

## Commercial Agents under Turkish Law

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### Introduction

As the world gets more globalised and interconnected, competition is getting fierce and companies are looking to enhancing their penetration into markets not only in countries where their business premises are located, but also in jurisdictions where they have no legal presence. There are many different ways of selling goods or providing services to customers in distant markets. One of the common methods is working with commercial agents.

Companies hire commercial agents mainly to enter into commitments with customers in distant markets. The main reason behind it is to make the utmost profit by cutting down the costs and saving time.

Contracts for commercial agency are governed by the provisions of the Turkish Commercial Code (TCC). However, TCC is not the only source for commercial agency contracts as there are by-laws about special types of agents such as shipping agents, insurance agents and travel agents.

This article will briefly examine the general characteristics of commercial agency relationship under Turkish law including rights, duties and liabilities of parties.

## Elements of Commercial Agents

The definition of an agent is found in article 102 of TCC. According to this definition an agent;

- is self-employed,
- acts as an intermediary or on behalf of the principal in contracts in relation to a commercial enterprise with third parties,
- has a continuous authority,
- does not have a title such as a commercial representative, sales clerk or an employee.

Parties to a commercial agency contract are the agent and the principal. The agent has the exclusive right to represent the principal in a specified territory unless otherwise agreed in writing by the parties.

There is no requirement as to the form of the agency contract. However, if the principal wants to empower the agent to act on behalf of himself, a special authorisation should be granted with a written agreement. In such case, this special authorisation should be registered to the trade registry and should be announced in the trade registry gazette.

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## Duties of the Commercial Agent

### Duty to Protect Principal's Interests

The primary obligation of the agent is to conduct the business of the principal in accordance with the instructions of the principal. Trust and confidence are of utmost importance to the principal in an agency contract. While conducting the business of the principal, the agent is under the obligation to protect the interests of the principal. This is an obligation that must be considered in all transactions conducted by the agent.

The agent is obliged to make a decent research about the payment ability of the potential customers. Likewise, agent has an obligation to keep the delivered goods safe and secure on behalf of the principal. Otherwise, agent will be liable for the damages unless he proves that he has no fault.

Agent is also under the obligation to protect the interest of the principal at the time of reception of goods. If the agent detects a damage while receiving the goods, it has a duty to take necessary steps to protect the rights of the principal. The agent, if necessary, has a right to sell the perishable goods with a court order and should inform the principal without any delay.

The agent gets to know business secrets of the principal during the agency contract. For this reason, it owes a duty of confidentiality to the principal.

### **Duty to Give Information**

The agent is under the obligation to provide information to the principal in a timely manner about the received notices. Agent should also provide information to the principal about the conditions of the market, financial situations of the customers and any changes thereof.

### **Duty to Comply with Instructions**

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The agent is self-employed, thus cannot be deemed an employee of the principal. However, within the scope of agency contract, the principal has a right to give instructions to the agent about the sale conditions or sale prices etc. Therefore, agent is obliged to comply with the instructions of the principal.

The agent has the authority to receive the payments on behalf of the principal for the delivered goods. In such case, agent should remit all the received money to the principal. Otherwise, it will be responsible for the received amount and the interest.

### **Duty not to Compete**

Unless there is a written agreement to the contrary, the agent represents a single principal and the principal hire a single agent in a specified territory. This means that the parties, in the absence of a written agreement, are under an obligation not to compete. In this context, an agent has a duty to refrain from competing with the principal concerning the subject matter of the agency and from assisting the principal's competitors.

## Rights of the Commercial Agent

### Right to Remuneration

The agent is entitled to remuneration for his services while acting as an intermediary or acting on behalf of the principal. The amount of remuneration is usually determined pursuant to the agency contract.

The right to claim remuneration arises with the performance of the contract concluded between the third party and the principal. However, parties may decide otherwise and accordingly the agent may be entitled to remuneration with the conclusion of the contract even if the contract is never executed. Unless otherwise agreed, the remuneration must be paid within three months.

Similarly, agent may be entitled to remuneration after the termination of the agency contract if it is proved that the transaction between the customer and the principal was concluded in a reasonable time after the termination and the effective cause of the transaction was the efforts of the agent.

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If the agent has an exclusive right to represent the principal in a specified a territory, it will be entitled to remuneration for the transactions without his interference but have been concluded during the term of agency.

### Right of a Lien

The agent who is in lawful possession of goods or negotiable instruments that belongs to the principal, has a right to retain possession of them until his remuneration is paid.

### Reimbursement of Extraordinary Expenses

The agent cannot demand his regular business expenses such as expenses of the staff, office or travelling. However, depending on the nature of the transaction, extraordinary expenses may be incurred by the agent. Pursuant to article 117 of TCC, agent is entitled such extraordinary expenses.

## **Goodwill Indemnity on Termination of Agency Contract**

The commercial agent will be entitled to have goodwill indemnity - if the below mentioned conditions are met- after the termination of the agency contract. Article 122 of TCC which is adopted from the European Directive (art. 17 of 86/653/EEC), regulates the goodwill indemnity which is also known as portfolio compensation.

Pursuant to article 122 of the TCC, the agent shall be entitled to a goodwill indemnity if:

- the principal is receiving significant benefits after termination of the contractual relationship because of new customers brought in by the agent,
- the agent, due to termination of the contractual relationship, loses his right to remuneration on account of customers having been brought in by him,
- the payment of the indemnity is equitable when all circumstances of the case are taken into consideration.

The amount of indemnity may not exceed the average of annual remuneration or other payments received by the commercial agent over the last five years. If the contractual relationship has lasted less than five years, the indemnity shall be calculated on the average remuneration of the continuation of the activity.

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Agent cannot waive his right to goodwill indemnity in advance. Claims for goodwill indemnity shall be brought within one year following the termination of the contract.

## **Obligations of the Principal**

The primary obligation of the principal is the payment of the remuneration to the agent pursuant to the agency contract.

The principal is under the obligation to provide the documents related with the goods concerned such as pricing lists, certificates of warranty, advertisements etc.

Furthermore, the principal is obliged to inform the agent about the matters required for the fulfillment of the agency agreement. In addition, the principal should notify the agent that the business volume may be significantly lower than what the agent would

normally expect. If the principal breaches this obligation, it will constitute a reason for rightful termination.

### **Commissionaire Agents and Other Representatives**

In some cases, companies prefer not to appoint a commercial agent and instead they appoint a commissionaire agent. A commissionaire agent makes transactions with customers in its own name. Therefore, customers are not aware that the he is acting on behalf of the principal. In other words, commissionaire agent invoices the customer in its own name and remits the received amount to the principal. However, the commissionaire agent has a continuous relationship with the principle like the commercial agent. Pursuant article 103/1(a) of the TCC, commissionaire agents are subject to the law of commercial agents.

Representatives who make transactions on behalf of foreign companies that do not have a head office or branch in Turkey are also subject to the law of commercial agents. The main difference between such representatives and the commercial agent is that the commercial agent has a continuous contractual relationship with the principal whilst representatives mentioned in the article 103/1(b) have a temporary relationship with the principal.

## GURULKAN ÇAKIR AVUKATLIK ORTAKLIĞI

Polat İş Merkezi, Offices 28-29  
Mecidiyeköy 34387  
Istanbul, TURKEY

T +90 212 215 30 00  
M info@gurulkan.com  
W www.gurulkan.com



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