relationship exists.[236]

However, even genuine agency contracts may constitute a restriction of competition under the Austrian Cartel Act, especially where they are directed at achieving a separation of markets. An example of this situation is the establishment of a network of contracts, particularly if such contracts contain an export ban or prohibitions of supply from one agent to another.[237]

Post-Termination Restrictions

An agreement restricting the business activities of an agent following termination of the agency contract's restraint of trade clause or non-competition clause is void.[238]

Taxation

Exposure to Local Income or Corporation Taxes

Individual income tax[239] is levied on the income of natural persons. The maximum tax rate is currently 50 per cent.

232 Cartel Act, para 22.
233 Entry into force 1 January 1994.
234 EEA Agreement, arts 53 *et seq*.
235 EC Treaty, arts 85 *et seq*.
236 Koppensteiner, *Wettbewerbsrecht* 2, vol 1, *Kartellrecht* (1989), at p 119.
237 Jakob-Siebert, in Groeben/Thiesing/Ehlermann, *Kommentar zum EWG-Vertrag*, 4th ed (1991), at pp 1674 *et seq*.
238 HVertrG, para 25.
239 Individual Income Tax Act (*Einkommenteuergesetz*) 1988, BGBI 1988/400, as amended. For an English translation, see Gröhs-Polak, *Austrian Business Taxation* (1992).

Corporation tax[240] is levied on the profits of juridical persons, especially corporations. With a fixed tax rate of 25 per cent, Austria's corporation tax is among the lowest of industrialized countries. When profits achieved by corporations are distributed to natural persons, the shareholders have to pay either 25 per cent capital yield tax or individual income tax on these dividends, but only at half the rate, ie, a maximum of 25 per cent.

Business Taxes

Austrian enterprises also have to pay a so-called community tax of three per cent of the aggregate wages.[241] Transfer taxes[242] and fees are levied on the assignment or acquisition of shares in corporations.

Taxes Related to Agent's Business Premises

Land transfer tax[243] (usually 3.5 per cent of the purchase price) must be paid upon acquisition of real estate property. Value added tax[244] is levied on the rental of business premises.

Use Taxes

Excise duties are levied on the consumption of certain specified goods, eg, petrol, tobacco, and alcohol.

Collection and Refund of Value Added Tax

The turnover or value added tax[245] is a tax levied on practically all commercial transactions. It is, at present, 20 per cent with rates between 10 per cent and 16 per cent for a few specific goods and services or particular regions. Since a turnover tax paid by enterprises is refundable, it only affects the final consumer.

Litigation Issues

Principal's Exposure to Local Jurisdiction

According to the Austrian law regulating legal venue and the competence of the courts in civil and commercial matters,[246] a party may be exposed to local

240 Corporate Income Tax Act (*Körperschaftsteuergesetz*) 1988, BGBI 1988/401, as amended. For an English translation, see Gröhs-Polak, *supra*, no 260.
241 Communal Tax Act (*Kommunalsteuergesetz*), BGBI 1993/819.
242 Capital Transfer Tax Act (*Kapitalverkehrsteuergesetz*), 16 October 1934, RGBI 1, at p 1058, as amended.
243 Land Transfer Tax Act (*Grunderwerbsteuergesetz*) 1987, BGBI 1987/309.
244 See text relating to value added tax.
245 Turnover Tax Act (*Umsatzsteuergesetz*) 1994, BGBI 1994/663.
246 Court Jurisdiction Act (*Jurisdiktionsnorm*), RGBI 1895/111.

jurisdiction with regard to pecuniary claims if he possesses property located in the Austrian territory. The value of this property need not equal the amount in dispute; however, it must not be totally out of proportion to that amount.[247]

Where an agent with his place of business in Austria has in his possession at least some items which belong to his principal, eg, samples or stock, the aforementioned provision may easily lead one to the conclusion that the agent may sue his principal in Austria. In addition, the agent's right of retention of the principal's property is to be seen in this respect.[248] It may, therefore, be advisable to include a choice-of-forum clause in the agency contract.

However, paragraph 99 of the Court Jurisdiction Act does not apply to parties with their seat or domicile in the EC or in signatory states of the Lugano Convention (basically, the EFTA states). For EC member states, international jurisdiction is governed by the Brussels Regulation,[249] which superseded the Brussels Convention of 1968. The Lugano Convention governs international jurisdiction in relation to the EFTA states.[250]

Agent's Receipt of Process

Among other statutory powers conferred upon the agent, the HVertrG expressly regulates the kinds of declarations or documents an agent may receive on behalf of his principal.[251]

Among these are notifications of defects or other declarations by the principal's clients.[252] This statutory authority of the agent does not extend to service of process, however.

According to the relevant Austrian law, service of process may be effected only by serving the recipient himself (in the case of a company, the company's officers) and, in limited cases, their employees.[253] Since an agent, by definition, cannot be his principal's employee, he does not qualify for such substituted service of process.

247 Court Jurisdiction Act, para 99.

248 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), at p 433.

249 Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In relation to Denmark, the regulation will only apply as of 1 July 2007 according to an additional agreement.

250 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. The Convention applies to Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Island, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

251 HVertrG, para 3(4).

252 Jabornegg, *Handelsvertreterrecht und Maklerrecht*, 4 (1987), p 98; Rummel, *JBl* 1980, 242.

253 Service of Process Act (*Zustellgesetz*), BGBI 1982/200, as amended.

Agent's Authority to Initiate Suits

Whether an agent is authorized to initiate legal proceedings on behalf of his principal depends upon the power of attorney given to him by his principal. The law on agency regulates only the statutory powers conferred upon the agent with respect to his principal's clients.[254]

With regard to legal proceedings, any person representing another in court must prove his authorization by presenting a written proxy. An exception to this rule applies only to lawyers.[255]

Arbitration

Commercial Arbitration

As a general rule, any dispute in commercial matters may be submitted to arbitration, including disputes over agency contracts. As a general rule, any dispute in commercial matters may be submitted to arbitration, including disputes over agency contracts. No restriction applies to disputes on pecuniary or proprietary claims. Other disputes may only be subject to arbitration if they are of such a nature that they could be settled by the parties also through a compromise, i.e., the parties must be, in legal terms, capable of disposing of the rights and obligations in dispute.[256]

The arbitration agreement or clause must be contained either in a document signed by both parties, or in their mutual correspondence by letter, telefax, e-mail, or any other form of message that provides sure evidence of the agreement.[257] The admissibility of arbitration is restricted in some fields, eg, in tenancy law and disputes relating to condominiums[258] and in labor law.[259]

Foreign Arbitration

Austria is a party to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and to the European Convention of 21 April 1961 on International Commercial Arbitration.[260] Austrian courts will, therefore, according to the rules of the Convention, recognize and enforce foreign arbitral awards.

254 HVertrG, para 3.
255 Code of Civil Procedure (*Zivilprozessordnung*), para 30, RGBI 1895/113.
256 Code of Civil Procedure, s 58(1).
257 Code of Civil Procedure, s 583(1).
258 Code of Civil Procedure, s 582(2).
259 Enforcement Act (*Exekutionsordnung*), RGBI 1896/79, as amended on Jurisdiction in Labor and Social Law Matters (*Arbeits- und Sozialgerichtsgesetz*), s 9, BGBl 1985/104, as amended.
260 BGBI 1951/200. For the text of the New York Convention, see (1958) *JBL* 396.

Foreign Jurisdiction and Enforcement of Foreign Judgments

National Law

Under the Austrian law on enforcement of judgments,[261] judgments rendered by a foreign court will be recognized and enforced under the condition that reciprocity is provided for in a treaty with the respective country.[262] Austria has entered into numerous multilateral treaties in this respect.

Brussels Regulation and the Lugano Convention

In General. The Brussels Regulation which entered into force in March 2002 superseded the Brussels Convention of 1968 which had entered into force in Austria in December 1998. The Lugano Convention entered into force in Austria in September 1996. These legal instruments apply to civil and commercial matters.[263] Legal disputes relating to agency contracts are, therefore, clearly within the scope of the Convention.

Jurisdiction. The general rule is the principle of *actor sequitur forum rei*. Parties domiciled within a member state of the EC or a signatory state of the Lugano Convention may be sued in the courts of that state.[264] The main connecting factor is domicile, not nationality.

Other than in the country where a party is domiciled, the party may be sued in another state according to the rules set out in sections 2–7 of chapter II of the Brussels Regulation or sections 2–6 of title II of the Lugano Convention, respectively. The most important provisions with possible relevance to agency contracts are discussed below.

In matters relating to a contract, a person may be sued in the courts of the place of performance of the contract. The Brussels Regulation and the Lugano Convention slightly differ in this respect. Applying the Brussels Regulation, ie, for disputes inside the EC, general rules exist for contracts on the sale of goods and the provision of services.[265] Disputes arising out of such contracts may be brought to the courts of the place where the goods were delivered or should have been delivered, or services were provided or should have been provided.

Jurisdiction is concentrated at this venue for all obligations of such contracts. For any other type of contract, jurisdiction must be determined individually for

261 Enforcement Act (*Exekutionsordnung*), RGBI 1896/79, as amended.

262 Enforcement Act, para 79.

263 Brussels Regulation and Lugano Convention, art 1; for the concept of 'civil and commercial matters', see Judgment by the European Court of Justice of 14 October 1976, Case 29/76, *LTU* v *Eurocontrol*, (1977) 1 CMLR 88.

264 Brussels Regulation and Lugano Convention, art 2.

265 Brussels Regulation, art 5(1), lit a.

the obligation in question,[266] ie, the contractual obligation forming the basis of the legal proceedings.[267]

The Lugano Convention does not contain any general rule. In its scope of applicability, the specific obligation in question also will be relevant to determine jurisdiction for contracts of sale and provision of services.[268]

In matters relating to tort, delict, or quasidelict, a person may be sued in the courts of the place where the harmful event occurred.[269] This place may either be the place of the event giving rise to the damage or the place where that damage actually occurred.[270]

The Brussels Regulation and the Lugano Convention also expressly mention 'agency' in article 5(5). This provision, however, only refers to persons under direct control of another enterprise.[271]

It does not comprise agents within the meaning of the HVertG. Both the Brussels Regulation and the Lugano Convention also contain an express rule on choice-of-forum agreements (prorogation of jurisdiction).

If the parties, one or more of whom is domiciled in a contracting state, have agreed that a court or the courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.[272] Such an agreement must fulfill certain formal requirements to validly establish jurisdiction of the chosen court.

Recognition and Enforcement of Judgments. The rules for the recognition and enforcement of judgments are set out in chapter III of the Brussels Regulation or title III of the Lugano Convention, respectively.

As a general rule, a judgment given in a state within the scope of those legal instruments and enforceable in that state also will be enforceable in any other state.

266 Brussels Regulation, art 5(1), lit a.

267 Judgment of the European Court of Justice of 6 October 1976, Case 14/76, *de B700s* v *Bouyer*, (1976) ECR 1497.

268 Lugano Convention, art 5.

269 Brussels Regulation and the Lugano Convention, art 5(3).

270 Judgment of the European Court of Justice of 30 November 1976, Case 21/76, *Mines de Potasse d'Alsace*, (1976) ECR 1735.

271 Judgment of 22 November 1978, Case 33/78, *Somafer* v *Saar.Ferngas*, (1978) ECR 1431, or (1979) 1 CMLR 490; Judgment of 30 November 1976, *Mines de Potasse d'Alsace*; and Judgment of 18 March 1981, Case 139/80, *Blanckert* v *Trost*, (1981) ECR 819.

272 Brussels Regulation, art 23(1); Lugano Convention, art 17(1).

Applicability of Foreign Law

The Austrian rules on conflict of laws[273] are embodied in the Federal Statute of 1978 on Private International Law (PIL Act).[274] According to the rules, the 'strongest-connection' principle governs, ie, factual situations with foreign contacts will be judged, in regard to private law, according to the law of that country to which the strongest connection exists.[275]

Austrian also has acceded to the EC Convention on the Law Applicable to Contractual Obligations (the Rome Convention), signed in Rome on 9 October 1980. The law applicable to disputes directly arising out of agency contracts is to be determined according to this convention.

As a general rule, a contract can be governed by the law chosen by the parties.[276] Without a choice of law, the 'strongest connection' principle applies. The Convention assumes that a contract is most closely connected with the country where the party who is to affect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence or central administration. Regularly, for agency contracts, this will be the state of the agent.

Product Liability

As early as 1988, Austria harmonized its national law to a great extent with the relevant EC Directive on product liability[277] by introducing — for the first time — the concept of product liability into the Austrian legal order.[278]

Agent's Liability for Principal's Defective Products

If, through a defective product, a person suffers death or injury or property is damaged, the producer is liable for compensation, regardless of fault (strict liability).[279] Where the producer is a foreign enterprise, the party who has imported the product into the EEA also may be held jointly and severally liable.[280]

If the producer or importer cannot be identified, the liability extends to any dealer who has put the product in question on the market unless, within a

273 In Austria, 'Private International Law' (*Internationales Privatrecht*).
274 *Bundegesetz vom 15 Juni 1978 über das internationale Privatrecht* (*IPR-Gesetz*), BGBl 1978/304. For an English translation of this statute, see Palmer, 'The Austrian Codification of Conflicts Law', (1980) 28 *Am J Comp* L, at pp 222–234.
275 PIL Act, s 1(1).
276 PIL Act s 5(1); Rome Convention, art 3.
277 EC Council Directive of 25 July 1985, OJ 1985 L 210, 29.
278 Product Liability Act (*Produkthaftungsgesetz*), BGBI 1988/99.
279 Product Liability Act, para 1(1), no 1.
280 Product Liability Act, para 1(1), no 2 and para 10.

reasonable time, he advises the injured person of the name of the producer, importer, or his own supplier.[281]

Agent's and Principal's Liability for Agent's Acts

As a general rule, everybody is liable for his own fault. However, in limited cases, Austrian law stipulates liability for another person's fault (vicarious liability). This is the case, where, in the performance of his obligation, a person (the principal) employs another person (the agent).

In such cases, the principal will be held liable for his agent's negligence.[282] This liability will apply only where the agent's negligence is connected with the obligation which the principal, by employing his agent, was to perform.[283]

General Environment for Distributors

Terminology

No legal definition of a distributor or a distributorship exists under Austrian law. Nor does such definition exist under German law. Indeed, various German terms, such as *Vertragshändler* or *Eigenhändler*, are used to describe a distributor.

Various legal scholars have provided definitions of the distributor. The most widely used definition is as follows:

> . . . a merchant, whose enterprise is integrated into the sales organization of a producer of brand products. The distributor undertakes by means of a long term contract with the producer or his intermediary, to either sell or promote the sale of contractual goods in a defined sales area. The distributor undertakes his commercial activities in his own name and on his own account; he is organizing his sales activities and risks for himself and may use the producer's brand simultaneously with his own (corporate) name when conducting business as distributor.[284]

Types of Distributors

The term 'distributor' covers various kinds of independent merchants who buy and sell products for and within the sales organization of a producer. The distributor may be integrated in the sales organization of a producer in various degrees; distributorship law is, therefore, a hybrid compendium of various laws, embodied in different statutory provisions applicable to different situations, depending upon the specific kind of distributor.

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281 Product Liability Act, para 1(2).
282 ABGB, para 1313(a).
283 Koziol-Welser, *Bürgerliches Recht I*, 64 (10th ed.), at p 449.
284 Ulmer, *Der Vertragshändler (The Authorized Dealer (Distributor))* (1969), at p 206.

For example, certain provisions of labor law may be applicable if the distributor is very rigidly included in the sales organization of the producer (and, possibly, obliged to follow direct orders of the producer); however, occasional purchases by the distributer from the producer may also amount to a distributorship.

Applicable Laws

Austrian law on distributorships is a mixture of various bodies of law which are contained in various federal acts. Depending on the nature of the distributorship, the following legal sources may or may not be applicable:

- The Commercial Code (*Unternehmensgesetzbuch*, UGB) and Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB) on rights and obligations under contract law;
- Agency law, as under the HVertrG;
- Labor law, as under various labor law acts; and
- Various other federal acts.

Given that no specific regulations on distributorship exist and in view of the fact that distributorships are, in most instances, similar to agency relationships, most provisions of agency law as described in part I of this chapter are considered applicable by analogy to distributorships, provided that the distributor is integrated in the sales organization of a producer, comparable with an agent.[285] In addition, legal provisions on the purchase of goods, as contained in the UGB and the ABGB, generally will govern purchase and sale transactions between distributor and producer.

Even though many similarities between agents and distributors exist, one substantial difference will remain. In contrast to the commercial agent referred to in the HVertrG, the distributor, while possibly deeply incorporated in the sales organization of the producer, always will act in his own name and on his own account.

It should be noted that the *Kommissionär*,[286] who also permanently buys and sells in his own name, must be distinguished from the distributor in that the *Kommissionär* acts for the account of another (the principal), while the distributor acts for his own account. Hence, certain duties and obligations of the

285 In the Judgment of 30 September 1996, OGH, 6 Ob 2072/96s, the distributor was considered incorporated in the sales organization of the producer where he is obliged to purchase goods, to promote sales, to possess an adequate stock, to have an efficient sales and client service organization, to provide information to the producer, and where the producer has the power to give instructions. However, by now, the analogous application of agency law to distributorship corresponds to the consistent practice of the Supreme Court of Austria (6 Ob 247/99p, 1 Ob 251/98p, 4 Ob 79/99t) recently approved in the Judgment of 22 April 22, 2009, OGH, 3 Ob 44/09f; Judgment of 5 May 2009, OGH, 1 Ob 10/09s.

286 UGB, ss 383 *et seq*.

Kommissionär towards the principal, as contained in sections 383 *et seq* of the UGB, will not apply to the regular distributor.

The distributor also must be distinguished from the franchisee who acts in his own name and on his own account but, generally, is more closely integrated in the sales organization of the franchisor. While distributors, as a rule, will find certain freedom, eg, for promotion and sales activities, the franchisee will, as a rule, follow overall public relations strategies of the franchisor.

Government Attitude

The government's reluctance to regulate the distributor's legal position is evidenced by comments of the Austrian Ministry of Justice on the bill for the HVertrG,[287] which adopted Austrian agency law to the relevant EC law or EEA law, respectively. The comments note that courts and legal scholars have recently applied provisions designated for commercial agents to other sorts of agents, in particular to the distributor (*Vertragshändler*) and franchisee. An inclusion of this group is not envisaged by the directive since there is great danger of having incomplete regulations. It, therefore, seems appropriate to leave all questions related to this problem to the continuously developing case law.

While case law and legal literature on distributorships under Austrian law are, indeed, developing, none exists on most issues of distributorship law. Most case law on distributorships deals with the question of whether or not section 24 of the HVertrG is applicable to distributors by analogy.

As discussed above, this provision deals with the agent's rights to indemnity after termination of the agency contract under certain circumstances. The reader should review the applicable sections in part I of this chapter for these issues; the remainder of part II will cover the general principles of Austrian law applicable to distributorships.

Formation of Distributorship Relationship

No specific legal provisions on the formation of a distributor relationship exist under Austrian law. Hence, general principles of Austrian civil law will apply.

In practice, an implicit distributorship will most often be assumed where the distributorship agreement was originally concluded for a fixed period of time and is subsequently continued tacitly, unchanged by the parties after that period.

In a distributorship agreement, the principal and the distributor will agree on terms and conditions of the purchase of goods. However, not infrequently, in an implicit distributorship relationship, both distributor and principal may use their

287 *Bundesministerium für Justiz zum HandelsvertreterG* 1992 of 7 February 1992.

own standardized general sales and purchase conditions which may, in certain circumstances, conflict.

Austrian courts would, in such a situation, apply both the standardized general conditions of sale (of vendor) and of purchase (of purchaser) to the extent that such general conditions do not contradict each other. Conflicting provisions of standardized terms would be held invalid if no common intent of the parties at the time of contracting could be proven.[288]

It is, therefore, recommended that parties agree explicitly on distributorship terms, including, without limitation, terms and provisions of purchase and sale.

Termination

Breach of Contract

Termination by Principal

In contrast to the law governing agency relationships, the reasons for termination without notice by the principal are not listed in a statute. However, section 22 of the HVertrG, comprehending the respective provisions of the HVertrG, will, in most cases, be applicable analogously, provided that the distributorship is similar to an agency relationship.

Case law on extraordinary termination of long-term agreements regularly provides that such extraordinary termination will be valid and permissible if a breach of contract of the contractual partner is of such nature that the continuation of the agreement until the end of its originally agreed-upon term will be unfeasible for the terminating party.[289]

Whether or not such situation is present will depend on specific details of the individual case. Furthermore, incapacity and bankruptcy of the distributor provide reasons to the principal for early termination.[290]

Termination by Distributor

Again, no statutory provision on early termination by the distributor exists. This issue is discussed in this chapter in the context of the agency relationship.

Automatic Termination of the contract

The contract terminates automatically if the principal is adjudicated bankrupt.[291]

288 Judgment of 7 June 1990, OGH, 7 Ob 590/90, *RdW* 1990, 406; Willvonseder, *Taktikspiel AGB*, *RdW* 1986, 69; confirmed by Judgment of 25 November 1999, OGH, 2 Ob 275/99a and by Judgment of 31 May 2006, OGH, 7 Ob 114/06z.

289 Judgment of 25 May 2000, OGH, 8 Ob 295/99 m, RdW 2000/652.

290 HVertrG, s 22, para 2.

291 HVertrG, s 26 para 1.

However, in case of imminent danger, the distributor has to continue exercising his tasks until other precautions are taken. A distributor can claim damages in the event of the contract termination before the contract expired.[292]

Termination Indemnity

In General

As discussed above, the focus of Austrian case law[293] in the area of distributorship law is on the question of whether section 24 of the HVertrG, which provides for a compensation claim of an agent under certain circumstances, should be applied equally to a distributorship relationship.

Since the analogous application of agency law to distributorships is no longer in dispute and complies with the consistent practice of the Supreme Court, the termination indemnity as set forth in section 24 of the HVertrG is applied to distributors provided that the following requirements are met.

Conditions for Analogous Application of Section 24

According to the established practice of the Supreme Court, the distributor is entitled to termination indemnity if his contract is approximated to the features of an agent's contract in a way that these elements prevail and the refusal of the respective claim would run contrary to the objectives of the HVertrG. It depends on whether and to which extent the relationship between the distributor and his principal is approximated to the relationship between an agent and his principal.[294] Two requirements are to be met cumulatively:

- The distributor must be incorporated into the sales organization of the principal in a way that is comparable with an agent; and
- The distributor must be obliged to surrender his established clientele to the principal.

The decisive criteria for the incorporation of the distributor into the sales organization of the principal are the following:

- The distributor's obligation to purchase goods and to promote sales;
- The efficient sales and client service organization of the distributor;
- The adequate (replacement) stock of the distributor;
- The distributor's obligation to cooperate with respect to the marketing of new products;
- The distributor's reporting duties;

292 HVtrG, s 26 para 2.

293 *RdW* 1986, 265; *ecolex* 1990, at p 22; *WBL* 1991, at p 67; Judgment of 30 August 2006, OGH, 7 Ob 122/06 a, *RdW* 2007/98, a p 86.

294 SZ 61/179; Judgment of 25 September 1999, OGH, 3 Ob 10/98 m; Judgment of 14 March 1999, OGH, 10 Ob 61/99 i.

- The non-competition clause;
- The distributor's obligation to follow orders of the principal;
- The distributor's obligation to turn over data on customers to the principal upon termination of the distributorship;
- The principal's power to give instructions;
- The principal's permission to permanent access to the commercial establishments of the distributor; and
- The principal's right to inspect the account books of the distributor.[295]

The second requirement (the obligation to surrender the established clientele to the principal) is met as soon as the principal is effectively enabled to make continuous use of the clientele established by the distributor (after the termination of the distributorship).[296]

Thus, for the entitlement of the distributor to termination indemnity, it is not necessary that the principal actually makes use of the clientele established by the distributor. The possibility of the utilization is sufficient.[297] However, the distributor's indemnity claim requires that the increase in value of the principal's 'good will' is not covered by the distributor's trade margin or other compensation (such as advertising or investment contribution by the principal).[298]

Exclusion of Indemnity

Note that an analogous application of section 24 of the HVertrG will be made only if the situation is as described above and:

- All conditions required for an agent's indemnity are present;[299] and
- There is no reason to exclude indemnity, as in the situation pertaining to agents.[300]

Pursuant to section 27 of the HVertrG, exclusion or restriction of indemnity by prior agreement is not admissible. In a recent judgment,[301] the Supreme Court

295 Judgment of 25 September 1999, OGH, 3 Ob 10/98 m; Judgment of 14 March 1999, OGH, 10 Ob 61/99 i; Judgment of 24 November 1998, OGH, 1 Ob 251/98 p; SZ 63/175. Nocker, *Ausgleichsanspruch* 2001, at p 16.

296 Judgment of 25 September 1999, OGH, 3 Ob 10/98 m; Judgment of 14 March 1999, OGH, 10 Ob 61/99 i; Judgment of 24 November 1998, OGH, 1 Ob 251/98 p, recently affirmed by Judgment of 22 April 2009, OGH 3 Ob 44/09 f.

297 Nocker, *Ausgleichsanspruch*, 2001, at p 17. A contractual clause which bares the distributor's claim for compensation is void and will not be upheld by Austrian courts (HVertrG, s 27, para 1).

298 Judgment of 22 April 2009, OGH 3 Ob 44/09 f.

299 HVertrG, s 24, para 1.

300 HVertrG, s 24, para 3.

301 Judgment of 24 February 2010, OGH 3 Ob 212/09m.

specified certain indications for circumvention of this prohibition in the context of the agreement on start-up fees (*Einstandszahlung*). Distributors are required to pay concession fees for acquisition of the principal's customers. However, agreements about the concession fee must not circumvent the prohibition of exclusion of indemnity. Certain terms can indicate a circumvention, for example, concession fees without counterperformance (*unentgeltliche Einstandszahlung*), extension of payment terms until termination of the agreement, and the sum of concession fee and indemnity being approximately the same. Such start-up fee provisions are also qualify as inadmissible exclusion of indemnity

Amount of Indemnity

The termination indemnity the distributor is entitled to under section 24 of the HVertrG *per analogiam* cannot be calculated by way of charging the commission. Instead of the agent's commission, it needs to be determined whether and to what extent the increase in value of the principal's 'good will' through the acquisition of the established clientele is covered by the distributor's trade margin.

The trade margin, therefore, constitutes the starting point for the calculation of the compensation claim. Special allowances granted on a regular basis, based on the turnover and directly honoring the distribution activities, are to be included in this base value.[302] However, payments the distributor receives for services which an agent does not usually perform are to be subtracted.[303] Further reductions can be made by taking the 'attraction of trade marks' (*Sogwirkung der Marke*)[304] and the potential risk of a movement of customers into consideration.

The evaluation of the amount of termination indemnity is highly dependent on the circumstances of each individual case. Hence, lump-sum calculation systems, as well as calculations by way of using definitive formulas, cannot be used. Considering the complexity of the matter and the extensive necessary evidence for all the circumstances that need to be taken into account, the only solution often is a determination according to section 273, paragraph 1, of the Code of Civil Procedure.[305] The latter provides that once it is certain that one party is entitled to indemnity, the amount of which is in dispute due to difficulty

302 Judgment of 23 October 2000, OGH, 8 Ob 74/00s.

303 Judgment of 23 October 2000, OGH, 8 Ob 74/00s; Judgment of 9 April 2002, OGH, 4 Ob 54/02y.

304 The term *Sogwirkung der Marke* is used in order to describe the effect a known trademark has on customers' choices. Thus, to that extent sales cannot be considered as an achievement obtained by the distributor. It therefore serves as an argument in favor of a respective reduction of the amount of indemnity. Especially in the automotive industry, this factor reducing the right to indemnity is of great importance. Judgment of 9 April 2002, OGH, 4 Ob 54/02y; Thaler, *Ausgleichsanspruch des Kfz-Händlers*, *ecolex* 2001, at p 119.

305 *ecolex* 2001, at p 119.

or impossibility of providing evidence, the court determines the amount according to its own conviction.

Other Post-Termination Issues

No provisions exist regarding the obligation of the distributor to return to his principal stock, samples, publicity materials, and documents. It is strongly recommended that express clauses regarding these issues be included in the distributorship agreement.

Unless a contrary provision is contained in the distributorship agreement, the distributor will be entitled to sell off his stock and inventory on termination of the distributorship agreement. Again, if price stability in the respective market is desired, careful drafting of respective provisions in the distributorship agreement is strongly recommended.

The distributor has rights similar to those of the agent to withhold the principal's property in order to secure his claims against the principal. The conditions for the exercise of such rights of retention are governed by sections 369 *et seq* of the UGB.

Section 454 UGB provides for a compensation claim of a distributor (or agent) who is integrated in a distribution system upon termination of the distribution: The distributor is entitled to compensation for all investments he was obliged to make under the distribution contract in view of a uniform market appearance and which are neither amortized nor marketable.

However, there is no claim in the case of early termination by the distributor, except for termination caused by the principal. The claim cannot become excluded contractually. It is independent from a claim for compensation according to section 24 HvertrG, and it must be asserted within one year from termination of the contract.

Intellectual Property

Liability of Distributor for Intellectual Property Infringements of Supplier

Under Austrian law, the distributor may be held liable to the supplier for violations in Austria of copyright law, patent law, trademark law, and/or unfair competition law related to the goods sold by the distributor.[306]

The principal may, under certain circumstances, be held liable for such intellectual property violations by his distributor, as defined under Austrian case law.[307]

306 The reader is referred to part I of this chapter where intellectual property is discussed in the context of the agency relationship. *RdW* 1984, 372; *ÖBl* 1984, 135.

307 *JBL* 1929, 232; *ÖBl* 1978, 157; Koppensteiner, *Wettbewerbsrecht* (2) 1987, at p. 289.

Trade Mark Registration on Termination of Distributorship

Similar to article VI of the Paris Convention on Industrial Property of 1883, section 30a of the Austrian Trade Mark Act (*Markenschutzgesetz* 1970, MSchG) provides for the right of a foreign trademark owner (such trademark being registered abroad or not) to demand that an identical or confusingly similar trade mark, used for the same or similar products and services, be canceled or transferred to him if:

- The application for registration was filed later than the acquisition of the trademark;
- The owner of such trade mark is or was under an obligation to the owner of the trademark to preserve his commercial interests; and
- The trademark was registered without prior consent of the trademark owner or without valid justification.

National Competition Law

As demonstrated above in the chapter relating to agency law, distributorship agreements may have an impact under Austrian competition law; in particular, the Austrian Cartel Act (*Kartellgesetz* 2005) may be applicable to distributorship relationships. Furthermore, Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices provides the framework for non-compete obligations not only on an international level but also for mere national cases until 31 May 2010.

This Regulation has been replaced by Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of article 101/3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, entering into force on 1 June 2010. However, a discussion of competition law in connection with distributorships would exceed the scope of this chapter.

Taxation

A foreign company may become subject to Austrian corporate income tax on income derived from business conducted in an Austrian permanent establishment or through a permanent representative (agent) and on certain other income from Austrian sources. In many cases, the Austrian tax liability of the foreign corporation is governed by a tax treaty. In general, treaties limit taxation of industrial and commercial activities in Austria on profits from a permanent establishment in Austria.

In such a case, the calculation of tax to be charged on the profits of the permanent establishment is similar to that of an Austrian resident corporation. A

tax treaty also may provide for withholding tax rates on passive income that are lower than the Austrian rates or may even eliminate the withholding tax. As a rule, a representation of a foreigner in Austria through an independent distributor who acts in his own name will not trigger income tax liability of the foreign principal. If the distributor relationship is, however, a close one, careful tax review is advisable.[308]

Litigation Issues

Distributor's Authority to Initiate Suit

It should be noted that Austrian courts are reluctant to allow a distributor to litigate, in his own name, a claim in which the supplier has an economic interest; permission to initiate such litigation without proof of an assignment of the claim from principal to distributor will be granted only in exceptional circumstances.

Note that, under Austrian law, the written certification of such assignment of monetary claims may trigger legal fees of 0.8 per cent of the assigned amount.[309]

Conflict of Laws

Conflict of laws questions are governed by the Rome I Regulation of the EU,[310] which is applicable from 17 December 2009. Under article 3 of the Regulation, contracts will be governed by the law chosen by the parties. The choice must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

There are no requirements as to form for choice-of-law agreements. Such agreement also can be validly reached orally. Pursuant to Article 4, paragraph 1, lit f, of the Rome I Regulation, which determines the applicable law in the absence of choice of law, a distribution contract will be governed by the law of the country where the distributor has his habitual residence.

Following this principle, a contract between distributor and producer will, in most in- stances, be governed by the law where the distributor has his habitual residence, if no deviating choice of law of the parties can be proven.

In view of the amendments to the Federal Act on Conflict of Laws, with respect to contracts concluded before 30 November 1998, a different result may apply if the distributorship amounts to little more than the buying and selling of goods.

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308 See the text, above, for coverage of taxation discussed in the context of the agency relationship. Individual Income Tax Act of 1988, para 98 (BGBI 400/1988, as amended); Gröhs-Polak, *Austrian Law and International Business*, vol 1, *Austrian Business Taxation* (Manz, 1992).

309 Federal Act on Legal Fees of 1957 (*Gebührengesetz*), BGBl 267/1957, as amended by BGBl 105/2005, s 33.

310 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Under the former section 36 of the Act on Conflict of Laws, the law of the seller would apply in this scenario, unless a deviating choice of law can be proven.[311]

In general, the compensation claim of the distributor under section 24 of the HVertrG *per analogiam* can be neither restricted nor suspended beforehand.[312] Choice-of-law agreements may, however, implicitly bar the applicability of section 24 of the HVertrG in cases when the chosen foreign law does not provide for a termination indemnity upon the termination of contract. Such agreements are possible and permitted where the facts of the case offer a connection to the law of different states.

If it is the law of an EU member state the parties agreed upon, a choice of law plays only a secondary role given that, according to article 17 of Directive 86/653/EEC,[313] agents, and thus most likely distributors analogously, have a right to indemnity throughout the EU. When the distributor is active outside the EU, the termination indemnity can be ruled out by way of such a choice of law.[314]

Product Liability

In order to harmonize its legal system with the respective European Directive,[315] Austria enacted the Federal Act on Product Liability. Prior to the introduction of the Act, a person who incurred damages due to the deficiency of a product had difficulties holding the producer liable for such damages since there was no contractual relationship between producer and consumer. However, under various cases,[316] the Austrian Supreme Court has held that intermediate sellers of merchandise would, in principle, be liable to the end user of the product only for fulfilling all the typical obligations and duties of an intermediate seller in the chain of sale.

The Federal Act on Product Liability provides for the liability of a producer or an importer even if they are not responsible for a product's deficiency (strict liability). They are liable for damages that are incurred as a consequence of a product's deficiency (as opposed to the damage by the product itself).

According to Austria's product liability law, only the producer and the importer are liable for a product's deficiency. However, if a producer or importer cannot

311 Section 36 of the Act on Conflict of Laws is no longer in force and does not apply to contracts concluded after 30 November 1998.

312 HVertrG, s 27, para 1, *per analogiam*.

313 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the member states relating to self-employed commercial agents, *Official Journal* L 382, 31 December 1986.

314 Nocker, *Ausgleichsanspruch*, 2001, margin numbers 495, 503, and 509.

315 Council Directive 85/374/EEC of 25 July 1985, *Official Journal* L 210/29 of 7 August 1985.

316 EvBl 1981/159; *JBl* 1987, at p 385.

be identified, the Federal Act on Product Liability provides for the liability of each merchant who introduced the respective product into the market, unless he provides the injured party with the producer's or importer's identity.

Apart from this situation, a merchant is only liable for damages caused by his own fault. In practice, fault is rarely attributable to a merchant since he regularly does not participate in the production process and is not capable of identifying a product's deficiency.[317]

Unlike the merchant, the importer of defective merchandise cannot exclude his liability by simply stating the producer's identity. He should, therefore, try to secure his right of recourse against the foreign producer through careful contractual provisions.

317 SC 54/116; for more detailed information on the Federal Act on Product Liability, see Welser/Rabl, *Produkthaftungsgesetz Kommentar*, 2004.