

# GERMAN COMMERCIAL CODE

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## **Article 84 Definition of a Commercial Agent**

(1) A commercial agent is a person who, as an independent person engaged in business, is regularly entrusted to procure business for another person or entity engaged in business (principal) or to conclude business in his name. A person is independent if he is basically free to organise his activities and to determine his working schedule.

(2) A person who, without being independent within the meaning of subsection 1, is regularly entrusted to procure business for a principal or to conclude business in his name, is deemed to be an employee.

(3) The principal may also be a commercial agent.

## **Article 85 Written Contract**

Either party may require that the contents of the contract as well as any subsequent amendments thereto be recorded in a document signed by the other party. This right may not be excluded.

## **Article 86 Duties of the Commercial Agent**

(1) The commercial agent shall endeavour to procure or conclude business; in doing so he shall safeguard interests.

(2) He shall communicate the necessary information to the principal, and, in particular, notify him without undue delay of all business procured and concluded.

(3) He shall attend to his duties with the care of a prudent merchant.

(4) Agreements deviating from subsections 1 and 2 above shall be invalid.

## **Article 86 a Duties of the Principal**

(1) The principal shall place at the commercial agent's disposal the documentation necessary in the performance of his duties, such as samples, drawing, price-lists, advertising material and terms and conditions of business.

(2) The principal shall give the commercial agent the necessary information. He shall notify the agent without undue delay of the acceptance or rejection of a business procured by the agent or concluded by him outside the scope of his authority to represent the principal, or of the non-performance of a business procured or concluded by the agent. The principal shall notify him without undue delay if it is probable that he can or will conclude business only in a significantly smaller volume

than the commercial agent could expect under normal circumstances.

(3) Agreements deviating from subsections 1 and 2 above shall be invalid.

### **Article 86 b** **Doubtful-Debt Commission**

(1) If a commercial agent guarantees the fulfilment of the obligation arising out of a business, he may claim a special remuneration (delcredere commission). This right may not be excluded in advance. This responsibility may only be assumed for a specific business transaction or for business transaction with specific third parties which the agent procure or concludes. This undertaking must be in writing.

(2) The claim to delcredere commission arises with the conclusion of the business transaction.

(3) Subsection 1 does not apply, if the principal or third party has his place of business or, if none, his residence, abroad. Nor does it apply to business transactions for the conclusion and performance of which the commercial agent has unlimited authority.

### **Article 87** **Business for which Commission is Payable**

(1) The commercial agent is entitled to commission for all business transactions concluded during the contractual relationship which are attributable to his activities or concluded with third parties whom he had acquired as customers for business transactions of the same kind. He has no claim for commission, if, and, to the extent that, pursuant to subsection 3 the commission is due to the preceding commercial agent.

(2) If a specific district or specific group of customers has been assigned to the commercial agent, he is entitled to commission even for business transactions concluded without his involvement with persons in his district or from his group of customers during the contractual relationship. This does not apply if and to the extent that pursuant to subsection 3 the commission is due to the preceding commercial agent.

(3) For a business concluded after termination of the contractual relationship the commercial agent is only entitled to commission if

1. he has procured or introduced and prepared the transaction in such a way that its conclusion is predominantly attributable to the performance of his duties and it is concluded within a reasonable period after termination of the contractual relationship, or
2. the third party's offer to conclude a business in respect of which the commercial agent has a claim for commission pursuant to subsection 1, sentence 1 or subsection 2, sentence 1 is received by the commercial agent or the principal before termination of the contractual relationship.

The successor commercial agent shall be entitled to a proportion of the commission provided for under sentence 1 above, if, by virtue of the particular circumstances, an apportionment of the commission is equitable.

(4) In addition to the claim for commission for concluded business transactions the commercial agent is entitled to a debt collection commission for amounts collected by him in accordance with instructions.

**Article 87 a**  
**When Commission Falls Due**

- (1) The commercial agent is entitled to commission as soon as and insofar as the principal has completed the transaction. An agreement to the contrary may be made; however, upon completion of the business transaction by the principal, the commercial agent is entitled to a reasonable advance due not later than the last day of the following month. Irrespective of an agreement to the contrary the commercial agent is, nevertheless, entitled to commission as soon as and insofar as the third party has completed the transaction.
- (2) Where it is clearly established that the third party will not perform, the claim for commission is lost; amounts already received shall be refunded.
- (3) The commercial agent is also entitled to commission where it is clearly established that the principal does not carry out the business transaction in whole or in part or as agreed. Such claim shall not arise, if and to the extent that the principal's non-performance is due to circumstances for which the principal is not responsible.
- (4) The claim for commission falls due on the last day of the month in which the claim is to be accounted for pursuant to Sect. 87c, subsection 1.
- (5) Agreements deviating from the provision contained in the first grammatical clause of section 2 and from sections 3 and 4 to the detriment of the commercial agent are invalid.

**Article 87 b**  
**Amount of Commission**

- (1) If the rate of commission is not determined, the customary rate is deemed to have been agreed.
- (2) The commission is to be calculated on the consideration payable by the third party or the principal. Discounts for cash payments are not to be deducted; the same applies to sales tax such as freight, packaging, customs duty and taxes, unless the incidental costs are charged separately to the third party. Value added tax shown separately on an invoice solely because of tax provisions is not considered to be charged separately.
- (3) In case of fixed-term contracts for transfer of use and enjoyment, the commission shall be calculated on the consideration for the duration of the contract. In case of non-fixed-term contracts, a commission shall be calculated on the consideration up to the point in time at which the third party can first give notice of termination; if the contract continues, the commercial agent is entitled to further commission calculated accordingly.

**Article 87 c**  
**Accounting for Commission**

- (1) The principal must calculate the commission to which the commercial agent is entitled on a monthly basis at the most. The accounting shall be carried out without undue delay, at the latest by the end of the following month.
- (2) When accounting takes place, the commercial agent may request production of an extract from the books in respect of all business transactions for which he is entitled to commission in accordance with sect. 87.
- (3) In addition, the commercial agent may request information concerning any matter which is material to the claim for commission, its due date and calculation.

(4) If the extract from the books is refused, or, if reasonable doubt exists as to the correctness or completeness of the accounting or of the extract from the books, the commercial agent may require that, at the principal's option, either he or an auditor or certified accountant of his choice shall be entitled to inspect the business books or other documents so far as is necessary to establish the correctness or completeness of the accounting or of the extract from the books.

(5) These rights of the commercial agent may not be excluded or restricted.

#### **Article 87 d Reimbursement of Expenditure**

The commercial agent may only require reimbursement of expenditure incurred in the ordinary course of business if this is customary within the trade.

#### **Article 88 Limitation of Claims**

The statute of limitations for the assertion of claims arising from the contractual relationship shall be four years, beginning from the completion of the year in which they fall due.

#### **Article 88 a Right of Retention**

(1) The commercial agent cannot waive his statutory rights of retention in advance.

(2) After termination of the contractual relationship, the commercial agent has, under the general law, a right of retention over materials placed at his disposal (Sect. 86 a subsection 1) only in respect of claims for commission which have fallen due and for reimbursement of expenditure.

#### **Article 89 Termination of the Contract**

(1) Where the contractual relationship has been entered into for an indefinite period, it may be terminated during the first year of the contract by giving one-month notice, during the second year of the contract by two-month notice, and during the third to the fifth year of the contract by three-month notice. After the contract has run for five years, it may be terminated by giving six-month notice. Notice may only be given to the end of a calendar month, unless the parties have agreed otherwise.

(2) The periods of notice specified in subsection 1, sentences 1 and 2, may be extended by agreement; the period of notice to be given by the principal may not be shorter than that to be given by the agent. Where it has been agreed that a shorter period of notice is to be given by the principal than by the agent, the period of notice to be given by the agent shall nevertheless be deemed also to be the period of notice to be given by the principal.

(3) A contract entered into for a fixed term which is continued by both parties after expiration of such fixed term shall be deemed to have been extended for an indefinite period. The total duration of the contractual relationship shall be taken as a basis for the purposes of determining the periods of notice pursuant to subsection 1, sentences 1 and 2.

**Article 89 a**  
**Termination without Notice**

(1) The contractual relationship can be terminated without notice by either party on significant grounds. This right may not be excluded or restricted.

(2) Where such termination is caused by conduct for which the other party is responsible, the latter must pay damages for loss resulting from termination of the contractual relationship.

**Article 89 b**  
**Claim for Compensation**

(1) After termination of the contractual relationship the commercial agent may demand from the principal reasonable compensation if and insofar as:

1. The Principal derives also after contract termination substantial benefits from the business with new customers brought by the agent and
2. the payment of a compensation is equitable having regard to all circumstances of the case and, in particular, the commission cost by the agent on the business transacted with such customers.

A customer can be said to have been recruited if the commercial agent has so significantly increased business relations with a customer that this corresponds in commercial terms to the recruitment of a new customer.

(2) Such compensation shall amount to not more than one year's commission or other annual remuneration calculated on the basis of the average of the last five years' activities of the commercial agent; where the contractual relationship has been of shorter duration, the average during the period of activity is to be taken as the basis.

(3) Such claim shall not arise, if

1. the commercial agent has terminated the contractual relationship, unless the conduct of the principal has given good cause for such termination, or, by reason of age or illness, the commercial agent could not reasonably be expected to continue his activity, or
2. the principal has terminated to contractual relationship for good cause justifying immediate termination by reason of fault on the part of the commercial agent, or
3. by agreement between the principal and the commercial agent a third party assumes the contractual rights and liabilities of the commercial agent in his stead; such agreement may not be concluded before termination of the contractual relationship.

(4) This claim may not be excluded in advance. It must be asserted within one year of termination of the contractual relationship.

(5) Subsections 1, 3 and 4 apply to insurance agents with the provision that the concept of business connections with new customers recruited by the commercial agent is replaced by the concept of procurement of new insurance contracts by the insurance agent, and an insurance contract can be said to have been procured if the insurance agent has so significantly extended an existing insurance contract as to amount in commercial terms to the procurement of a new insurance contract. Notwithstanding subsection 2, the compensation payable to the insurance agent shall not amount to more than three years' commission or other annual remuneration. The provisions of sentences 1 and 2 shall apply mutatis mutandis to savings and loan associations agents.

## **Article 90 Business Secrets**

The commercial agent shall not exploit or divulge to others business secrets entrusted to him or which have become known to him through his activities for the principal, even after termination of the contractual relationship, insofar as this would be contrary to the business ethics of a prudent businessman taking all circumstances into account.

### **Article 90 a Non-Competition Clause**

(1) An agreement which restricts the business activities of the commercial agent after termination of the contractual relationship (non-competition-clause) must be in writing and a document containing the agreed terms signed by the principal has to be supplied to the commercial agent. The agreement may not exceed two years from termination of the contractual relationship; it may extend only to the geographical area or group of customers allocated to the commercial agent and to the kind of goods in respect of which the agent is to procure or conclude business for the principal. The principal must pay to the commercial agent reasonable compensation for the duration of the restriction on competition.

(2) The principal may waive the restriction on competition at any time in writing before the end of the contractual relationship; this will result upon the expiration of six months from such a declaration in his being relieved of the obligation to pay compensation. If the principal terminates the contractual relationship for good cause by reason of fault on the part of the commercial agent, the commercial agent has no right to compensation.

(3) If the commercial agent terminates the contractual relationship for good cause by reason of fault on the part of the principal, he may free himself of the restriction upon competition by written declaration within one month of termination.

(4) Alternative agreements disadvantageous to the commercial agent may not be made.

## **Article 91 The Commercial Agent's Authority**

(1) Sect. 55 also applies to a commercial agent who has been given the authority to conclude business by a principal who is not a merchant.

(2) Even if a commercial agent is not authorised to conclude business transactions, he is deemed to be authorised to receive notices of defects in goods, declarations that goods are being made available and similar declarations whereby a third party asserts or reserves his rights arising from an inadequate contractual performance; he may assert the rights of the principal to preserve evidence. A limitation of these rights may only be asserted against a third party, if he knew or should have known thereof.

### **Article 91 a Lack of Authority**

(1) If a commercial agent who has only the authority to negotiate business, has concluded a business in the principal's name, and the third party did not know of the lack of authority, the principal is deemed to have given consent to the business unless he repudiates it vis-à-vis the third party without delay after being informed by

the commercial agent or third party of its conclusion and main contents.

(2) The same applies if a commercial agent who has the authority to conclude business, has concluded a transaction in the principal's name which he was not authorised to conclude.

## **Article 92**

### **Insurance Agent and Savings and Loan Association Agent**

(1) An insurance agent is a person who is entrusted to procure or conclude insurance contracts as a commercial agent.

(2) The contractual relationship between the insurance agent and the insurer is governed by the provisions applicable to the contractual relationship between commercial agent and principal except for subsection 3 and 4.

(3) Notwithstanding sect. 87, subsection 1, sentence 1 an insurance agent is only entitled to commission for business which can be attributed to the performance of his duties. Sect. 87, subsection 2 does not apply to insurance agents.

(5) The insurance agent is entitled to commission (Sect. 87a, subsection 1) as soon as the insured has paid the premium on which the commission is calculated pursuant to the contractual relationship.

(5) The provisions of subsections 1 to 4 apply mutatis mutandis to savings and loan association agents.

## **Article 92 a**

### **Minimum Standards for Working Conditions**

(1) As regard the contractual relationship of a commercial agent who by contract may not represent other principals or for whom, due to the manner and scope of activity required of him this is impossible, the Federal Minister of Justice by agreement with the Federal Minister of Economics and Labour - after hearing associations of agents and principals - may prescribe, by regulations not requiring the consent of the Federal Council, the minimum contractual duties required of a principal to ensure that the necessary social and economic needs of such commercial agents or of a particular group of them are satisfied. The duties so prescribed may not be excluded or limited by contract.

(2) Subsection 1 also applies to the contractual relationship of an insurance agent who by reason of one or more agreements has the authority to negotiate and conclude business for several insurers belonging to a group of insurance concerns or to a joint organisation of such concerns, if termination of the contractual relationship with one insurer would, in case of doubt, also result in termination of the contractual relationship with the other insurers. In this case it may also be determined, by regulations not requiring the consent of the Federal Council, whether the duties as prescribed are owed by all insurers jointly and severally or proportionately or by only one insurer, and how compensation should be allocated between them.

## **Article 92 b**

### **Part-time Commercial Agents**

(1) Sect. 89 and sect. 89b do not apply to part-time commercial agents. If the contractual relationship has been entered into for an indefinite period it may be terminated by giving one-month notice to become effective at the end of a calendar month; if a different notice period has been agreed, it must be the same for both parties. The right to claim a reasonable advance under sect. 87a, subsection 1,

sentence 2 can be excluded.

(2) Subsection 1 may only be relied upon by a principal who has expressly entrusted the commercial agent with the negotiation or conclusion of business transactions as a part-time commercial agent.

(3) Whether the commercial agent is merely a part-time commercial agent is to be determined by reference to the generally accepted view.

(4) The provisions of subsections 1 to 3 apply mutatis mutandis to insurance agents and savings and loan association agents.

#### **Article 92 c**

#### **Commercial Agents Outside the European Union; Shipping Agents**

(1) If the activity of the commercial agent under his contract with the principal is not to be carried out within the territory of the European Union or the other contracting states of the convention on the European trading area, then all provisions of this chapter may be varied by agreement.

(2) The same applies if the commercial agent is entrusted with the procurement or the conclusion of business whose purpose is the chartering, making ready or fitting out of ships or the booking of passages on ships.

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