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Insights



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**Applicable Law to Distribution Agreements
in the different European countries**

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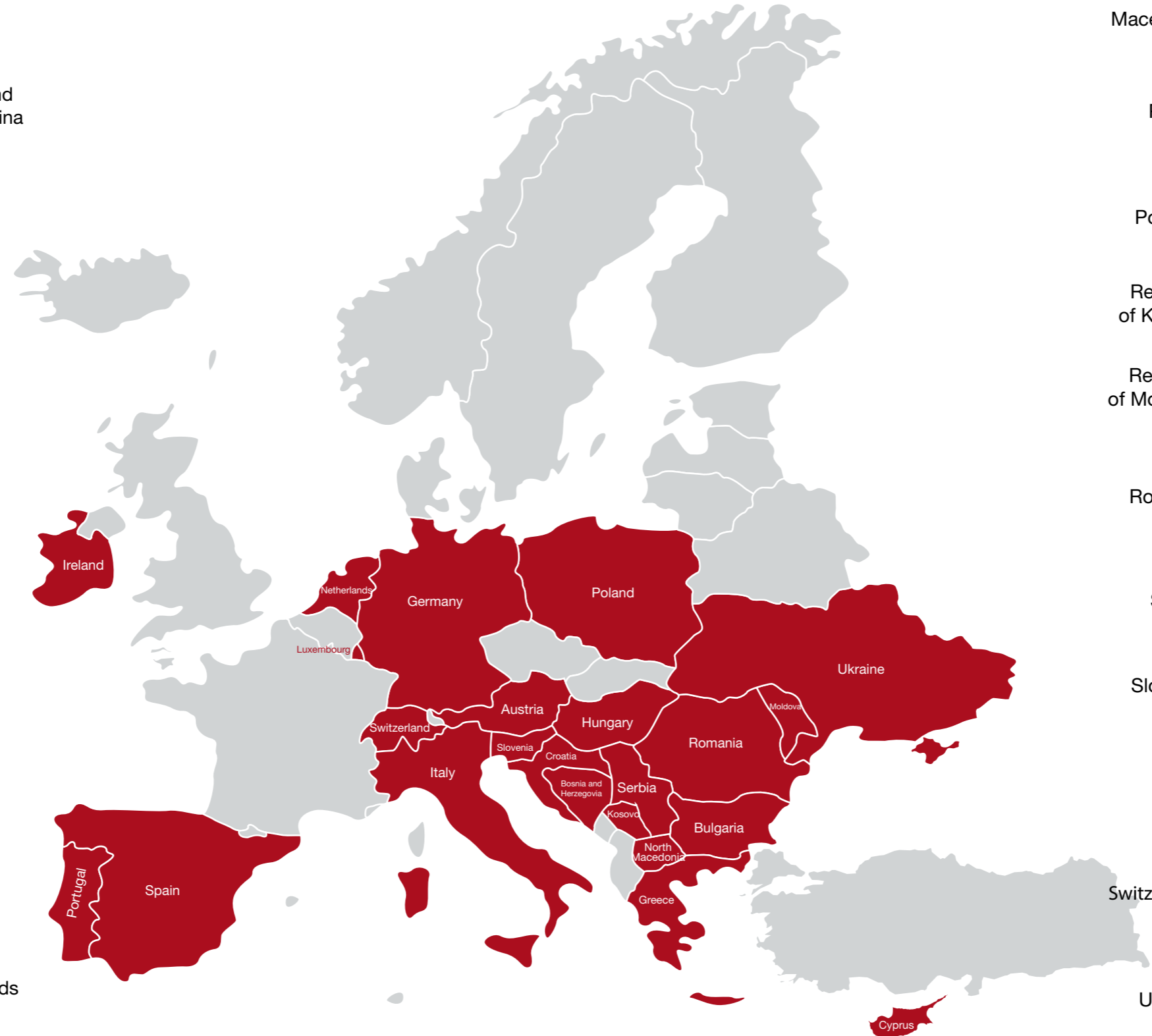


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Which European countries apply regulations on distribution agreements?

No	A foreign law can govern the distribution contract, although certain mandatory provisions of the Agency Act and the Entrepreneurs Act still apply to Austrian distributors.	Austria	North Macedonia	The distribution contracts must comply with the Law on Obligations and specific provisions included in the Law on Protection of Competition.	No
No	The distribution contract is not explicitly regulated in the Law on Obligations, but it has to be in accordance with other sources of law in the domestic legal system.	Bosnia and Herzegovina	Poland	The distribution contracts are governed by the fundamental principle of the contractual freedom and must be compliant with the domestic competition law and the EU and international law.	No
No	Distribution agreements concerning the legal relationship of further sale of goods from the distributor to its contracting parties is regulated by the rules on EU and national competition law.	Bulgaria	Portugal	The distribution agreements are no specifically regulated but they are protected by the Portuguese Competition Law and indirectly regulated by the Agency Law.	No
No	The provisions of the Civil Obligations Act apply to the relationship between a supplier and its distributor.	Croatia	Republic of Kosovo	The private international law is being drafted and the contracting parties are free to choose the applicable law by contract.	No
No	A distributorship agreement between a supplier and its distributor is governed by the principles of Contract Law, which reflect common law principles.	Cyprus	Republic of Moldova	Distribution contracts are briefly regulated since March 2019 under a separate Section of the Civil Code pertaining to the Book of Obligations.	Yes
No	German law does not provide for regulations concerning a distributor and the Courts therefore apply the provisions on agency or sales agency agreements.	Germany	Romania	There is no specific law or legal provision on distribution agreements, rather, the general terms of the Civil Code on the sale and purchase of goods apply to distribution agreements.	No
No	Distribution agreements are governed by the fundamental principle of the contractual freedom, although Greek Courts may apply same rule as for commercial agency agreements.	Greece	Serbia	There are no obstacles for the contracting parties to determine which law will be applicable on issues arising from their contractual relationship.	No
Yes	The Civil Code includes domestic rules for distribution agreements, which should also be compliant with specific rules for regulated sectors.	Hungary	Slovenia	Slovenian case law provides that a distribution contract is a mixed contract between an agency and sales contract.	No
No	EU Law and Irish Competition Law applies to Distribution Agreements.	Ireland	Spain	The distribution agreements may adopt different forms and legal structures and they are mainly subject to the principle of contract freedom regulated in the Civil Code.	No
No	Although the parties can decide how to regulate their distribution relationship, there are some fundamental principles, according to the Courts, that the parties cannot derogate, such as the <i>bona fides</i> principle.	Italy	Switzerland	The rules regarding distributorship relationships derive from general principles of Swiss contract law and sometimes the Code of Obligations governing agency agreement is applied by analogy.	No
No	While form free distribution agreements are subject to the general law of contracts, certain types of distribution agreements may also need to comply with European competition laws.	Netherlands	Ukraine	The Ukrainian legislation does not specifically regulate distribution agreements but some issues are regulated for several sectors.	No



AUSTRIA



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A foreign law can govern the distribution contract, although certain mandatory provisions of the Agency Act and the Entrepreneurs Act still apply to Austrian distributors carrying out their distribution activities in the country.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Forms of (vertical) distribution contracts (e.g. exclusive distribution agreements or franchise agreements), are not regulated in separate legal acts. Such contracts are mainly governed by the laws of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) and the Entrepreneurs Act (*Unternehmensgesetzbuch*).

However, under certain circumstances and based on a case-to-case basis, specific regulations of the Act on Commercial Agents (*Handelsvertretergesetz*) (the “Agency Act”) can apply per analogiam to distribution agreements, in particular, the right to claim compensation upon termination (in German: *Ausgleichsanspruch*).

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from

the one applicable to the distributor territory with a waiver of the legislation of the latter?

In general, a law other than Austrian law can govern the distribution contract. However, certain mandatory provisions of the Agency Act and the Entrepreneurs Act still apply to (Austrian) distributors carrying out their distribution activities in Austria (such as the claim to a compensation payment upon termination). Thus, such provision cannot be waived or amended in advance by way of contract.

In addition, the Entrepreneurs Act contains a mandatory provision regarding the reimbursement of the distributor for contractually required investments. Those are investments which the distributor was required to make because of the contractual obligations (e.g. investments into the show room to match the branding requirements of the principal or advertisement investments).

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Yes, according to case law, the distributor has the right to receive compensation upon termination in accordance with the Agency Act under the following circumstances:

- the distributor is integrated into the distribution organization of the principal to such extent that the distributor’s economical position and its contractual obligations are comparable to the position of an agent; and
- the distributor must hand over the client base to the principal upon termination of the contract.

The distributor has an (economical) position like an agent if the distributor (i) has a minimum-sales quota, (ii) is required to maintain a certain distribution structure comprised of sales and maintenance operations, including storage for new and spare parts, (iii) has been allocated with a specific contractual territory (even if such territory is not exclusive), (iv) must participate in the launching of new products, (v) is subject to a non-compete clause and (vi) must report to the principal and allow the principal to review its books and to access the sales facilities.

However, due to the application of the respective provision of the Agency Act, the distributor has no right to claim compensation if -among others- (i) the distributor terminated the contract (prematurely) without cause or (ii) the principal terminated the contract with the distributor for cause.

Save for a more favourable contractual regulation, the amount of the compensation

upon termination shall amount to at least a one-year average sales margin of the distributor. The amount is calculated on the annual margins of the five preceding years. (if the contract lasted shorter than five years, the average is calculated on the annual margins of the entire term of the contract). In addition to the claim for compensation upon termination, the distributor has the right to be reimbursed for the required investments made into the distribution structure (in German: *Investitionsersatz*).

The legal basis is § 454 of the Entrepreneurs Act. This provision allows the distributor to claim from the principal the required investments made by the distributor in accordance with the distribution contract, provided such investments neither have been written off nor cannot be reasonably utilized by the distributor.

The distributor must claim the reimbursement within one year of the termination of the distribution agreement. The right to reimbursement cannot be excluded in advance in the distribution contract. The right to claim compensation upon termination and the right to reimbursement for the mandatory investments are not mutually exclusive but can be both claimed by the distributor upon termination of the distribution contract.

4 Can the distributor validly waive such compensation in the contract itself?

No, the distributor cannot waive the right to compensation in advance in the contract; once the claim arises for the distributor, the same could waive the claim. ■

BOSNIA AND HERZEGOVINA



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The distribution contract is not explicitly regulated in the domestic legal system, nor the rights and obligations of the contracting parties, but it is covered by general provisions of the Law on Obligations, contractual practice and business customs.”

The only thing which is strictly regulated is the admissibility of this type of distribution contract from the point of competition law. However, in many legal acts, primarily laws, the distribution contract is mentioned as a type of contractual relationship between business entities.

The organization of the sale of goods is the reason for this type of contact in the law of Bosnia and Herzegovina, so it can be defined as an agreement in which a distributor has the right to sell the seller's goods, while the seller is obliged to supply the distributor with goods.

Further, just like most of the other countries, there is a rich general contractual practice, rules created by participants in business activities, principles and case law which regulate some aspects of this contract.

The Law on Obligations also stipulates that any agreed trade usages and mutually developed practices shall apply to obligations between traders.

In general, the parties are free to regulate their contractual relationship that must be in compliance with the Constitution, mandatory laws and the morals of the society.

Generally, the distribution agreement consists of the identification of the parties, specification of the goods that are subject of distribution, delivery dates, the territory where the distributor can sell goods, the fact whether the contract is an exclusive agreement or the distributor is only one of multiple distributors in the region, termination, terms and conditions of sale, effective date and duration, possible subagents, payments, responsibility and rights of both parties, indemnification, limitation of liability

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Generally speaking, a distribution contract represents a legal agreement concluded between a supplier and a distributor of goods.

The distributor agrees to buy products from the supplier and sells them to clients within certain geographical areas. In consideration of the foregoing, the distribution contract is not explicitly regulated through the Law on Obligations as the most important legal source that governs contracts in Bosnia and Herzegovina.

Domestic legal sources in Bosnia and Herzegovina do not regulate the content of this contract, *essentialia negotii*, nor the rights and obligations of the contracting parties.



and general provisions like force majeure, governing law, disputes, severability, etc.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Commonly, upon the conclusion of the distribution contract, the parties should agree on the governing law, especially when there is an international element in the agreement.

So the parties agree that for all purposes, the Agreement shall be governed and construed in accordance with the substantive laws of the country chosen. The contractual parties have the choice to select which jurisdiction shall be applied to the individual distribution agreement.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

As already mentioned, there are no specific rules regarding distribution contracts and the issue of compensation in case of a breach of obligations under this kind of agreement.

Nevertheless, the distribution contract must be in accordance with the imperative norms of the legal system, i.e., it must not be contrary to coercive regulations, public order or good business practices. The distributor is entitled to be compensated upon the termination of the term of his distributions right in accordance with general rules on compensation prescribed by the Law on Obligations.

In other words, when the other contractual party does not fulfill the obligation or is late with its fulfillment, the distributor, inter alia, has the right to demand compensation for the damage suffered as a result.

The parties may even extend the liability to a case for which they are not otherwise liable. When it comes to applicable compensation, the distributor is entitled to compensation for ordinary damages and lost profits, which the other party had to foresee at the time of concluding the contract as possible consequences of the breach of a contract, and given the facts that were known or must have been known to him at the time of the conclusion.

4 Can the distributor validly waive such compensation in the contract itself?

The liability of the supplier for intent or gross negligence may not be excluded in advance by contract. The provision of the distribution contract which determines the maximum amount of compensation is valid if the amount determined is not in obvious disproportion to the damage caused and if nothing else is determined by law.

In case of limitation of the amount of compensation, the distributor has the right to full compensation if the impossibility of fulfilling the supplier's obligation is caused intentionally or by the gross negligence of the supplier. ■

BULGARIA



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There is no explicit provision on distribution agreements neither in the Obligations and Contracts Act, nor in the Commerce Act, and they would represent a commercial sale within the meaning of Article 318 and the following provisions of the Commerce Act.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Despite the fact that there is no explicit provision on distribution agreements neither in the Obligations and Contracts Act, nor in the Commerce Act, within the context of a distribution agreement the sale of goods from the seller/manufacturer to the distributor would represent a commercial sale within the meaning of Article 318 and the following provisions of the Commerce Act.

Furthermore, distribution agreements concerning the legal relationship of further sale of goods from the distributor to its contracting parties down the distribution chain is regulated by the rules on EU and national competition law.

Given the sending and receiving of multiple orders over a long period of time in business relationships, the shipping of goods, the questions of shifting the risk and the

ownership rights, can be agreed verbally, nevertheless, the practice shows that most distribution agreements are entered into by means of a framework agreement. The framework agreements do not enjoy a special legislative regulation under Bulgarian law.

Specific requirements might be applicable in relation to distribution agreements in regulated sectors (e.g. energy, food, pharmaceuticals, etc) which shall be also considered by the respective business sector.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

There is no special domestic choice-of-law provision for distribution agreements under the Bulgarian Private International

CROATIA



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Distribution contracts are not specially regulated in the domestic legal system, so the provisions of the Civil Obligations Act apply to the relationship between a supplier and its distributor and the Act on Protection of Market Competition refers to conditions and restrictions on vertical agreements.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Generally, a distribution contract is not specially regulated in the legal system of the Republic of Croatia, so the provisions of the Civil Obligations Act (Official Gazette 35/05, 41/08, 125/11, 78/15, 29/18) apply to the relationship between a supplier and its distributor. According to Article 3 of the Civil Obligations Act, that parties to the contract are free to regulate their contractual obligations under the Constitution of the Republic of Croatia, mandatory laws, and the moral of the society, the provisions of the Civil Obligations Act apply to the distribution contracts.

However, the certain regulation in respect of the distribution contracts can be encountered in the laws that regulate the market competition such as Regulation on exemption of vertical agreements between undertakings (Official Gazette 79/09, 80/13)

which applies under the Act on Protection of Market Competition (Official Gazette 79/09, 80/13) and both contain the provisions which refer to conditions and restrictions that vertical agreements between undertakings, i.e. distribution contracts shall contain. Also, the above-mentioned regulations are applicable in a case when distribution contracts refer only to the Croatian market.

On the other hand, when it comes to distribution on the market of the other countries of the European Union, Commission Regulation (EU) No. 330/2010 of April 20, 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 shall be applicable.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Law Code. Therefore, such submission is permitted under the general rules of private international law.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

There are no specific rules for termination of distribution agreements. In this regard, the general rules and principles on termination, including rescission of the contract apply. Unlike commercial agency agreements, upon termination of distribution agreements the distributor does not enjoy the right to compensation under statutory law as clarified in Decision No. 51 from January 25, 2010 of Sofia Court of Appeal under civil case No. 2734/2008, Civil College, 3rd Division.

However, the distributor may enjoy the right to compensation on the basis of the agreed arrangements between the parties into the distribution agreement.

4 Can the distributor validly waive such compensation in the contract itself?

Since there is no specific statutory provision for such compensation, no waiver is required. ■



CYPRUS



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A distributorship agreement between a supplier and its distributor is governed by the principles of Contract Law, provided that the terms agreed do not contravene rules of public policy, EU and Cyprus competition law.”

The parties to a distributorship agreement have the freedom to agree on the contractual terms which will govern their relationship, therefore they can also agree upon the law that shall govern the distribution contract, of course, if this does not contravene the Constitution of the Republic of Croatia, mandatory laws and the moral of the society. If the parties do not agree upon applicable law, the law of the country where the distributor has a habitual residence shall be applicable.

The possibility of choosing the applicable law arises from the freedom of the parties to regulate their obligations as it is stated in Article 3 of the Civil Obligation Act. This is also in accordance with the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I) and Croatian Act on International Private Law (Official Gazette 101/17).

Under Article 3 of Rome I, the contracts shall be governed by the law chosen by the parties, and the parties shall make the choice expressly or it may arise from the provisions of the contract or circumstances of the case.

Moreover, if the parties have not agreed on the law applicable to the contract, under Article 4.1.f of Rome I, the distribution contract shall be governed by the law of the country where the distributor has his habitual residence.

However, please note that the possibility to agree upon the law applicable to the contract is restricted by mandatory provisions, i.e. provisions which are significant and crucial for safeguarding the country's public interests, such as its political, social or economic organization and this apply to any situation, no matter which law applies to the contract.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

As it is stated above, the distribution contract is not regulated by the law itself. Since there is no legal provision in our legal system that defines parties to the contract, contractual obligations of both parties, compensation, and any other fee, etc., general rules of contract law apply. The parties to the contract may arrange and define their mutual rights and obligations including the terms of termination and compensation upon termination.

The above-mentioned arises from Article 3 of the Civil Obligations Act by which parties to the contract are free to regulate their contractual obligations what we already have stated.

Therefore, it is not contentious to arrange compensation under the distribution contract.

4 Can the distributor validly waive such compensation in the contract itself?

Yes, the parties to the contract are free to waive certain rights they have and choose not to exercise it, especially the right they are free to agree upon, all in accordance with the Civil Obligations Act. ■

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

There are no statutory provisions that govern relationships involving distributors. In general, a distributorship agreement between a supplier and its distributor is governed by the principles of Contract Law, which reflect common law principles.

Thus, the parties to a distributorship agreement have the freedom to agree on the contractual terms which will govern their relationship, provided that such terms do not contravene rules of public policy, EU and Cyprus competition law and any other mandatory Cyprus laws, including those relating to trademarks and intellectual property rights.

The terms of the agreement should clearly stipulate the period in which the agreement is valid, the main object of the agreement (i.e. the products and their specifications) and

the territory in which the agreement covers for distribution of the products and where it will be enforced in case of non-performance and breach. It is advisable that the parties to the agreement document it fully, to avoid uncertainty in case of a later dispute.

The distributorship relationship is, in nature, different to other possible models of supply such as agency or franchise.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Freedom of contract allows the governing law and jurisdiction that will govern the agreement to be determined by the parties in accordance with their intentions.

In determining the intention of the parties if a breach arises, the court in Cyprus will consider the following elements:

GERMANY



Dr. Rouven Schwab - Partner
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Member Firm of Andersen Global

German law does not provide for regulations concerning a distributor and the Courts therefore apply the provisions on agency or sales agency agreements”

- whether the parties have expressly chosen the governing law (usually by an express clause in a contract),
- where the parties did not make an express choice, the intention is to be derived from the terms of the contract as well as the circumstances surrounding it,
- where the above do not apply, the lex causae is the law under which the contract or transaction has its closest and most real connection.

The above considerations do not apply to matters of procedure in relation to remedies arising out of the contract. These are governed lex fori, by the law of the court where the case is tried.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Cypriot law does not stipulate any specific formalities to be followed in order to terminate a distributorship agreement. General principles of contract law apply. The parties are free to contract in relation to termination provisions and are able to agree on all relevant terms, such as the circumstances in which termination may take effect and the required notice period. It is important to note that the courts will set aside a contract or a provision of a contract which they consider to be unduly onerous.

In contrast to an agent, a distributor has no automatic legal right to be indemnified upon termination of the distribution agreement. The distributor could, however, be entitled to damages arising from loss of profit if the agreement is terminated other than in a manner specified in the distribution agreement or if the court decides that termination occurred without reasonable notice on the part of the supplier. The distributor could also claim damages in respect of any outstanding breaches of contract on the part of the supplier which existed at the time of termination. There is also recourse to action if the supplier fails to honour any post-termination obligations stipulated in the original agreement.

4 Can the distributor validly waive such compensation in the contract itself?

Yes, this is possible as a matter of freedom of choice and contract. When a party to a contract has a legal right and chooses not to exercise it, the party makes a legally enforceable choice: an election of the legal rights they want to have, however, this should carefully be considered before making such a choice as it will not be enforceable at a later stage should any dispute arise in relation to the agreement. An alternative to waiving rights can be a liquidated damages clause to be stipulated in the agreement. ■

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

German law does not provide for regulations concerning a distributor. The courts therefore apply the provisions on agency agreements (Geschäftsbesorgungsvertrag) or sales agency agreements (Handelsvertretervertrag) accordingly. In principle, general contract law applies, in particular the freedom of contract content (Vertragsinhaltsfreiheit). Corrections are made to the freedom of contract content in the event of general terms and conditions or inappropriate short notice periods through judicial control, as well as the analogous application of the obligation to pay compensation with regard to sales agents.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

In accordance with the principle of freedom of contract, the parties to a distribution agreement are allowed to choose the applicable law under German law. Accordingly, it is also conceivable that the parties agree to determine a different applicable legal system in deviation from the contract territory. In such constellations, however, it must be examined in each individual case whether mandatory local legal provisions take precedence. This will usually be relevant when the distributor agreement is terminated in connection with the question of whether a claim for compensation exists.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Insofar as the parties have not regulated this by contract, the distributor is generally not entitled to compensation in the event of termination of the distributor agreement by the entrepreneur.

GREECE



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Member Firm of Andersen Global

Distribution contracts are in general unregulated agreements, governed by the fundamental principle of the contractual freedom, although Greek Courts may apply the provisions of the Presidential Decree 219/1991, which rules commercial agency agreements.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In its simplest form, a distribution contract is a framework contract by which the producer undertakes, for a definite or indefinite period of time, to supply the distributor (which is an independent entrepreneur) with his products and the distributor undertakes to place these products on the market, in its own name, on its own account and at its own risk. The distributor (unlike the commercial agent who receives a commission) enjoys discounts on the producer's prices and therefore, his remuneration consists in his profit, i.e. the difference between the purchase price by the producer and the sale price to the customer.

The distribution contract may be exclusive, when the distributor acquires the right to exclusively market the conventional products in a specified area.

Contrary to commercial agency agreements -which are governed by the Presidential

Decree 219/1991, in compliance with Directive 86/653/EEC” (“PD”) as amended by Presidential Decree 264/1991, 249/1993, 88/1994 and 312/95-distribution agreements are not regulated in Greece directly by a specific law. Distribution agreements are therefore unregulated agreements, which are governed by the fundamental principle of the contractual freedom (361 Greek Civil Code).

However, Greek Courts decided that the provisions of PD may apply *mutatis mutandis* on all intermediation agreements. This view was partially adopted by the Greek legislator until the Article 14.4 section a and b of L. 3557/2007, established the “*mutatis mutandis* application” of the PD solely with respect to commercial agency agreements concerning the provision of services, as well as exclusive distribution agreements.

However, the above-mentioned law does not refer to other forms of distribution, including the simple distribution agreements.



- obligation to store goods,
- obligation of the distributor to participate in trade fairs,
- obligation to carry out advertising.

This list could be continued, but the most important indications are mentioned.

It is not necessary for all these criteria to be fulfilled for the analogous applicability of Sec. 89b Commercial Code to the contract of a distributor. Rather, it is sufficient that the distributor is integrated into the sales organization of the entrepreneur in a manner comparable to a sales agent in terms of the overall picture of its ties and obligations.

In addition, the claim for compensation requires that the distributor is contractually obliged to provide the entrepreneur with its customer data so that the entrepreneur can immediately and easily make use of the advantages of the customer base upon termination of the contract.

4 Can the distributor validly waive such compensation in the contract itself?

Since German law does not provide for such compensation, no waiver is required. ■

The German Federal Court (BGH) is applying the compensation rules for sales agents analogously (Sec. 89b Commercial Code) in case a distributor is integrated into the sales organization of the entrepreneur like a sales agent, especially if it is required by the contractual obligations to act like a sales agent for the distribution of the entrepreneur's products and is also subject to other obligations and commitments typical of a sales agent.

The following characteristics speak in favor of integrating the distributor into the sales organization of the entrepreneur:

- granting of an exclusive distribution right,
- non-competition obligation of the distributor,
- allocation of a specific market responsibility area,
- duty to promote sales,
- targeted sales promotion according to the guidelines of the entrepreneur,
- provision of demonstration products,
- training of the sales staff,
- minimum purchase obligations of the distributor,
- duty to maintain a stock of goods and spare parts,
- duty to provide customer services,
- control and monitoring powers of the entrepreneur,
- reporting and notification obligations of the distributor,
- instructions of the entrepreneur,
- duty to furnish the business premises,

After great debate, on June 27, 2013 the Supreme Court in Plenary confirmed the *mutatis mutandis* application of the PD in all intermediation agreements (e.g. non-exclusive distribution agreements, commission agency agreements, brokerage agreements, etc.), provided of course that the respective criteria set by the PD are met.

Subsequently, Greek courts have ruled that PD 219/1991 may apply to distribution agreements under the following circumstances (inductively): (i) the distributor acts as part of the commercial structure of the producer, having the same weak position and intense dependency on the producer as the commercial agent, as well as the same degree of integration in the supplier's network; (ii) the distributor contributes to the extension of the producer's clientele, undertaking responsibilities similar to those of a commercial agent; (iii) the distributor undertakes a non-compete obligation; (iv) the distributor enjoys a specific protected territory; and (v) the producer has knowledge of the distributor's clientele and after the termination of the distribution agreement, the distributor delivers to the producer a list of its clientele.

Considering the above, the answer to the question of whether PD 219/1991 applies to other forms of distribution agreements needs to be considered on a case-by-case analysis of the integration criteria stipulated above.

Needless to say that the basic criterion for the *mutatis mutandis* application of the PD in distribution agreements is whether or not the producer is in a position to draw benefits (make sales) from the clientele contributed by the distributor or whether his affairs have been significantly advanced throughout the duration of the contract, preserving such benefits after the contract is terminated.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

According to Article 3, paragraph 3 of Regulation 593/2008 ("Rome I") in conjunction with Article 9, paragraph 2 of the same Regulation (which replaced the Rome Convention), the contracting parties in the above contracts are free to choose the applicable law and thus, to submit the



contract by agreement to a different legislation from the one applicable. The above discretion of the Parties is provided under the condition that such choice, may not circumvent any mandatory European Community's law provisions, adopted for the purpose of ensuring public interests (of a political, social or economic nature). Provisions of such kind ("compulsory law") must be considered, in view of the case law of the International European Court, the protective provisions for the commercial agent of Presidential Decree 219/1991. In view of the above, the parties may stipulate in writing a clause determining jurisdiction.

Note that all private agreements in general (including the one in question) can be subject to arbitration, as long as such agreement is concluded in writing.

The case of lack of choice of the applicable law by the contracting parties, with regard to the distribution contracts, is dealt with in Article 4 of the above Regulation, which stipulates that, in the absence of a choice of law applicable by the Contracting Parties, the contract shall be governed by the law of the country in which the distributor has his habitual residence (art. 19 of Regulation 593/2008).

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

The provision of Article 9, of Presidential Decree 219/1991, stipulated that, the commercial agent at the termination of the contract is entitled to one last fee, which was called "customer compensation".

The question whether the distributor is entitled to claim customer compensation, *mutatis mutandis* to the provision of Article, 9 of Presidential Decree 219/1991, preoccupied the case law, which has been controversial for plenty of time.

The decision of the Cancellation Supreme Court of Greece (Areios Pagos) 139/2006 was a milestone to the issue, when it was ruled the *mutatis mutandis* application of the above provision (Article 9, of Presidential Decree 219/1991) to the distribution agreements, as long as there are similarities which justify such application. Indicatively, the following cases were identified as such "similarities":

- (i) when the distributor operates as part of his counterparty's commercial structure, having the same weak position and the same degree of integration as the commercial agent,
- (ii) when the distributor contributes to the expansion of the counterparty's clientele by performing tasks comparable to those of the agent and connected to the counterparty's sales network,
- (iii) when the distributor undertakes not to compete with its counterparty,
- (iv) when its clientele is known to the counterparty, especially if it falls to him after the termination of the cooperation,



HUNGARY



Balázs Dominek - Partner
Andersen in **Hungary**
Member Firm of Andersen Global

The Civil Code includes the very brief domestic rules for distribution agreements, which should also be compliant with the Hungarian Competition Act and domestic regulation for vertical agreements, including specific rules for regulated sectors.”

(v) when the economic activity of the distributor and his financial benefits, regardless of their formal economic characterization, are similar to those of the commercial agent.

Thereafter, the legislator defined according with Article 14, paragraph, 4 section b of Law 3557/2007, that “the provisions of Presidential Decree 219/1991 apply *mutatis mutandis* to the exclusive distribution contracts, if, as a consequence of these contracts, the distributor acts as part of commercial structure of the supplier”.

To conclude, the provisions on customer compensation of Presidential Decree 219/1991 are applied directly to the exclusive distribution contracts as well. For the other distribution contracts, which do not involve exclusivity, the issue will be treated each time specifically and based on the criteria specified by the Cancellation in its above decision. Regarding the amount of compensation, it is up to the crisis of the judge; this is inherent in the claim for damages itself, since it arises, inter alia, when it is considered reasonable in the light of the circumstances.

The law (PD 219/1991 - Article 9, paragraph 1) sets its maximum limit which cannot exceed the average annual remuneration received by the commercial agent during the last five years (5), provided that the contract lasted at least five years. If it lasted less, its amount cannot exceed the average of the fees the duration of the contract. Remuneration of the commercial agent is the commission he receives for his mediation.

The commercial agent must state that he is going to exercise his claim, within a period of one year from the termination of the contract (Article 9, paragraph.2), otherwise his right is extinguished; the declaration can be made in any way, without specifically requiring the relevant lawsuit.

The claim for customer compensation is subject to a five-year limitation period according to article 250 no. 1 of the Civil Code.

Customer compensation is not due (Article 9, paragraph 3 of Presidential Decree 219/1991): a) When the producer terminates the contract due to the fault of the commercial agent, which would justify termination of the contract at any time, b) when the commercial agent terminates the contract, unless this termination is due to the fault of the represented or is justified by reasons of age, physical weakness or illness of the commercial agent due to which it is not possible to reasonably require him to continue his activity and c) when after the agreement with the represented, the representative assigns to a third party the rights and obligations he has undertaken under the commercial representation contract.

4 Can the distributor validly waive such compensation in the contract itself?

Resignation of the commercial agent from his claim in customer compensation, before it is born, i.e. before the termination of the contract, is invalid (Article 9, paragraph 4 PD 219/1991). Furthermore, the commercial agent is entitled according to the common law to request the compensation of any further damage suffered from any illegal behavior of the represented, according to the general provisions of the Civil Code (Article 9, paragraph 1 PD 219/1991).

Thus, the illegal as abusive, e.g., complaint brought about termination of the contract, gives rise in parallel to the claim for customer compensation and a claim for compensation for the damage actually suffered by the agent during the general provisions of Articles 281 and 914 of the Civil Code. ■

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Chapter L of Book 6 of the Civil Code of Hungary (Act V of 2013) includes the very brief domestic rules for distribution agreements. Distribution agreements should be compliant with the provisions of Chapter V of the Competition Act of Hungary (Act LVII of 1996) and the domestic block exemption regulation for vertical agreements, Government Decree no 205/2011. These laws are the domestic counterparts of Article 101 TFEU and the EU Vertical Block Exemption Regulation (Commission Regulation (EU) No 330/2010) applicable for those vertical competition law restraints in distribution agreements, which may affect the Hungarian market.

These domestic laws are substantially the same as their EU law counterparts with several differences however, which should be duly considered by all distribution agreements affecting the Hungarian market. Several domestic sectoral laws impose additional legal requirements and rules on distribution agreements in regulated sectors (e.g. energy, food, pharmaceuticals, etc). These should be also considered by the affected sectoral market players.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

There is no special domestic choice-of-law provision for distribution agreements. Therefore, such submission is permitted with the general restrictions of private international law.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Any compensation upon the termination of a distribution agreement is exclusively subject to the agreement of the contracting parties. No mandatory or dispositive domestic legal provision exists to this end (unlike in the case of self-employed commercial agents, for example).

4 Can the distributor validly waive such compensation in the contract itself?

Since there is no legal provision for such compensation, no waiver is required. ■

IRELAND



Mark Gorman - Partner
Andersen in **Ireland**
Member Firm of Andersen Global

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

EU Law and Irish Competition Law applies to Distribution Agreements. Under EU law, Articles 101 and 102 of the Treaty of the Functioning of the EU (“TFEU”) prohibit anti-competitive agreements between undertakings (businesses) and the abuse of a dominant position by undertakings. Article 101(1) of TFEU, prohibits: “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Members States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”.

Article 101(3) provides an exception to this general rule where an agreement:

- contributes to “improving the production or distribution of goods or to promoting

The Distribution Agreement can be submitted to whatever jurisdiction the parties mutually agree and it must also be compliant with the EU law and the Irish Competition Acts”

technical or economic progress, while allowing consumers a fair share of the resulting benefit;” and

- does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives of Article 101 TFEU; and
- does not allow the parties to eliminate competition in respect of a substantial part of the products in question.

A distribution agreement is a form of “Vertical Agreement”, i.e. where two or more undertakings operate at different levels of the production or distribution chain, and accordingly falls within the remit of Article 101 TFEU.

In Irish law, Sections 4 and 5 of the Competition Acts 2002 – 2014 have equivalent effect at an Irish level. There must be an actual or potential effect on trade between EU member states before Articles



101 and 102 of the TFEU apply. Sections 4 and 5 of the Competition Acts apply to conduct having an effect on trade in Ireland or any part of Ireland.

In Ireland, the Competition Act empowers the Commission for Competition and Consumer Protection (the “CCPC”) to adopt declarations which have, at the Irish level, an equivalent effect to block exemption regulations at the EU level. It will however very much depend on what sort of Distribution Agreement is being agreed (selective or exclusive distribution etc.).

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

The Distribution Agreement can be submitted to whatever jurisdiction the parties mutually agree. However, the application of the provisions of TFEU and the Irish Competition

Acts cannot be excluded, their application is not dependant on the jurisdiction clause in the Distribution Agreement, but on the reality of whether the agreement may affect trade between Members States of the EU and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

No. There is no compensation or indemnity payable to a distributor on termination of the distributorship agreement, unless it is specifically contractually agreed in advance.

However, the distributor may be able to claim damages where the agreement is terminated in breach of the agreement, under general contracting laws.

Also, distributors can potentially make arguments that the nature of the relationship was in fact one of commercial agent, and if successful in making that categorisation could be entitled to compensation under agency rules.

4 Can the distributor validly waive such compensation in the contract itself?

No statutory compensation applies, so there is no effective waiver. If the parties have agreed that compensation would be payable upon termination, the distributor could of course waive that contractual compensation. ■

ITALY



Francesco Inturri - Partner
Andersen in **Italy**
Member Firm of Andersen Global

There is not under the Italian jurisdiction a typical distribution contract model. The parties can decide to regulate their distribution relationship as they prefer, using clauses of typical contracts such as agency agreement or procurement contract or mandate contract.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

The Distribution contracts, under the Italian jurisdiction, are defined as “atypical contracts”. The adjective atypical, about a contract, is used when the parties, according to the Article 1322, paragraph 2, of the Italian Civil Code, decide to adopt a contract model not described and not wholly regulated under the Italian Civil Code or under any other law.

So, we can state that there is not, under the Italian jurisdiction, a typical distribution contract model. The parties can decide to regulate their distribution relationship as they want and prefer, using clauses of typical contracts such as agency agreement or sales contract or procurement contract or mandate contract, etc.

However, there are some fundamental principles that the parties cannot derogate,

such as the *bona fides* principle provided as per Articles 1175 and 1325 of the Italian Civil Code.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Considering the fact that the parties do not need to respect a typical model but, on the contrary, they can choose how to regulate their distribution agreement, we can observe that it is possible to apply also a legislation other than the Italian one.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

The Italian Courts, about the interruption of an open-ended-distribution agreement, state the following principles. It is allowed,

according to *bona fides* principle, to the parties of a distribution agreement to exercise the right of withdraw at any time as long as the part, who wants to exercise this right, gives to the other one a notice defined “reasonable”.

For example, a notice of 18 months may be judged reasonable for an agreement in force between the parties for 25 years; on the other hand a notice of 3 months can be judged reasonable for an agreement in force for 26 months.

So, we can affirm that it is always preferable to predetermine the reasonable notice in the distribution agreements, but this predetermination cannot exclude, totally, the possibility that a Judge defines the notice not reasonable according to “*bona fides*” principle, on the basis, for example, on the

duration of the agreement at the moment of the notice of termination.

Moreover, some of the Judges of the Corte di Cassazione affirm that the exercise of the right of termination, in the case of a distribution agreement, can be also judged as an abuse of the right.

This particular case -the abuse of the right to terminate an agreement- takes places when the part, who has the power to exercise this right of termination, breaks the principle according to which the economically strongest part of an agreement cannot abuse of his dominant position; in other words, the strongest part of an agreement cannot use its power with the intention to create an unfair damage to the other part.

So, we can conclude that there is not an automatic right to obtain a compensation in favour of the part which suffers the termination of the agreement, in the case of a termination of an open-ended-distribution agreement.

Nevertheless, if there is a violation of the reasonable notice or if there is an abusive exercise of the right of terminate an agreement, against *bona fide* principle, the part which suffers the termination of the agreement can claim a compensation.

4 Can the distributor validly waive such compensation in the contract itself?

As we said before, there isn't a right to obtain a compensation in favour for the distributor, so the parties can decide to regulate their commercial relationship how they prefer. So, they can also exclude the compensation for the distributor but it is fundamental that the parties respect the both abovementioned principles of reasonable notice and *bona fides* and that the economically strongest part does not abuse of its dominating position. ■



NETHERLANDS



Boian Popov - Partner
Taxture Global, **Netherlands**
Collaborating Firm of Andersen Global

Distribution agreements are form free. As such they are not regulated by specific mandatory provisions in the Civil Code. While form free, the contractual freedom is limited by general Dutch principles of contract law, such as the principle of reasonableness and fairness.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Book 6, part 5 of the Dutch Civil Code contains rules and regulations applicable to contract law, which include distribution agreements. It is more regulatory law than mandatory law and therefore most of the provisions under the Dutch Civil Code may be deviated from.

Please note that agency agreements do have a specific set of mandatory rules under the Dutch Civil Code (i.e. Book 7 of the Dutch Civil Code).

Distribution agreements do not require to be in writing (they are form-free and thus may be concluded e.g. orally or by exchange of emails). As such they are also not regulated by specific mandatory provisions in the Dutch Civil Code. Even though form-free, the contractual freedom is, however, limited by general (Dutch) principles of contract law, such as the important principle of reasonableness and fairness.

Typically, distribution agreements may be divided in sole, non-exclusive or exclusive agreements. The latter may also need to comply with European competition laws.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Under Section 3 of the applicable Regulation (EC) No. 593/2008 on the law applicable to contractual obligations, parties to a distribution agreement are free to choose the law applicable to their agreement.

However, as a rule, this choice may not set aside the mandatory rules of the laws of a country that would have been applicable if no choice were made.

If parties do not make an explicit choice, the laws of the country in which the distributor resides will be applicable (assuming the distributor is located in the EU). ▶

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

In general, compensation in case of a termination of a distribution contract is not due given the principles of contract law (this is different for agency agreements). However, case law shows that depending on the duration of a contract a compensation may be due if the notice of termination is considered as short. For example, a 12-year-old distribution contract cannot be ended immediately or with a short notice period of 1 month.

4 Can the distributor validly waive such compensation in the contract itself?

It is possible to agree to a waiver upfront, but this could be challenged to be contrary to the Dutch general rules on reasonableness and fairness. It will very much depend on the facts and circumstances whether or not such a waiver will hold. A possibility to consider, is to agree that any amount due on compensation for a termination is considered in the margin made by the distributor. ■



NORTH MACEDONIA



Ana Pepeljugoska Kostovska - Partner
Pepeljugoski, North Macedonia
Collaborating Firm of Andersen Global

The distribution contracts are not separately regulated although its content is influenced by the trade customs and the provisions of the other similar types of agreements and they must comply with the Law on Obligations and the Law on Protection of Competition.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In Macedonian legislation, the distribution contract is considered as “unnamed contract” i.e. contract that is not separately regulated and named by the law. Instead, the distribution contract arose as a result of the autonomous trade practice and its content is largely influenced by the trade customs and the provisions of the other similar types of agreements such as purchase agreement, commercial representation contract, franchise contract etc.

The Law on Obligations is the main law that regulates the content of the contracts, hence is widely applicable to the content of the distribution contracts too. Beside the Law on Obligation, the Law on Protection of Competition contains some provisions that regulate the distribution contracts but exclusively in regards to the protection of competition. In addition, since the distribution contract regulates supply and distribution of

goods, the provisions of the Law on road transport are applicable to some extent too.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

The party autonomy is the main principle of the contract law. According to the Private International Law Act, whenever there is a foreign element, the contracting parties are free to choose their applicable law in regards to the contract and to submit their contract under a legislation of their choice, whether that is for the whole contract or just part of the contract.

Their will for the chosen applicable law may be explicitly expressed with the contract or it may arise from the provisions of the contract or from other circumstances. However, if both of the parties are domestic natural persons or legal entities and the contract is concluded on the territory of North Macedonia, they

cannot submit the contract to a different legislation than the Macedonian.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

The distributor is entitled to compensation upon termination of the term of his distribution rights for the completed and due work that was performed according to the contract, before the termination of the contract. In this case, the other contracting party is obliged to compensate the distributor, or otherwise the distributor will have the right of court protection. The amount of the compensation will depend solely on the prices agreed between the parties with the distribution contract.

Beside the compensation for completed and due work, in case of unilaterally, premature termination of the contract, the contractual party that breached the contract is obliged to compensate the damages to the other party. The amount of the compensation will depend on the real damage that occurred from the breach of the contract and the loss of future benefit that the other party will have to bear.

In addition, the contracting parties are also free to agree penalties in case of breach of the contract. If penalties were agreed, the party that breached the contract will be obliged to pay them to the other party in the amount agreed with the contract.

4 Can the distributor validly waive such compensation in the contract itself?

The distributor cannot validly waive the right on compensation for completed and dull work in the contract itself. The distributor also cannot waive the right on compensation for damages with the contract, before the damage occurs. Any opposite provision will be considered null and void. ■



POLAND



Magdalena Rydel - Associate Andersen in Poland
Member Firm of Andersen Global

The distribution contracts are not defined in the Civil Code nor other Polish legal act. They are governed by the fundamental principle of the contractual freedom, being compliant with the domestic competition law and the European Union and international law”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In the Polish jurisdiction there is no regulation of distribution contracts, which means that they are not defined in the Civil Code nor other Polish legal act, thus they belong to the group of contracts called *unnamed contracts*. At the same time, the distribution contract is an empirical contract, which means that it is shaped in the practice of economic turnover.

The principle of freedom of contract (expressed in Article 3531 of the Civil Code) applies to distribution contracts, i.e. legal relations governed by a distribution contract are created by the parties in a way that is free and corresponds to the parties (contrary to the so-called *named contracts*, regulated in the specific parts of the Civil Code).

This does not mean that the distribution contracts can be formed absolutely freely, because their content should not be

contrary to the law, i.e. their aims, provisions and effects cannot violate any provisions of universally binding law, including European Union and international law.

Certain regulations relating to a distribution contracts can be found, among others, in the competition law regulations such as the Act on Competition and Consumer Protection or the Regulation of the Council of Ministers of March 30, 2011 on the exemption of certain types of vertical agreements from the prohibition of restrictive agreements.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Pursuant to Article 3 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), the parties may freely choose the law of the country to be applied to

the interpretation and performance of the distribution contract.

If the distribution contract does not incorporate contain provisions on applicable law, the provisions of the Regulation (EC) No 593/2008 (Rome I) will be referenced to determine the applicable law. According to Article 4, paragraph 1, letter f of the Regulation (EC) No 593/2008 (Rome I), the distribution contract shall be governed by the law of the country in which the distributor has its habitual residence.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

As indicated above in the Polish legal system, there is no statutory regulation of the distribution contract, i.e. the law does not define mutual rights and obligations of the parties to the distribution contract.

However, the distributor has the right to compensation on general principles. Pursuant to Article 471 of the Civil Code, each debtor is obliged to repair damage resulting from non-performance or improper performance of an obligation, unless the non-performance or improper performance

is a consequence of circumstances for which this debtor is not responsible.

4 Can the distributor validly waive such compensation in the contract itself?

As there is an absence of legal regulation concerning particularly the distribution contract, the general terms will apply to the waiver of compensation in the distribution contract. Pursuant to Article 473 § 2 of the Civil Code, all contractual reservations, according to which the debtor (in this case, the distributor) would not be liable for damages that could be caused to the creditor intentionally, are invalid. The roots of this regulation come directly from Latin rules: *Nulla pactione effici potest, ne dolus praestetur* (“The contract cannot exclude liability for deception”) or *Dolus omnimodo puniatur* (“Acting with malicious intent must always be punished”). In the remaining case, i.e. liability for damage caused unintentionally, the distribution contract may provide distributor’s withdrawal from compensation.

To sum up, it is unacceptable to exclude or limit the liability, in the content of the distribution contract, only for damage caused by intentional fault. ■



PORTUGAL



João Gutierrez - Associate
CNA – Curado, Nogueira & Associados, Portugal
Collaborating Firm of Andersen Global

The distribution agreement is a non-typical kind of agreement in Portugal and it is not subject to any particular law although it is indirectly regulated by the Agency Law and protected by the Portuguese Competition Law.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In Portugal there is no specific legislation regarding distribution contracts.

The distribution agreement –also called of “commercial concession” (concessão comercial)– is a non-typical kind of agreement in Portugal, in a sense that it is not subject to any particular *lex specialis*, such as agency law, and is thus subject to the principle, stated in Article 405 of the Portuguese Civil Code, of freedom of contractual provisions (which provisions should be legally admissible under general law).

Nevertheless, the distribution agreement is recognised by law and protected by the Portuguese Competition Law.

The Portuguese Courts have established that the rules of Decree–Law No. 178/86,

of July 3, with modifications inserted by the Decree-Law No. 118/93, of April 13 (the “Agency Law”), are indirectly applicable as

analogous interpretation criterion, especially regarding the contract’s termination.

Said analogous applicability of the Agency Law by is only considered by the courts in the presence of circumstances of the Principal-Distributor contractual relationship and mutual rights and obligations such as:

- the performance by the Distributor of tasks similar to those of the agent as to be a factor of attractiveness of customers,
- the high degree of integration of the Distributor in the Principal’s network,
- the possibility for the Principal to benefit from the customers of the Distributor in the territory,



- the economical dependency of the Distributor towards the Principal.

None of these circumstances are mentioned directly in the Portuguese Law, all of them are the result of the Courts’ attempt to establish uniform criteria on which to base the analogy.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Yes. Considering that there is no specific legislation regarding distribution contracts, the parties may freely stipulate the applicable law, with the general restrictions of private international law. Within the European Union, Article 3 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council, of June 17, 2008, on the law applicable to contractual obligations (Rome I), stipulates that a contract shall be governed by the law chosen by the parties, as long as the requisites of said article are met.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Should the analogous application of the Agency Law come to be considered, the following cumulative prerequisites of Article 33, No. 1, of Decree-Law No. 178/86 to award the Distributor a Clientele Indemnity would have to be verified:

- (i) the Distributor has brought to the Supplier new customers or has significantly increased the volume of business with existing customers and

- (ii) the Supplier continues to derive (or may potentially derive) substantial benefits from the business with such customers, and

- (iii) the Distributor does not receive, after contract termination, any retribution for contracts promoted or concluded with such customers.

The calculation of the goodwill indemnity through analogous application of Agency Law is done under Article 34 of Decree-Law No. 178/86:

- the indemnity is calculated on an equitable basis,
- the amount may not be higher than a figure equivalent to an indemnity for 1 year, based on the distributor’s average annual profit from sales over the preceding 5 years,
- if the contract goes back less than 5 years, the indemnity shall be calculated on the average for the period in question,

As an overall view of the Portuguese Courts’ decisions:

- Portuguese courts take the equitableness of the goodwill compensation very literally and always stay much attached to the particulars of each case,
- the numbers and method vary from case to case, preventing the drawing up of a “mathematical formula”,
- Portuguese courts tend to reduce dramatically the amount claimed by the Distributor, even if said amount respects the rules previously mentioned,
- it is quite unusual for a Distributor to receive the full “5 years average annual profit”.



The criteria typically considered by Portuguese courts to determine the actual amount by equity are the following:

- the time needed by the terminated party to find a comparable situation,
- the disadvantages and damages to the Distributor occurring from the loss of distribution contract,
- the duration of the contractual relations,
- the level and the evolution of the Distributor's turnover in relation to products distributed,
- the general success or failure of the Distributor's activities,
- the nature of the products concerned and the renown of the trademark,
- the costs and investments made by Distributor,
- the nature of the obligations assumed by the Distributor,
- the circumstances surrounding the termination.

Similarly to what we have pointed out above in respect of the circumstances that allow the analogous application of the Agency Law, none of these factors above are mentioned directly in the Portuguese Law, all of them are the result of the judges' attempt to establish uniform criteria on which to base the calculation of the indemnity.

Furthermore, there is still not a definitive answer as to what the expression "average annual profit" stands for: the present tendency is clearly for Net Profit, although there are still some decisions that mention Gross Profit.

4 Can the distributor validly waive such compensation in the contract itself?

All higher courts' decisions tend to follow the same steps in order to sustain the analogous application of Agency Law: since the distribution agreement is an atypical agreement, not directly treated by any particular *lex specialis*, in absence of an express contractual regulation, the contract must be interpreted by the general rules of contract law and, if necessary, by the specific rules that regulate contracts that present the biggest analogy with distribution agreements –the Agency Law– with the necessary changes.

In a personal note, it is our opinion that sometimes the Courts produce decisions that are contradictory to this line of reasoning. Often the written agreements expressly stipulate the consequences of the termination of the contract, waiving the right to any kind of indemnity, and still the judges apply the Agency Law by analogy, "overrunning" the principle of freedom of contractual provisions.

So, the question remains: being an atypical contract, is the parties' freedom to contract and create their own rules limited by the analogous application of another law or are the parties totally free to create their own rules and the analogous application of another law may only occur if there is a shortcoming in the contract?

We are unable to find a unanimous answer to this question in the Portuguese doctrine: some authors defend that there are mandatory rules because they concern public order reasons (to protect the weaker negotiating party), while other authors defend that such position is to turn an atypical contract into a typical one. ■

REPUBLIC OF KOSOVO



Agron Curri - Associate
Pepeljugoski, Republic of Kosovo
Collaborating Firm of Andersen Global

The distribution contracts are not separately regulated although its content is influenced by the trade customs and the provisions of the other similar types of agreements, and the parties are free to choose the applicable law by contract.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Distribution Contract is not mentioned anywhere in the Law on Obligations, so it is not regulated specifically by law.

Instead, the distribution contract is result of the autonomous trade practice and its content is largely influenced by the trade customs and the provisions of the other similar types of agreements such as purchase agreement, commercial representation contract, franchise contract etc.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Contracting parties are free to choose the applicable law by contract. In Kosovo, the draft law on private international law is in the process of being drafted.

The law of the former Yugoslavia from 1982 is currently applicable, where the dominant principle is also the party autonomy.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Upon termination of contract the distributor is entitled to compensation depending on the rights and obligations provided by the contract and in this case the provisions for compensation of damages will be applied.

4 Can the distributor validly waive such compensation in the contract itself?

The distributor cannot validly waive the right on compensation for completed and dull work in the contract itself. The distributor also cannot waive the right on compensation for damages with the contract, before the damage occurs. Any opposite provision will be considered null and void and can be canceled in court proceeding. ■

REPUBLIC OF MOLDOVA



Ana Galus - Partner
Turcan Cazac, Republic of Moldova
Collaborating Firm of Andersen Global

Distribution contracts are specifically regulated since March 2019 by the Civil Code and the local Competition law and the Regulation on Evaluation of Vertical Anticompetitive Agreements are also applicable.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Distribution Contracts are briefly regulated in Moldova since March 2019 under a separate Section of the Moldovan Civil Code pertaining to the Book of Obligations. Furthermore, the local Competition law No. 183 dated July 11, 2012, and the Regulation on Evaluation of Vertical Anticompetitive Agreements, approved by Decision of the Moldovan Competition Council No. 13 dated August 30, 2013 are applicable from an antitrust perspective.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

The parties to a distribution contract are entitled to freely agree on the legislation that will govern such contract, pursuant to the

freedom of the contract provisions provided by the Moldovan Civil Code.

What is more, the conflict of laws rules applicable to contracts with foreign elements (for example, where one of the parties operates outside Moldova) also provide that the parties are free to decide on the law governing the contract (to the totality of the contract, or to a part of the contract). The choice of law will regulate such areas as, inter alia, contract interpretation, performance of contractual obligations, evaluation of damages for non-performance, statutes of limitations, effects of contract nullity. As provided by the local conflict of laws rules, the manner of performance under the contract, and the remedies available in case of improper performance will be considered under the laws of the state where the performance takes place.

Further, the above contractual freedoms of the parties are limited by the applicable mandatory legal provisions, as well as in

case the application of the foreign law clearly violates the public order of Moldova, insofar as it would lead to a result obviously incompatible with the fundamental principles of the law of Moldova or with the fundamental human rights and freedoms. In case of removal of the application of foreign law, the law of the Republic of Moldova shall apply.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

There are no specific provisions in the local Civil Code, or other relevant legal acts, that would expressly regulate the right of a distributor to be compensated upon termination of the term of his distributions right, or that would prescribe the amount of such compensation.

Pursuant to the freedom of the contract principle, the parties are free to determine the content of the distribution contract, including to provide the right of the distributor to be compensated upon termination of the term of his distribution right, as well as the relevant compensation. In the absence of any express contractual provisions,

the distributor would be entitled to a compensation upon termination of the term of his distribution rights under the general legal provisions of the Civil Code, should Moldovan law be applicable.

4 Can the distributor validly waive such compensation in the contract itself?

If compensation upon termination of the term of his distributions right refers to general compensation due to the distributor for the works performed, then the distributor may not validly waive its right to such compensation under Moldovan law.

If such compensation would be awarded as damages, then the distributor may not waive its right to such compensation in case the damages were caused with intent or by imprudence.

Finally, should such compensation constitute a separate compensation agreed upon in the contract that does not cover damages, the distributor may validly waive such compensation in the contract, should Moldovan law be applicable to the contract, as there are no express legal provisions preventing the parties from doing so. ■



ROMANIA



Andreea Opreșan - Managing Associate
Țuca Zbârcea & Asociații, Romania
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In Romania, the parties to an agreement may establish the rules regulating the contract on all aspects except for provisions that would breach mandatory public interest norms. EU competition norms on vertical agreements fully apply to distribution agreements.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In Romania, the parties to an agreement may establish the rules regulating the contract on all aspects except for provisions that would breach mandatory public interest norms.

There is no specific law or legal provision on distribution agreements, rather, the general terms of the Romanian Civil Code on the sale and purchase of goods apply to distribution agreements in Romania.

From competition law perspective, there are specific rules on exclusive and selective distribution systems, non-compete obligations or single branding clauses applicable in case of distribution agreements. Commission Regulation (EU) N. 330/2010 of April 20, 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 and

the Commission Guidelines on Vertical Restraints apply directly to distribution agreements in Romania.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

As a matter of rule, the parties to the contract may select the applicable law to the distribution agreement, in particular if one of the parties is not a Romanian company. If both parties to the contract are Romanian, there should be no legal or practical scope to select a foreign applicable law.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

In case of distribution agreements, there is no mandatory compensation for the distributor



upon termination of the contract, unless (i) the parties expressly agree on a compensation for termination in the distribution agreement or (ii) the distributor may raise damages claim against the supplier for the termination.

As opposed to the distribution agreements, in case of agency agreements the termination of the contract is linked with a mandatory compensation for the agent. The Romanian Civil Code implements the EU Directive on agency agreements, thus providing that the agent has a right to a compensation in case of termination if:

(i) the agent procured new clients for the principal or significantly increased the volume of operations with existing clients, while the principal still enjoys substantial incomes from exchanges with such clients; and

(ii) the payment of such compensation is fair, considering the exact circumstances, in particular, the commissions that the agent should receive as a result of exchanges of the principal with the clients indicated above and potential non-compete clauses to the benefit of the principal that would limit the activities of the agent post-termination.

The compensation should not exceed the annual remuneration due to the agent based on the yearly average in the last 5 years of contract or, as applicable, during the contract, if the duration does not exceed 5 years. The agent must ask for the compensation. The agent could not waive such right in the agency agreement.

4 Can the distributor validly waive such compensation in the contract itself?

As mentioned above, unlike in the case of agency agreements, the distributor is not automatically entitled to a compensation if the distribution agreement terminates.

However, this is without prejudice to a right to damages if the supplier breaches its obligations. The distributor could not waive such right to damages in advance, but the parties could amicably settle a potential dispute linked to the termination of the distribution agreement by a termination agreement regulating all the terms and conditions of linked to the termination of the distribution agreement, as well as any compensation due by one party to the other. ■

SERBIA



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Collaborating Firm of Andersen Global

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

The distribution contract in Serbian law belongs to the unnamed sui generis contracts, since it is not specifically regulated by the positive legislation of the Republic of Serbia. From the above said, it follows that the Serbian law does not determine the essential elements of distribution contract, the content of the obligations, as well as the form of the distribution contract. In accordance with the autonomy of the will, the contracting parties determine all elements of the contract by themselves.

The will of the contracting parties is limited only by the domain of compliance with coercive regulations, public order and good customs. Most often, this includes compliance of the provisions of the contract with imperative rules concerning the protection of competition. In practice, the contracting parties usually agree on the following important elements of distribution

The Serbian law does not establish the essential elements of distribution contract and the contracting parties determine all elements of the agreement by themselves, although certain clauses may be regulated by the Law on Protection of Competition.”

contract: determination of the contractual product and the contractual territory, the exclusivity right, the non-competition issue, prices and conditions of sale, duration and termination of the contract.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

In accordance with the modern tendency of market business, the distribution contract is mostly concluded between the contracting parties that have their seats in different countries. In principle, there are no obstacles for the contracting parties to determine which law will be applicable on issues arising from their contractual relationship.

However, it should be borne in mind that the distribution contract usually contains clauses that regulate the issues of distributor's competitiveness, in which case the mandatory application of the imperative

provisions of the Law on Protection of Competition of the Republic of Serbia cannot be waived.

This applies not only to the territory of the country where the contract obligations are performed (mostly, this will be case in the country where the distributor operates), but also to the territory of the country where the performance of contractual obligations could affect competition. If the distribution contract contained provisions which prohibited competition in the way that infringes the competition law, those contractual provisions would be invalid, and the contracting parties could incur high fine and criminal sanctions. In accordance with the previously said, the contracting parties are free to determine the applicable law and to waive the application of the law of the distributor country in the domain of their contractual relationship.

On the other hand, in the domain of competition and consumer protection, the application of imperative legislative which protect competition and consumer rights cannot be waived.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

The distribution contract is a contract with permanent performance of services because

it implies a continuous legal relationship between the supplier and the distributor. The distribution contract is concluded with the aim of producing legal effects between the contracting parties for a longer period of time, and its termination may involve some kind of damage to the distributor. Since the distribution contract is not legally regulated, there are also no explicit regulations on distributor compensation upon the termination of the contract. In comparative law practice, the type of this compensation is known as “compensation for business reputation”, but this term is still not recognized in the case law of the Republic of Serbia.

For now, the courts in the Republic of Serbia have not awarded a special compensation to the distributor upon the termination of the contract. It can be concluded that the distributor is not authorized by law or case law on compensation upon termination of the term of distributions right, which certainly does not prevent the contractual parties to specifically determined the payment of this compensation through other institutions of contract law.

4 Can the distributor validly waive such compensation in the contract itself?

Considering that the distribution contract is an unnamed sui generis contract, and that the compensation is not a legally essential element of the contract, there are no obstacles for distributor to validly waive such compensation in the contract itself.

If the contract stipulates that the law of Republic of Serbia shall apply on it, waiver of the compensation is not even necessary, because the distributor is not entitled to it by law. Contrariwise, any right to compensation upon termination must be specifically agreed in the contract. ■



SLOVENIA



Katja Šumah - Partner
Miro Senica and Attorneys, Slovenia
Collaborating Firm of Andersen Global

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In Slovenian legislation, there are no specific provisions on distribution contracts. Even though distribution contracts are not explicitly regulated in the Obligations Code, Slovenian case law provides that a distribution contract is a mixed contract between an agency and sales contract. If the elements of the agency are preponderant, the provisions which regulate agency shall be used. This is especially relevant in relation to the notice period and the severance pay in case of termination of the distribution agreement.

EU and Slovenian competition laws should also be observed, as anti-competitive agreements could be deemed null and void.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Slovenian case law provides that a distribution contract is a mixed contract between an agency and sales contract. If the elements of the agency are preponderant, the provisions which regulate agency shall be used.”

Yes, in accordance with Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), the contract shall be governed by the law chosen by the parties, who are free to waive the use of legislation which would generally be applicable. In case no choice of governing law is made by the parties, a distribution contract shall be governed by the law of the country where the distributor has his habitual residence.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Distribution agreements are not specifically regulated in the Slovenian Obligations Code, therefore the contracting parties are generally free to determine the terms of the distribution agreement, including payment of compensation upon termination, according to the principle of free regulation of obligation relationships. ▶

Depending on the nature of the specific distribution agreement, provisions in relation to agency could be used. These provisions expressly regulate the severance pay for the commercial agent in cases where the agent obtained new clients for the principal or appreciably expanded the transactions with previous clients and after the contract terminates the principal enjoys significant benefits with such clients. Such severance pay to the commercial agent may not exceed the average annual commission over the last five years since the conclusion of the contract.

The provisions regulating agency agreements also require monthly payments of compensation to the commercial agent in exchange for not performing any activities that would compete with the principal's activities for the maximum period of two years after termination of contract. These monthly payments are equal to the average monthly commission over the last five years.

Hence the distributor could in principle be entitled to severance pay, generally not exceeding the amount of average yearly commission in the last five years and/or to monthly payments of compensation in exchange for not performing competitive activities after the termination of the contract, if sufficient elements of agency would be present. Since not all distribution agreements have elements of agency, the use of the rules regarding the severance pay/compensation would depend on each particular case, in which it would have to be shown to the court that the contractual relationship in question preponderantly had elements of an agency agreement.

4 Can the distributor validly waive such compensation in the contract itself?

Yes, the distributor can validly waive such compensation in the contract itself, in accordance with the principle of free regulation of obligation relationships, accepted in the Slovenian Obligations code. ■



SPAIN



José Ignacio Olleros - Partner
Andersen in Spain
Member Firm of Andersen Global

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

Essentially, a distribution agreement is a collaborative contract concluded between independent entrepreneurs, generally a manufacturer and several vendors, for the purpose of implementing a sales or distribution network of the manufacturer's products or services.

Unlike what happens with agency agreements, regulated by Act 12/1992, of May 27, on Agency Agreements (the "Agency Act"), there is no specific legislation in Spain regarding distribution agreements. Furthermore, neither the Spanish Civil Code nor the Spanish Commercial Code refer to this type of agreements. Therefore, these agreements may adopt different forms and legal structures.

The distribution agreements may adopt different forms and legal structures and they are mainly subject to the principle of contract freedom regulated in the Civil Code. The Courts have applied rules of the Agency Acts by analogy to distribution contracts.”

In light of the above, pursuant to Spanish jurisprudence, distribution agreements are atypical contracts¹, that is, they are new contractual structures that lack of specific regulation. Their effective use has allowed them to achieve a social classification that justifies a differential treatment. Accordingly, a distribution agreement is mainly subject to the principle of contract freedom regulated in Article 1,255 of the Spanish Civil Code.

Finally, as to the relationship between suppliers and distributors, it is subject to the existing doctrine and case-law of the Spanish Supreme Court. In this regard, the Supreme Court has established in various resolutions that some rules and principles of the Agency Act are applicable as interpretative criteria by analogy to distribution agreements. However, it is not a uniform criteria and therefore, the abovementioned analogy will have to be studied on a case by case basis.



2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Distribution Agreements signed from December 17, 2009 onwards have to follow the provisions of the Rome I Regulation (593/2008), which establishes contract freedom as a general principle. Accordingly, the parties may expressly determine the applicable law of the agreement which must be connected with it. In addition, there is a possibility to choose a different applicable law for each section or clause of the contract and the agreement may be subject to amendments throughout its existence.

However, in the event the parties do not expressly determine the applicable law and unless the agreement is clearly and manifestly more closely connected with another legislation, the applicable law will be the distributor's applicable law. In any case, the applicable law shall not be contrary to public policy, as it is composed of provisions to be respected in order to preserve the public or supra-individual interests.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Spanish jurisprudence has frequently recognized the distributor's right to be compensated. The Supreme Court criteria recognizes the right to a compensation and calculates it depending on whether the compensation is a consequence of the clientele obtained by the distributor, or the damages suffered by the latter after the termination of the agreement. With respect to the goodwill (clientele) compensation, it is necessary to mention that in the past these compensations were recognized in distributor agreement's by analogy with the Agency Act.

However, this "assimilation" does no longer apply automatically. If the distribution agreement does not establish the implementation of the Agency Act, the Court² will consider whether or not the Agency Act can be implemented by analogy, provided that there is no default by the distributor and his position can be considered as an agent, which has to be evidenced by the distributor.



¹The Provincial Court of Madrid, Section 10, September 13, 2006, n°. 546/2006, rec. 221/2006 understands it as an essentially atypical contract, and the Supreme Court (Civil Chamber), December 18, 1995, rec. 2792/1992, also emphasizes the "significant atypical nature".

SWITZERLAND



Roberto Cavadini - Partner
Andersen in **Switzerland**
Member Firm of Andersen Global

The rules regarding distributorship relationships derive from general principles of Swiss contract law and sometimes the Code of Obligations governing agency agreement is applied by analogy.”

In the event that these conditions are not fulfilled, the provisions of the Spanish Civil Code which recognize a compensation based on the loss of profit suffered by the distributor, if any, as a result of the lack of prior notice when the contract is terminated, will be applied to the agreement.

There is not a particular amount of compensation generally recognized to distributors. Thus, distributors have to prove that the circumstances in the particular situation can justify the obtaining of such compensation.

Additionally, the legislation does not establish a certain minimum or maximum limit to calculate the relevant compensation. This will depend on the specific case and the criteria adopted by the Court.

However, in recent years, the courts have considered the maximum amount corresponding to agency agreements as the maximum limit for calculating the relevant compensation (the compensation cannot exceed the legal limit established in Article 28 of the Agency Act, which consists of the average annual amount of remuneration collected by the agent during the last five years or during the term of the contract, if this is less).

Therefore, if the parties do not foresee a goodwill compensation in the agreement, the Court will consider the amounts subject to indemnification according to certain criteria such as, but not limited to, the term of the agreement, the exclusivity clause, and / or if the market or the clients remain linked to the branch.

That is, the courts will decide the compensation amount, on a case by case basis, and may consider the legal limit provided for in article 28 of the Agency Act.

4 Can the distributor validly waive such compensation in the contract itself?

Under Spanish case-law a waiver of the distributor's right to receive a compensation is valid. Accordingly, it can be excluded from the agreement by the parties.

The Supreme Court has admitted the possibility of renouncing to, modifying or regulating the distributor's right to receive a compensation as a consequence of there being no legal provision on this matter (unlike what happens with agency agreements under which there is a specific mandatory provision regulating the goodwill -clientele-compensation) and the fact that this kind of clauses are not contrary to the law, the moral or the public order.

In this regard, the waiver of such compensation must be expressed properly (waiver clauses that are extremely open or unspecific are not possible) in order to avoid it to be considered unreasonable or debatable, which would lead to the invalidity of the clause. ■

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

In contrast to the statutory provisions under Articles 418a to 418v of the Swiss Code of Obligations (“CO”) governing agency agreements, Swiss law does not contain specific provisions governing distributorship agreements.

The rules regarding distributorship relationships derive from general principles of Swiss contract law and, sometimes by analogy, from the above mentioned statutory provisions dealing with agency agreements as applied by the courts (case law) and as interpreted and commented by legal authors.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

The Swiss law regulations allow the parties to freely choose a different legislation from the one applicable to the distributor territory. Please note however that any subsequent change from Swiss law as the governing law to a legal system which does not provide for a mandatory claim for clientele compensation (see answer to questions 3. and 4. hereafter) and, therefore, deprives the distributor of his right to claim compensation could be perceived as an attempt to evade the mandatory provision of Article 418u of the CO. Such evasion of the law would be invalid and not protected by Swiss courts.

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

The issue of a distributor's entitlement to claim compensation for clientele has long time been discussed controversially in legal writing. The case law of the Swiss tribunals has long been settled that only proper agents were entitled to a compensation for clientele.

² Supreme Court May 19, 2017, n°. 1911/2017 establishes that the Agency Act is applicable to distribution agreements by analogy, provided that the following conditions can be verified by the Court: (i) the analogy exists with the integration in sales network that approaches the distributor's position to the agent; (ii) there is no clause excluding the implementation of the Agency Act by analogy; and (iii) it must be verified that the requirements set out in the Agency Act for granting goodwill compensation or any other indemnity are met.

In a landmark decision rendered on May 22, 2008, the Swiss Federal Supreme Court ruled that under certain circumstances exclusive distributors have a mandatory compensation claim for clientele upon termination of the distribution agreement.

Pursuant to the decision of the Federal Supreme Court, an exclusive distributor has a mandatory compensation claim for clientele if he can establish the four conditions for clientele compensation under Swiss agency law (Article 418u CO) and, in addition, if the distributor is integrated in the supplier's distribution system and due to his limited economic freedom his position is similar to that of an agent.

The four conditions for clientele compensation for agents are the following:

- (i) the agent –through its marketing activities– has either established or significantly increased the supplier's customer base,
- (ii) the supplier's customer base has been established or substantially increased through the agent's marketing activities,
- (iii) after expiration of the agency relationship, the customers acquired by the agent are likely to remain loyal to the product and, therefore, the supplier (or his successor in title) substantially benefits from the customer base established or increased by the agent,
- (iv) after having taken all relevant circumstances into account, the compensation for clientele must not be inequitable.

The distributor is strictly integrated in the supplier's distribution system, for example, if the supplier has far reaching control and decision-making authority. Examples of situations that would evidence such an integration may include the following:

- the distributor has an obligation to purchase a minimum quantity of products,
- the supplier has a right to unilaterally change the prices and the terms of supply,
- the supplier has the sole right to approve new points of sale,
- the supplier has a right to cease producing and distributing the products,
- the distributor has an obligation to allocate each year certain amounts to marketing activities,
- the distributor must keep a minimum quantity of products in stock,
- the distributor has certain reporting obligations, such as the obligation to submit sales reports and to keep the supplier informed about competitor activities,
- the distributor has an obligation to disclose its accounting records upon request of the supplier,
- the distributor has an obligation to disclose information on its turnover,
- the distributor has an obligation to disclose its customers to the supplier.

A further criteria evidencing the distributor's integration in the supplier's distribution system can be the distributor's obligation to make considerable investments in view of the distribution of the product. The higher such investments, the more the distributor making such investments must be considered as integrated in the supplier's distribution system.

If the exclusive distributor is integrated in the supplier's distributions system based on the



above criteria and therefore his position is similar to that of an agent, and the exclusive distributor has a mandatory (i.e. inalienable) claim for clientele compensation.

Whether or not the conditions are met is a matter that needs to be assessed in the individual case.

The distributor's claim for clientele compensation shall not exceed the net earnings for one year derived from the distribution relationship, computed on the average of the last five years.

If the relationship has not existed for so long, then the net earnings are computed on the average of the actual term. The net earnings for one year are the maximum amount an exclusive distributor can claim as clientele compensation.

4 Can the distributor validly waive such compensation in the contract itself?

If the requirements are met, a distributor has a mandatory claim for clientele compensation. Accordingly, also any waiver written in the distribution agreement itself will prove invalid and without effect, and the rest of the agreement would remain in force (severability).

A distributor can validly waive its right to claim compensation for clientele only after termination or expiration of the agreement. ■

UKRAINE



Anzhela Makhinova - Partner
Sayenko Kharenko, Ukraine
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The Ukrainian legislation does not specifically regulate distribution agreements and the parties are free to enter into the contracts, although the domestic law stipulates mandatory requirements to be obeyed by both suppliers and distributors mainly in specific sectors.”

1 In your jurisdiction, is there a regulation of distribution contract and through what legislative tool?

The Ukrainian legislation does not specifically regulate distribution agreements. Notably, Ukrainian law in different spheres operates with the notions “distribution”, “distributor”, “dealer”, “dealer activity” and stipulates mandatory requirements to be obeyed by both suppliers and distributors/dealers, to name but a few: distribution of medicines, motor cars, agricultural vehicles, securities etc. At the same time, even in the said spheres Ukrainian law does not specifically address any requirements to the distribution agreements themselves.

Notwithstanding the above, pursuant to Article 6 and Article 627 of the Civil Code of Ukraine, the parties are free to enter into the contracts that are not directly stipulated by law and stipulating its terms and conditions. At the same time, such contracts shall comply with general principles of civil legislation, customary business practices, requirements of reasonableness and equitableness.

In the absence of specific regulations, in Ukraine distribution agreements are mainly governed by the Civil Code of Ukraine and the Commercial Code of Ukraine (the “Commercial Code”).

Moreover, while concluding distribution agreements, the parties shall take into account the provisions of competition legislation, legislation regarding quality, safety of goods and of protection of consumers’ rights, legislation in the sphere of intellectual property and advertising as well as other mandatory provisions stipulated in the current Ukrainian legislation.

2 Is it allowed in your jurisdiction the submission of the contract by agreement of the parties to different legislation from the one applicable to the distributor territory with a waiver of the legislation of the latter?

Under Article 43 of the Law of Ukraine “On International Private Law” the parties to the contract are generally free to agree

on the applicable law, except situations when Ukrainian law directly prohibits such agreement. However, it should be stated that the abovementioned submission does not permit to avoid application of mandatory provisions of Ukrainian law (pursuant to Article 14.1 of the Law of Ukraine “On International Private Law”).

Pursuant to Article 32 of the Law of Ukraine “On International Private Law” if the parties fail to agree on the law to govern the contract, the latter will be governed by the law of country, which has the closest connection to the transaction. If other is not foreseen by or does not follow from the conditions or content of the transaction or from all circumstances of the case, then the transaction is deemed to have the closest connection to the law of the state, where the party that shall perform execution to be the decisive value for the content of transaction, has its residence or location.

Article 44 of the Law of Ukraine “On International Private Law” sets forth the list of contracts and defines parties thereto that shall perform execution to be the decisive value for the content of transaction. The above list does not include the distribution contract, however, taking into account the position of the scholars as to the close connection between the distribution contracts and sale and purchase contracts, the party that shall perform execution to be the decisive value for the content of the distribution contract, shall be the seller (in case of the distribution contract – the supplier).

3 Is the distributor entitled to be compensated upon the termination of the term of his distributions right? What is the applicable compensation, if any?

Ukrainian law does not provide any rules on compensation to be paid upon termination

of the distribution agreements. There is no relevant case law either. Hence, general provisions of civil law shall apply i.e. the parties to the distribution agreements are allowed to agree upon such a compensation as well as methodology how it shall be calculated.

At the same time, in case of unjustified unilateral termination, the other party may claim for damages compensation (including actual damages, loss of profit, moral damages, if any), and for imposition of penalties set forth in the distribution agreement. The amount of the damages claimed had to be proven before the court by the party claiming the latter.

4 Can the distributor validly waive such compensation in the contract itself?

Taking into account that Ukrainian law is silent on any such compensations, the parties are free to regulate this issue by their own. If they do not want to have such a compensation in place, it shall not be indicated in the agreement. ■



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