Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2013

Finding the Best Lawyer for You

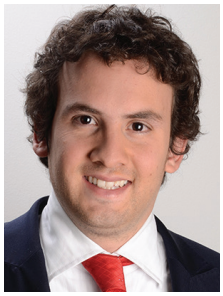
Helping Clients Find the Right Lawyer: Innovation in Client Service

Current Legal Topics:

North America • Europe, Middle East & Africa

Latin America & Caribbean • Asia Pacific

Juan David Alzate Peña



Guillermo León Ramírez Torres

The New Commercial Agency Contract for Goods Bill: Complying with the Requirements of the U.S.-Colombia Trade Promotion Agreement

The Commercial Agency Contract is regulated in Chapter V, Articles 1317 to 1331, of the Colombian Commerce Code "CCO" (Decree 410 of 1971).

The Commercial Agency Contract concept includes services and goods and is defined in Article 1317 of the above-mentioned Code, as follows: "Through the agency contract, one businessmen assumes in an independent and steady way, the obligation to promote or exploit business in a specific commercial branch and within a prefixed zone in the national territory, as the representative or agent of a domestic or foreign principal or as a manufacturer or distributor of one or more of the principal's products. The person assuming such an obligation is generally known as the agent."

On the other hand, the most important and critical aspects of the actual Commercial Agency Contract are related to the (i) justified and (ii) unjustified termination of the contract, which are regulated in the Articles 1324, 1325 and 1327 of the CCO.

According to these rules, in the first event, the principal will have to pay to the agent for each year of the contract period, an amount equal to one-twelfth of the average commission, royalty or profit, received by the agent during the previous three years of the contract (or the average based of all the remuneration if the contract is shorter). This payment has been named by the Colombian Doctrine as "Cesantía Comercial."

In the second event, the agent, based on his efforts to improve and upgrade the market position and goodwill of the brand, products and services subject of the contract, has the right to demand, in addition to the sum aforementioned, compensation from the principal. In this case, to determine the amount of compensation, it's necessary to consider the duration, importance and volume of the business and commercial activities held by the agent during the contractual relationship.

Notwithstanding, it is important to mention that the same rule applies when the agent finishes the contract with justification attributable to the businessmen, and that the agent loses his right to demand compensation from the principal if the contract terminates due his fault.[1]

The Precedents of the Supreme Court of Justice regarding the Commercial Agency Contract

In Colombia, during the 1980s and early 1990s, the Commercial Agency Contract was subject to an intense debate in the High Courts, especially regarding the subject of the existence of Commercial Agency Contract on parallel with a Distribution Contract.

In the 1980s, the Colombian industry was deeply concerned by the possibility that their distributors could come back to them claiming the existence of a Commercial Agency Contract and thus the payment of the

Juan David Alzate Peña focuses his practice on civil law, commercial contracts, real estate transactions, business and corporate law.

Guillermo León Ramírez Torres focuses his practice on civil law, commercial law and bankruptcy procedures.

Pinilla, Gonzalez & Prieto Abogados
Av. Street 72 # 6-30, 14 Floor
Bogotá - Colombia
(+57 1) 210 1000 Phone
(+57 1) 211 9465 Fax
jalzate@pgplegal.com
gramirez@pgplegal.com
www.pgplegal.com

"Cesantía Comercial." The fears of the Colombian industry seemed to materialize when the Antioquia´s Superior Tribunal condemned Icopinturas S.A. to pay to a distributor the "Cesantía Comercial,"considering that the latter had contributed to open new markets for the products of the former. This sentence was revoked later by the Supreme Court of Justice who considered that the agent was buying the goods for himself with the intention of reselling them and thus, he was promoting his own business. This doctrine was ratified by the Supreme Court of Justice in the *Cacharrería Mundial vs. Jorge Ivan Merisalde* case, which became a leading case for a line of precedents that was ratified in the *Distrimora Ltda. vs. Shell* case of 1995 and later on, in the sentences enacted by the Bogota, Boyacá and Tolima's Superiors Tribunals as a result of the lawsuits promoted by several distributors[2] against *Productos Alimenticios Doria S.A.* in 2009.

The "Icopinturas" case caused a huge uproar in the national Doctrine, which considered that the Supreme Court Justice was protecting the interest of the Colombian Industry and their theory was oriented to forbid the application of the Commercial Agency Contract. As detractors of the "Icopinturas" case, Professors Jaime Arrubla Paucar and William Namén Vargas sustained that the existence of a Distribution Contract and buying for reselling did not exclude the existence of a Commercial Agency Contract considering that the agent was responsible for publicity and could only sell in the designated territory and within the prices fixed by the principals.

In 2010, both professors found themselves as members of the Supreme Court of Justice and by 2011, they were faced with a new case of Commercial Agency Contract. In October 19, 2011, the Supreme Court of Justice changed the precedent line that came from 1980 and condemned Hewlett Packard to pay his distributor the "Cesantía Comercial" considering that the Commercial Agency Contract could co-exist with a Distribution Contract.

The Commercial Agency Contract and the U.S.–Colombia Trade Promotion Agreement

On November 22, 2006, the Colombian and United States of America governments finished negotiations of the terms for the Trade Promotion Agreement (TPA) between both countries. One of the commitments acquired by the Colombian Government was to promote before the Congress, the modification of the Commerce Code regarding the Commercial Agency Contract.

The current regulation of the Commercial Agency Contract is considered an obstacle for the American goods producers due to the fact that the commercial relationships they should establish to distribute their products within the Colombian territory, could be declared as Commercial Agency Contracts, granting the distributors the rights of an agent upon the termination of the contract.

In order to prevent the Commercial Agency Contract to be a barrier for the implementation of the TPA, the Colombian Government committed to reform the aforementioned contract:

- To eliminate the "Cesantía Commercial" that was mandatory and could not be excluded by pact between the parties.
- To eliminate the presumption of exclusivity of territory in order to allow the existence of several distributors (Article 1318 CCO).
- To modify the criteria used to calculate the compensation owed to the agent whenever the contract is terminated without cause.

The New Commercial Agency Contract for Goods

On April 29, 2013, the Colombian House of Representatives, in Plenary Session, approved the Bill Number 146 of 2012, which creates the Commercial Agency Contract for Goods.

This new type of contract has the following scope, characteristics and contributions:

(i) Restricts its application solely to the promotion, exploitation, fabrication and distribution of goods and software.

(ii) Maintains the actual Commercial Agency Contract to services and other types of commercial activities that don't involve goods or software.

(iii) Excludes the applications of the Articles 1318, 1324, 1325 and 1327 of the CCO. However, the other CCO's norms continue to be fully applicable.

(iv) Eliminates the existing compensation consequences for termination of the contract, transferring this kind of responsibility to the General Rules, which are less onerous for the principal.

(v) Prohibits its applications to the current contracts executed and performed under the CCO's regulations.

Finally, it is important to mention and clarify that the Bill needs to pass the next two debates in the Colombian Senate to become an Act; however, we consider its approval in its current version very probable.[3]

1 Based on Article 1324 of the CCO.

2 Zuluaga y Soto S.A., Distrisagi Ltda. and Sierra Pineda y Cía. S. en C., respectively.

3 *This article was submitted for publication on May 28, 2013. As of that date, the Colombian Congress had not yet approved the final text of the Bill Number 146 of 2012.*