



The effectiveness of minimum turnover clauses in agency agreements.

Is the non attainment a sufficient reason for
immediate termination and/or for the exclusion
of goodwill indemnity?

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Definition

Minimum Turnover (Principal friendly)

Minimum Orders (Balanced)

(Article 5.4 model contract)

The Agent shall transmit during each calendar year, orders giving rise to sales carried out by the Principal during such year for not less than the amount specified in Annex C-3 («Minimum Turnover»). For the years following those for which **the Minimum Turnover** is indicated in Annex C-3, **the Principal shall determine the Minimum Turnover for each year**, taking into account the market conditions and the development of sales within his network.

The Agent shall transmit during each calendar year, orders for not less than the amount specified in Annex C-3 («**Minimum Orders**»). For the years following those for which the Minimum Orders are indicated in Annex C-3, **the parties shall determine jointly and in good faith** the Minimum Orders within the end of the month preceding the year at issue. If nothing has been agreed such minimum amount will be automatically increased by 10% with respect to the minimum of the previous year.



Principal friendly – Quantification Minimum turnover - (Annex C-3 model contract)

The Agent undertakes, during each year, to transmit orders giving rise to sales carried out by the Principal for not less than:

- ◆ (amount in money)
- ◆ (amount in Products)
- ◆ % of the target agreed upon in accordance with Article 5.1

Balanced - Quantification Minimum Orders – (Annex C-3 model contract)

The Agent undertakes, during each year, to transmit orders for not less than:

- ◆ (amount in money)
- ◆ (amount in Products)
- ◆ % of the target agreed upon in accordance with Article 5.1



Consequences of non-attainment

Principal friendly and **Balanced**

(Article 5.5 model contract)

If at the end of the calendar year the Minimum Turnover / Minimum Orders applicable to such year is not attained, the Principal shall be entitled, at his choice:

- (a) **to terminate this contract** under Article 18; or
- (b) to cancel the Agent's exclusivity; or
- (c) to reduce the extension of the Territory, by excluding the territories where the Agent has made less promotion.



Exercise of the rights - Exception

Balanced

(Article 5.6 and 5.7. model contract)

This right under Article 5.5 must be exercised by the Principal **in writing not later than two months after the end of the year** during which the **Minimum Orders** have not been attained

Article 5.5 is not applicable to the extent that the Agent proves that the non-attainment of the **Minimum Orders** are due to **objective reasons** which he could **not foresee** and for which he is **not responsible**.



Circumstances justifying earlier contract termination

Principal friendly and **Balanced**

(Article 18.1. model contract)

Each party may terminate this contract **with immediate effect**, without respecting a period of notice, by simple communication served in conformity with Article 19, in case of:

- (a) **a substantial breach** by the other party of the obligations arising out of this contract, as defined in Article 18.2 hereunder, or
- (b) exceptional circumstances justifying the earlier termination, as defined in Article 18.4 hereunder, or
- (c) change of control, ownership and of management, as specified in Article 18.5 hereunder.



Substantial breach

Principal friendly and **Balanced**

(Article 18.2 and 18.3 model contract)

Any failure by a party to carry out all or part of his contractual obligations resulting in such detriment to the other party as to **substantially deprive him** of what he is entitled to expect under the contract, **shall be considered as a substantial breach** for the purpose of Article 18.1 above.

The parties hereby **agree to consider** in principle, unless the contrary is proved, **as a substantial breach** of the contract the **violation of the provisions under Article 5** (...). Moreover, the violation of any other contractual obligation may be considered as a substantial breach, if such violation is repeated notwithstanding a request by the other party to fulfil its contract duties.



Unjustified earlier termination – Damages

Principal friendly and **Balanced**

(Article 18.6 model contract)

Should a party terminate the contract on the basis of this Article, by invoking circumstances which **thereafter appear not to be of such gravity as to justify the earlier termination**, the termination will **nevertheless be effective**, but the other party will be entitled to **recover possible damages** suffered as a consequence of the unjustified earlier termination. Such damages are presumed to be equal to the average profits the terminated party would have made with the performance of the contract during the period the contract would have lasted in case of normal termination, based on the turnover of the preceding year. However, the damaged party may prove that the actual damage is higher and, respectively, the party having terminated the contract may prove that the actual damage is lower. **(The above damages are in addition to the indemnity, which may be due under Article 21 => goodwill indemnity).**