

Your World First



CMS Commercial Law Group Guide

Distribution and Agency Agreements



Whilst many aspects of the distribution relationship will be similar when distributing within the EU there are important differences to bear in mind and which can be costly to ignore.

There are various methods for a manufacturer or wholesaler to get its products to market. However, two of the most tried and tested methods are agency and distribution agreements. Business people often use the terms 'agent' and 'distributor' interchangeably. However, there are important legal and practical distinctions between the two.

This guide attempts to be informative as regards the general context of the laws affecting distribution and agency agreements as well as providing detail in relation to commonly encountered problems.

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Austria

Agency Agreements

Austrian Commercial Agents Act

Are there any formal requirements upon concluding an agency agreement?

Under Austrian law, an agency agreement can be executed both verbally and in writing. There are no special formalities to take into account. Upon request of either party however, the other party has to cooperate in formalising the content of the agreement in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

What are the primary duties of the Agent?

The Commercial Agent has to inform the Principal immediately of any business transaction that he has closed for him.

What are the primary duties of the Principal?

The Principal has the following duties:

- to give to the Commercial Agent the necessary documents and all necessary information relating to the goods concerned and information necessary for the performance of the agency contract;
- to inform the Commercial Agent immediately when he anticipates the volume of transactions will be considerably lower than the Commercial Agent could have expected, especially regarding the previous business scale or according to the details given by the Principal; and
- to notify the Commercial Agent without delay about the acceptance or rejection of a transaction intermediated or closed without authorization by the Commercial Agent, or the non-execution of a business intermediated or closed by him.

How is the Agent paid for his services?

There are no mandatory rules governing the remuneration of the Agent.

During an agency agreement

Unless otherwise agreed, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action. The mere naming of a third party who would like to conclude a transaction does not lead to a claim for commission unless such a trade practice for the relevant business sector exists;
- the transaction has been concluded with customers that were exclusively assigned to the Agent;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent;
- the transaction has been concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract terminated.

A subsequent Commercial Agent has no right to claim commission if the predecessor deserves it, unless the circumstances justify a division of the commission between him and his predecessor.

Can a del credere clause be inserted into the agreement?

A del credere clause is valid.

Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.



Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given, three months' notice must be given during the third year, four months' during the fourth year, five months' during the fifth year and during the sixth and any subsequent years a six months' notice must be given.

Goodwill or other Compensation

A Commercial Agent is entitled to make an appropriate compensation claim after termination of the contractual relationship if and to the extent that:

- he has brought the Principal new customers or has significantly increased the volume of existing business;
- it is to be expected that the Principal or its legal successor will be able to derive considerable benefits from this volume of business even after termination of the contractual relationship; and
- the amount of the compensation is equitable taking into account all the circumstances and, in particular, the commission lost by the Commercial Agent on the business concluded with the customers in question.

The compensation claim generally amounts to the loss of income of the Commercial Agent due to the termination of the contractual relationship. This loss is calculated on the basis of a 'prognosis period' and past income of the Commercial Agent. The prognosis period is to be determined on the basis of the goods distributed and usually amounts to two to three years (but may be longer e.g. in case of a very long life cycle of the relevant products). The past income is determined on the basis of the income of the Commercial Agent in the last twelve months prior to the effective date of termination.

From these earnings only income attributable to customers acquired/expanded by the Commercial Agent are taken into account. In the final step this amount is reduced by the assessed average customer fluctuation and discounted to its present value.

The amount of the compensation may not exceed a figure equivalent to one year's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.

In which cases does compensation not apply?

No compensation is due when:

- the Principal has terminated the agency contract because of default attributable to the Commercial Agent which would justify immediate termination of the agency contract under national law;
- the Agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the Principal or on grounds of age, infirmity or illness of the Commercial Agent in consequence of which he cannot reasonably be required to continue his activities;
- the Agent assigns his rights and duties under the agency contract to another person with the agreement of the Principal.

The Agent loses the compensation claim if he has not notified to the Principal within one year after termination of the contract that he wishes to claim his rights for compensation.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation is invalid.

What is the statute of limitation?

All claims based on the commercial agency agreement expire after three years. If the claim has been notified to the Principal, the limitation is sustained until receipt of the written reply of the Principal.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Austrian law, a distribution agreement can be executed both verbally or in writing. There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to EU Competition law. If the market shares of both parties are below 30%, non-complete clauses are valid provided that they do not exceed five years, are geographically limited and proportional to the rights and interests of the Principal.

Under Article 5 of Commission Regulation 330/2010 relating to vertical agreements, post-contractual non-competes are not allowed, with the single exception of a one-year post-termination non-compete connected to a franchise where the franchisee remains for that period of one year in the building where it performed the franchised activity.

Can distribution agreements include Minimum Sales Quotas?

Such a provision is only limited by the general principle of violation of moral principles. If this provision violates moral principles which means it is in conflict with the general principles of Austrian law and/or the distributor would have to act illegal to reach these quotas, it becomes unenforceable.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices although the parties must be confident that the maximum or recommended price will most of the time not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Contracts of definite duration without the possibility of an early termination end upon the expiry of their term, without prior notice, unless this leads to a result that is conflicting with the principle of reasonableness and fairness.

Contracts of indefinite duration where no notice period was agreed upon, may only be terminated with a reasonable and timely notice period. A reasonable notice period takes into account all circumstances of the specific case.

Are there any formalities to be completed?

There are no specific formalities.

Is there any kind of compensation or goodwill indemnity to be paid?

Two different types of compensation claims exist.

Claims based on Sec 454 of the Austrian Commercial Code:

- Distributors can claim compensation for investments made according to the distribution contract in order to achieve a standardised distribution system, insofar as these investments are not amortised and not adequately utilizable by the distributor. However, distributors have to be subject to vertical restraints. The compensation is calculated by deducting amortisation from the respective investments made by the distributor.

Claims based on the Law on Commercial Agents (analogous application):

- If the distributor is integrated into a distribution system similar to a Commercial Agent contract, he is entitled to claim compensation. The amount of compensation is derived from the advantages gained by the manufacturer and the distributor's loss of potential turnover.

Is bankruptcy a reason for termination?

There is no automatic termination in the case of bankruptcy.

A contractual provision allowing termination in the case of bankruptcy is not valid.

What is the statute of limitations?

A statute of limitation of three years applies to all claims regarding the performance of a (distribution) agreement.

May parties choose litigation or arbitration?

Jurisdiction clauses:

- Contractual jurisdiction clause is valid.

Arbitration clauses:

- An arbitration clause has to be in writing and signed by both parties or by the exchange of a letter, fax, E-Mail or other forms of communications and prove the consent of the parties. However, some aspects of a decision by an arbitration tribunal can be reviewed by a court.

Belgium

Agency Agreements

The law on commercial agency agreements of 13 April 1995

Are there any formal requirements upon concluding an agency agreement?

Under Belgian law, an agency agreement can be executed both verbally or in writing. There are no special formalities to take into account. Oral agreements are deemed of indefinite duration. Upon request of either party however, the other party has to cooperate in formalising the content of the agreement in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

What are the primary duties of the Agent?

Key examples of the duties of a Commercial Agent are:

- negotiate and execute agreements on behalf of the Principal in good faith;
- give the Principal all necessary information; and
- follow reasonable instructions of the Principal.

What are the primary duties of the Principal?

The Principal has the following duties:

- to give to the Commercial Agent the necessary documents and all necessary information relating to the goods concerned and information necessary for the performance of the agency contract;
- to inform the Commercial Agent immediately when he anticipates the volume of transactions will be considerably lower than the Commercial Agent could have expected, especially regarding the previous business scale or according to the details given by the Principal; and
- to notify the Commercial Agent without delay about the acceptance or rejection of a transaction intermediated or closed without authorization by the Commercial Agent, or the non-execution of a business intermediated or closed by him.

How is the Agent paid for his services?

The remuneration of the Agent comprises either:

- a fixed amount,
- a variable commission, or
- a combination of both systems.

The commission becomes due at the latest when the transaction is completed by the third party or should have been completed if the Principal would have executed its obligations under the transaction.

During an agency agreement

Unless otherwise agreed, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action;
- the transaction has been concluded with customers that were exclusively assigned to the Agent;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent;
- the transaction has been concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within six months after that contract terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is valid but must be in writing.

Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.



Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given, three months' notice must be given during the third year, four months' during the fourth year, five months' during the fifth year and during the sixth and any subsequent years a six months' notice must be given.

Goodwill or other Compensation

A Commercial Agent is entitled to make an appropriate goodwill compensation claim after termination of the contractual relationship if and to the extent that:

- he has brought the Principal new customers or has significantly increased the volume of existing business;
- it is to be expected that the Principal or its legal successor will be able to derive considerable benefits from this volume of business even after termination of the contractual relationship; and
- the amount of the compensation may not exceed a figure equivalent to one year's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.

If the Agent can claim goodwill compensation and this compensation does not cover his actual damage, the Agent can also claim compensation for any actual damage above the amount of the compensation for goodwill.

In which cases does compensation not apply?

No compensation is due when:

- the Principal has terminated the agency contract because of default attributable to the Commercial Agent which would justify immediate termination of the agency contract under national law;

- the Agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the Principal or on grounds of age, infirmity or illness of the Commercial Agent in consequence of which he cannot reasonably be required to continue his activities;
- the Agent assigns his rights and duties under the agency contract to another person with the agreement of the Principal.

The Agent loses the compensation claim if he has not notified the Principal within one year after termination of the contract that he wishes to claim his rights for compensation.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation is valid when:

- in writing;
- limited to the type of transactions covered by the agency agreement;
- limited to the territory or type of clientele attributed to the Agent;
- limited to six months after termination of the agreement.

The post contractual non-compete clause will not be applied in case of a termination by the Principal without breach by the Agent, or by the Agent for breach by the Principal.

What is the statute of limitation?

All claims based on the commercial agency agreement expire one year after termination or five years after the claim originates, whichever comes first.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Belgian law, a distribution agreement can be executed both verbally or in writing. There are no special formalities to take into account.

The law of 19 December 2005 on pre-contractual information regarding commercial cooperation agreements, imposes how to disclose certain information regarding the contract and the contract parties, one month before the execution of the contract. This information must be disclosed together with a copy of the cooperation agreement.

Commercial cooperation agreements are all agreements where against payment of any kind, one party grants the other party the right to use its commercial formula when selling products or delivering services. A commercial formula can consist of either the use of a trade name or logo, or technical or commercial assistance or knowhow.

Contracts executed in disrespect of this law can be declared null and void upon request of the party that is granted the right to use the commercial formula.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

If contractual exclusivity is granted to the distributor and the contract is of indefinite duration, the Law of 27 July 1961 applies.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to EU Competition law. If the market shares of both parties are below 30%, non-complete clauses are valid provided that they do not exceed five years and are geographically limited and proportional to the rights and interests of the Principal (and thus limited to competing products or services).

Post contractual non-compete clauses are only valid if limited to one year and if they comply with following conditions:

- (a) the obligation relates to competing goods or services;
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;

Can distribution agreements include Minimum Sales Quotas?

There are no mandatory rules under Belgian law relating to Minimum Sales Quotas. A quota may, of course, be high enough to constitute a de facto non-compete if it can be shown that in the distributor's circumstances it would not buy competing products above the quota level. In this case, there is a small risk that the above rules on non-competes may apply.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices, although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Distribution agreements in general

Contracts of definite duration without the possibility of an early termination end upon the expiry of their term, without prior notice, unless this leads to a result that is conflicting with the principle of reasonableness and fairness.

Contracts of indefinite duration where no notice period was agreed upon, may only be terminated with a reasonable and timely notice period. A reasonable notice period takes into account all circumstances of the specific case such as:

- investments made;
- duration of the cooperation;
- importance of the contract in the general business.

The law of 27 July 1961

The Law of 1961 is applicable to some but not to all kinds of distribution agreements, that are executed in Belgium. The three main categories to which the act applies are:

- exclusive distribution agreements, i.e. agreements whereby the distributor is the only seller of the supplier's products in a defined territory. Shared exclusivity does not bar the courts from finding that there is exclusivity;
- quasi exclusive distribution agreements, i.e. agreements where, according to the case law, the distributor sells 80% or more of the supplier's products in the territory;

- distribution agreements where important obligations are imposed on the distributor, such as investments in stores, hiring qualified personnel, following marketing instructions, reach certain quota's, etc.

The law of 1961 provides for a relatively long notice period upon termination of these three types of distribution agreements if they have an indefinite duration. Contracts of definite duration are considered to become contracts of indefinite duration after a third renewal.

In the event that an exclusive distribution of indefinite duration is terminated by either party other than for reasons of serious breach of contract by the other party, the distributor is entitled to a reasonable notice period (article 2 of the act of 1961).

What exactly is considered to be a reasonable notice period is not specified in the act of 1961 but is to be determined on a case by case basis by the parties and, in the event of disagreement, by the Courts. Elements that are taken into account by the Courts in determining the reasonable notice period include:

- the length of the distribution agreement;
- the territory of the agreement;
- the importance of the sales of the products covered by the distribution agreement in respect to the total activity of the distributor;
- the brand notoriety;
- turnover and commercial success of the distributor, etc...

The notice periods awarded by the Belgian Courts range from three months to 42 months. Distributorships that have lasted 10 years will on the average require a notice period of 12 to 18 months.

In the event that a party terminates the distribution agreement without any notice period or with an insufficient notice period, the terminating party shall have to pay to the other party compensation which corresponds to the average semi-gross margin that the terminated party would have realised during the reasonable notice period. The semi-gross margin is calculated on the basis of the net profits before taxes, increased with the irreducible overhead costs which the terminated party cannot eliminate upon termination of the distribution agreement.

Are there any formalities to be completed?

There are no specific formalities.

Is there any kind of compensation or goodwill indemnity to be paid?

Distribution agreements in general

Except for agreements falling within the scope of the Law of 27 July 1961, there is no statutory right to compensation. Parties are free to provide remedies

The law of 27 July 1961

In case of the termination of the agreement by the supplier, except if this termination is based on a material breach of the distributor, the distributor will also be entitled to an additional indemnity pursuant to article 3 of the act of 1961.

This additional indemnity consists of the three following elements: goodwill, expenses and the severance pay.

a. Goodwill

The goodwill created by the distributor will give rise to compensation if it will benefit the supplier after the termination of the agreement.

In order to be entitled to a goodwill indemnity, the distributor will have to demonstrate that its customers are attached to the brand name of supplier's products and not to the business of the distributor as such. As a result, after termination of the distribution agreement, the customers will continue to purchase supplier's products either directly from supplier or from other or new distributors.

The indemnity is intended to be a consideration for the goodwill created by the distributor. No such indemnity should be awarded if the distributor has taken over existing customers and if its sales have not significantly increased.

The goodwill indemnity is determined on the basis of equity, which makes it difficult to assess. It is often expressed as the equivalent of the net profits before taxes (sometimes increased with overhead costs) or the equivalent of one or two years of gross profits.

b. Expenses

The terminated distributor is entitled to obtain compensation for the expenses incurred through the exploitation of the distributorship that could benefit the supplier after the termination of the agreement.

In most cases, it will be impossible for the distributor to prove that the expenses he has incurred in connection with the exploitation of his distributorship will benefit the supplier after the termination of the distribution agreement. Therefore, the courts often refuse to grant this part of the additional indemnity.

Even publicity expenses relating to the supplier's products are usually not taken into account by the Courts when determining the additional indemnity. Up till now only the distributor's expenses of important publicity campaigns just before the termination of the distribution agreement have been taken into account by some Courts.

c. Severance pay

The severance pay that the distributor is required to pay to employees who are dismissed as a consequence of the termination of the distribution agreement may be recouped from the supplier.

If the distributor is required to dismiss employees as a direct result of the termination of the distribution agreement, the distributor can request compensation amounting to the severance pay due to its employees. The burden of proof rests upon the distributor to demonstrate that the severance pay was due as a result of the termination of the distribution agreement.

The severance pay for dismissing personnel in Belgium is relatively high, ranging from minimum three months for lower employees to several years for managers.

Is bankruptcy a reason for termination?

There is no automatic termination in the case of bankruptcy.

A contractual provision allowing termination in the case of bankruptcy is valid. A contractual provision allowing terminating in the case of a judicial reorganisation in the framework of the Law on the continuity of Undertakings of 31 January 2009 is not valid.

What is the statute of limitations?

A statute of limitation of ten years applies to all claims regarding the performance of a distribution agreement.

May parties choose litigation or arbitration?

Parties can choose jurisdiction or opt for arbitration. Belgian Courts can refuse to apply an arbitration clause if during the arbitration, the law of 27 July 1961 would not apply to a distribution agreement falling within the scope of that law that is executed in Belgium.

England and Wales

Agency Agreements

(The Commercial Agents (Council Directive) Regulations 1993)

Are there any formal requirements upon concluding an agency agreement?

Other than in respect of restraint of trade clauses which must be in writing to be effective, an agency agreement can be executed both verbally or in writing and there are no special formalities to take into account. Upon request of either party however, the other party has to cooperate in formalising the content of the agreement in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

What are the primary duties of the Agent?

Common Law

Key examples of the duties of a Commercial Agent are:

- to obey the lawful instructions of the Principal;
- only to act within the limits of his authority;
- to use reasonable diligence, skill and care, and reasonable despatch;
- not to put himself into a situation where his interests will conflict with those of his Principal;
- to disclose all material facts to the Principal and to refrain from divulging confidential information to third parties;
- not to make a secret profit or to accept bribes;
- to account to the Principal for property and money of the Principal which is under his control;
- not to delegate his authority.

These duties can be contracted out of as between Principal and Agent where both are businesses.

Regulations

Other duties are imposed by Regulations. These duties cannot be contracted out of:

- the Agent must look after the interests of the Principal and act dutifully and in good faith; and

- the Agent must 'make proper efforts' to negotiate and conclude those transactions he is instructed to take care of, communicate to his Principal all necessary information available to him, and comply with his Principal's reasonable instructions.

What are the primary duties of the Principal?

Subject to variation by agreement and subject to the Regulations (where applicable) the Principal has the following duties:

Common Law

- to pay the Agent's remuneration and/or commission; and
- to pay the Agent's expenses and indemnify him against losses incurred in the performance of lawful acts within the scope of the Agent's authority.

Regulations

- to act dutifully and in good faith towards the Agent to give the necessary documents and all necessary information relating to the goods concerned and information necessary for the performance of the agency contract;
- to inform the Agent within a reasonable period of his acceptance/refusal to any commercial transactions negotiated or concluded by the Agent, and of any non-performance by him of any transaction arranged by the Agent; and
- to give advance notice of any significant fall in demand for the products in the territory.

How is the Agent paid for his services?

There are no mandatory rules governing the remuneration of the Agent.

If the parties do not expressly agree upon remuneration for the services of the Agent, the court will impose a reasonable sum.

During an agency agreement

Unless otherwise agreed, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action;
- the transaction has been concluded with customers that were exclusively assigned to the Agent;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent;
- the transaction has been concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is valid even if it is not confirmed in writing.

Duration of the agency contract

Parties are free to decide on the duration of the agreement. If no term is agreed (either orally or in writing) then the agency agreement shall be deemed to have been agreed for an indefinite term.

Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term. Automatic renewal or express indefinite duration after a fixed term is valid.

Termination of the agency contract

Immediate termination is permitted for material breach or failure to perform. However, the Principal's obligation to act in good faith would probably mean that an attempt to terminate the agreement on a technicality would put the Principal in material breach of its good faith obligations and give rise to a cause of action for the Agent.

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given and during the third and any subsequent years a three months' notice must be given.

Goodwill or other compensations

After termination of the agency contract, the Commercial Agent is entitled to be indemnified or compensated for damage. Although a settlement for 'indemnity' or 'compensation' can only be finalised after the agreement has terminated, the parties can agree in the contract whether 'compensation' or an 'indemnity' will be payable upon termination, with the prevailing view now being that the 'indemnity' option is preferable from the Principal's point of view.

In which cases does compensation not apply?

No compensation is due when:

- the Principal has terminated the agency contract because of default attributable to the Commercial Agent which would justify immediate termination of the agency contract under national law (e.g. material breach/ exceptional circumstances);
- the Agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the Principal or on grounds of age, infirmity or illness of the Commercial Agent in consequence of which he cannot reasonably be required to continue his activities; or
- the Agent assigns the agreement to other agents.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years. The obligation must be limited to the territory or client group and to products competing with the products for which the agency agreement was executed.

What is the statute of limitation?

An Agent's claim for indemnity or compensation becomes time-barred if he has not notified the Principal within a year of termination that he intends to pursue a claim. Litigation does not need to be commenced within that period and the normal limitation periods for bringing claims under the Limitation Act 1980 apply to agency agreements subject to the laws of England and Wales (six years).

Comments

Pursuant to the Bribery Act 2010, of particular concern to Principals is the new section 7 corporate offence of failure to prevent bribery by an 'associated person'. A commercial organisation is guilty of an offence if a person associated with it (which includes an Agent) bribes another person intending to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of the business for the commercial organisation. The only defence available to the Principal is if it can show that it has in place adequate procedures designed to prevent bribery by its associated persons.



Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under UK law, a distribution agreement can be executed both verbally or in writing. There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to EU Competition law. If the market shares of both parties are below 30%, non-complete clauses are valid provided that they do not exceed five years and are geographically limited and proportional to the rights and interests of the Principal.

Post-contractual non-competes are not allowed, with the single exception of a one-year post-termination non-compete connected to a franchise where the franchisee remains for that period of one year in the building where it performed the franchised activity.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be imposed on the distributor. A quota may, of course, be high enough to constitute a de facto non-compete if it can be shown that in the distributor's circumstances it would not buy competing products above the quota level. In this case, there is a small risk that the above rules on non-competes may apply.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices, although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Parties are free to set out notice periods in the contract. Where the contract is not for a fixed term and does not expressly set out the notice period for termination, it can be terminated by either party giving reasonable notice. What constitutes reasonable notice is likely to take into account the following: length of the relationship between the parties; the time and money invested by the distributor; the percentage of the distributor's turnover attributed to its activities under the contract; any acceptance that the distributor would not sell products which competed with the supplier's products. In a recent case the court considered those factors and held that a reasonable period of notice for termination was nine months; *Jackson Distribution Ltd v Tum Yeto Inc* [2009] EWCA 982 (QB).

Are there any formalities to be completed?

There are no specific formalities, except contractual agreement.

Is there any kind of compensation or goodwill indemnity to be paid?

There is no statutory right to compensation. Parties are free to provide remedies (e.g. liquidated damages) or indemnities (e.g. for loss of goodwill) in the contract.

Is bankruptcy a reason for termination?

There is no automatic termination in the case of bankruptcy.

A contractual provision allowing the termination in the case of bankruptcy is valid.

What is the statute of limitations?

A statute of limitation of six years applies.

May parties choose litigation or arbitration?

The parties are free to choose the jurisdiction for any dispute, including litigation or arbitration.

France

Agency Agreements

(Law of 25 June 1991 codified under article L. 134-1 of the French Commercial Code)

Are there any formal requirements upon concluding an agency agreement?

The agency agreement can be executed both verbally and in writing.

Under French law, the Commercial Agent must register with a special register held by the Commercial court where the Commercial Agent is located.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

Pursuant to article 1998 of the French Civil Code, the Principal is bound by the commitments made by the Agent. He will not, however, be bound by any commitments made by the Agent outside the scope of the mandate unless it was expressly or tacitly ratified by the Principal.

What are the primary duties of the Agent?

Key examples of the duties of a Commercial Agent are:

- obligation of loyalty: the Agent must comply with the Principal's instructions; the Agent must act with due diligence; the Agent must keep the information provided by the Principal confidential and his acts must not affect the Principal's reputation;
- accountability and transparency obligation: the Agent must inform the Principal of his management measures and return to the Principal all sums collected on the Principal's behalf;
- non-compete obligation: the Agent cannot accept to represent one of the Principal's competitors without the Principal's authorization. The agreement may expressly provide that the non-compete obligation will also apply after the termination of the agreement. To be valid, such clause must be established in writing, and be limited to a specific geographic sector, a group of persons entrusted to the Commercial Agent and the type of goods or services which are covered by the contract. However, it will only be valid for a period of two years after the termination of the agreement.

What are the primary duties of the Principal?

The Principal has the following duties:

- obligation of loyalty: the Principal must ensure the Agent is able to execute his mandate;
- obligation of information: for example, Principal shall transfer to the Agent all the documents relating to the products or services which are necessary for the performance of the agreement;
- obligation to perform the agreements entered into by the Agent on behalf of and in the name of the Principal;
- obligation to pay the Agent.

How is the Agent paid for his services?

There are no mandatory rules governing the remuneration of the Agent.

During an agency agreement

If the parties do not expressly agree upon remuneration for the services of the Agent, the court will impose a reasonable sum, based on what is the customary compensation for Commercial Agents for similar products in the region. If there is no such customary practice the Agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is only valid if agreed upon in writing. The liability of the Agent will be limited to the amounts of the Agent's commission.



Duration of the agency contract

Parties are free to decide on the duration of the agreement. If no term is agreed in writing then the agency agreement shall be deemed to have been agreed for an indefinite term.

Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given and during the third and any subsequent years a three months' notice must be given.

Goodwill or other compensation

The Agent is entitled to a mandatory compensation for goodwill of two years' remuneration based on the average of last three contract years (or actual term, if shorter).

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Pre-contractual stage

Under French law, the Principal must provide to the distributor at least 20 days before the signature of the contract all relevant information enabling the distributor to commit itself with full knowledge of the facts.

This obligation only applies when (i) the Principal provides to the distributor a corporate name, trademark or trade name to carry out its activity and (ii) the agreement is exclusive or quasi-exclusive.

In which case does compensation not apply?

No compensation is due when the Principal has terminated the agency contract because of a breach of the contract by the Agent.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years after termination of the agreement. The obligation must be limited to a specific geographical sector and, if applicable, the group of persons entrusted to the

Commercial Agent and the type of goods or services which the latter represents under the contract.

What is the statute of limitation?

The Agent has one year to claim for the compensation resulting from the termination of the agreement.

It applies essentially to exclusive distribution agreements ('concession exclusive de vente') contracts and franchise agreements.

Upon request, the Principal must also provide the distributor with the price list, the rebates and the terms and conditions of sale.

Additional and specific information must be provided by a service provider.

Contractual stage

Under French law, a distribution agreement must be executed in writing.

This agreement must include both the terms and conditions for the sales of products as well as the terms and conditions of any service that can be provided by the distributor in order to promote the contractual goods.

The agreement must be finalized every year before March 1st.

However according to the French Commercial Practices Board (Commission d'Examen des Pratiques Commerciales), this obligation doesn't apply to long term relationships such as franchise or selective distribution agreements.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulations on vertical restraints.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to EU Competition law.

If the market shares of both parties are below 30%, non-compete clauses are valid provided that they do not exceed five years and are geographically limited and proportional to the rights and interests of the Principal.

Post contractual non-compete clauses are allowed if they are limited to one year, to the contractual products and to activity performed within the same premises, and are necessary to protect the know-how of the Principal. However, even if those conditions are not fulfilled, parties may still prove that the post-contractual non-compete clauses doesn't have an effect on competition.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas are valid provided that the targets are reasonable, i.e. realistic. The clause must define clearly and objectively the settings and must not be discretionary compared to the targets established with the other distributors. The targets must not be imposed on the distributor or disproportionate in consideration of the importance of the territory conceded.

Can the Principal influence resale price of the distributor?

Suppliers may not impose a minimum resale price. Maximum price fixing and recommended price are accepted although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

French case law is more severe than in most of the other Member states.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Contracts of definite duration without the possibility of an early termination end upon the expiration of their term, without prior notice, unless agreed otherwise in writing in the agreement.

Contracts of indefinite duration where no notice period was agreed upon, may only be terminated with a reasonable notice period (between two to three months).

Moreover, article L.442-6 of the French Commercial Code sanctions the abrupt termination of an 'established business relationship' when the notice period is not sufficient. The notice period must take into account the duration of the relationship (example: 20 years business relationship = two years notice period).

Are there any formalities to be completed?

Contracts of indefinite duration must be terminated in writing.

Is there any kind of compensation or goodwill indemnity to be paid?

There is no statutory right to goodwill compensation. Upon expiration of the term of an agreement of definite duration, no compensation is due.

In case of abrupt termination of an established business relationship, even if the contractual notice period was given, compensation for insufficient notice will be due, calculated based on the gross margin that would have been made during the reasonable notice period.

Is bankruptcy a reason for termination?

There is no automatic termination in the case of bankruptcy.

A contractual provision allowing to terminate in the case of bankruptcy will not be enforceable.

What is the statute of limitations?

A statute of limitation of five years applies to all claims regarding the performance of a (distribution) agreement.

May parties choose litigation or arbitration?

The parties are free to choose jurisdiction as well as opt for arbitration.

Germany

Agency Agreements

(German Commercial Code)

Are there any formal requirements upon concluding an agency agreement?

Under German law, an agency agreement can be executed both verbally or in writing. There are no special formalities to take into account. Upon request of either party however, the other party has to cooperate in formalising the content of the agreement in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

Unless contractually provided, the Principal is free to accept or reject business transactions acquired by the Agent, but must notify the Agent without delay.

What are the primary duties of the Agent?

The Agent has the following duties:

- solicit business for the Principal;
- provide the Principal with the opportunity to enter into sales contracts with customers or even conclude such contracts itself in the name of the Principal;
- provide the Principal with relevant information regarding the market, (potential) customers and requirements concerning the products;
- diligently safeguard the interests of the Principal in all business respects;
- follow the Principal's instructions;
- maintain confidentiality;
- adhere to non-compete obligations for the term of contract.

What are the primary duties of the Principal?

The Principal must:

- support the Agent with respect to the Principal's business; and pay commission.

Obligation to provide support includes:

- duty to prepare documents such as price lists, brochures, sample offers, general business terms and conditions;
 - duty to be considerate (observe interests of Agent);

- inform the Agent of material aspects regarding distribution of products;
- general duty of loyalty to the Agent, must avoid anything which might damage the Agent's position.

How is the Agent paid for his services?

There are no mandatory rules governing the remuneration of the Agent.

If no commission rate has been agreed, the usual commission rate applies.

During an agency agreement

Unless otherwise agreed, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action. Joint responsibility is sufficient;
- the transaction has been concluded with customers that were exclusively assigned to the Agent even for transactions concluded without Agent's involvement;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent even for transactions concluded without the Agent's involvement.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is only valid (i) if parties agreed upon such mechanism in writing and (ii) only for a specific business transaction or for business transactions with specific third parties which the Agent himself has concluded or acquired.



Duration of the agency contract

Parties are free to decide on the duration of the agreement. If the parties continue to perform the agreement after its expiration without agreeing on another definite term, the contract is considered to have been tacitly renewed for an undefined duration.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice. See also 'Notice Period'.

Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given, three months' notice must be given during the third year, four months' during the fourth year, five months' during the fifth year and during the sixth and any subsequent years a six months' notice must be given.

The Agency agreement ends at the end of month in which the notice period expires.

The notice period can be extended in the contract. The Agent's notice period can however not be longer than the Principal's.

Goodwill or other compensation

The Agent is entitled to mandatory compensation for goodwill of one year's remuneration based on the average of last five contract years (or actual term, if shorter).

In which cases compensation does not apply?

No compensation is due when:

- the Principal has terminated the agency contract because of default attributable to the Commercial Agent which would justify immediate termination of the agency contract under national law;

- the Agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the Principal or the Agent has good cause for termination;
- the Agent assigns his rights and duties under the agency contract to another person with the agreement of the Principal.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years after termination of the agreement. The obligation must be limited to the territory or client group and to the products for which the agency agreement was executed.

The Principal must pay reasonable compensation for the duration of the non-compete obligation.

What is the statute of limitation?

Any claim arising from an agency agreement is subject to a three-year limitation period, starting at the end of the year during which the claim became due and the creditor (e.g. the Agent) gained knowledge (or did not gain knowledge due to its gross negligence) of the debtor and the circumstances creating the obligation. In absence of such knowledge, there is a maximum limitation period of 10 years from the date on which the claim originated.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under German law, a distribution agreement can be executed both verbally or in writing. There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

Exclusivities are subject to rather strict anti-trust laws in Germany. Depending on the respective market shares sole distribution rights (e.g. exclusivity for territory or customer group), exclusive supply obligations and prohibition on competition leading to obligation of distributor to purchase products only from the Principal, could be invalid. In addition EU anti-trust law may apply.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be imposed on the distributor, but restrictions (e.g. anti-trust law and the law on general terms and conditions) may apply.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Contracts of definite duration without the possibility of an early termination end upon the expiration of their term, without prior notice, unless agreed otherwise in writing in the agreement. Such contracts can be terminated for breach in which case notification must be given without undue delay after gaining knowledge of the circumstances allowing the termination for cause.

Contracts of indefinite duration where no notice period was agreed upon, may only be terminated with a reasonable notice period. The courts take into account the statutory law on Commercial Agents and, therefore, apply a notice period ranging from one month to six months depending on the overall term of the distributor agreement. However, in some cases longer notice periods may apply. Termination for breach is also possible.

Are there any formalities to be completed?

There are no specific formalities. However, in case of termination for breach the reasons for such termination must be stated in the notice.

Is there any kind of compensation or goodwill indemnity to be paid?

In accordance with German case law, compensation can be based upon the statutory law on Commercial Agents if the distributor is integrated in the sales organization of the Principal, e.g. by performing comparable tasks to those of a Commercial Agent, and if the distributor has a contractual obligation to transfer its customer data to the Principal upon termination. In general, the compensation claim is calculated just like the Agent's compensation claim, in particular the maximum cap (one year's remuneration) applies.

However, contrary to the commercial agency agreement, the distributor's compensation claim can more easily be contractually excluded.

Is bankruptcy a reason for termination?

There is no automatic termination of the agreement in the case of bankruptcy of the distributor, but German courts consider this a reason for the Principal to terminate for cause. Contractual clauses providing for automatic termination of the contract in case of bankruptcy are permitted.

According to German insolvency law, a distribution contract will automatically terminate if the Principal becomes bankrupt. Parties may not deviate from this regulation.

What is the statute of limitations?

Compensation is excluded if not claimed within one year from end of contract. If it is not excluded, the statute of limitation is three years starting at end of year in which claim became due and the creditor (i.e. Principal or distributor) gained knowledge (or did not gain knowledge due to its gross negligence) of the debtor and circumstances creating the obligation. Without such knowledge, a maximum of limitation period of 10 years from the date on which the claim originated applies. German courts usually admit a contractual deviation (e.g. shorter limitation period).

May parties choose jurisdiction or arbitration?

A contractual jurisdiction clause is valid if signed by both parties in the same document. Parties can opt for arbitration.

Hungary

Agency Agreements

Act CXVII of 2000 on the Commercial Representation Contracts of Self-employed Commercial Agents is only effective until 15 March 2014 due to the new Hungarian Civil Code entering into force, replacing the above Act with specific provisions.

Are there any formal requirements upon concluding an agency agreement?

Under Hungarian law, an agency agreement must be in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

Unless contractually provided, the Principal is free to accept or reject business transactions acquired by the Agent, but must notify the Agent without delay.

As a general rule (as set out in the Hungarian Civil Code) to appoint subagents the approval of the Principal is required.

What are the primary duties of the Agent?

The Agent must:

- use its best endeavors to intermediate the transactions;
- inform third parties about its scope of representation;
- proceed by considering the Principal's interests, keep the Principal informed and follow its instructions.

What are the primary duties of the Principal?

The Principal has the following duties:

- provide necessary information and documents to the Agent so that it is able to perform its tasks;
- inform the Commercial Agent immediately when he anticipates the volume of transactions will be considerably lower than the Commercial Agent could have reasonably expected;
- notify the Commercial Agent without delay about the acceptance or rejection of a transaction intermediated or closed without authorization by the Commercial Agent, or the non-execution of a business intermediated or closed by him; and

- bear the risk of damages unless otherwise agreed upon by the parties.

How is the Agent paid for his services?

There are no mandatory rules governing the remuneration of the Agent.

During an agency agreement

Provided that the parties agreed in a commission fee in the agency agreement and unless otherwise agreed, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action;
- the transaction has been concluded with customers that were exclusively assigned to the Agent even for transactions concluded without the Agent's involvement;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent even for transactions concluded without the Agent's involvement.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract was terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is only valid if parties agreed upon such mechanism in writing.



Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given and during the third and any subsequent years three months' notice must be given. Shorter notice period may only be applied if the Agent does not carry out such activity as a main activity.

Provisions more favorable for the Agent are possible. In case of termination by notice, the notice period shall coincide with the end of the calendar month.

Goodwill or other compensation

Following the termination of the agency agreement, the Agent is entitled to compensation if and to the extent that:

- the Agent has acquired new clients for the Principal and the Principal has a substantial benefit from such client following the termination of the agency agreement; and
- if the payment of compensation is equitable with respect to all the circumstances and, in particular, the commission that would have been earned by the Agent from future transactions with solicited customers if the agreement had remained in force.

In which cases does compensation not apply?

No compensation is due:

- if the agency agreement is terminated for breach of the Agent with immediate effect; or

- if the agency agreement is terminated by the Agent, unless such termination is justified by circumstances attributable to the Principal or on grounds of age, infirmity or illness of the Agent in a consequence of which the Commercial Agent cannot reasonably be required to continue his activities; or
- the Commercial Agent assigned his rights and duties under the agency agreement to another person with the consent of the Principal.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years.

If the agency agreement is terminated due to the serious breach of the Principal, the Agent is entitled to terminate the non-compete agreement (by a written notice) within one month as of the termination of the agency agreement by notice.

What is the statute of limitation?

Any claim based on the Agency law expires within five years except for the claim for indemnity that expires one year after the termination of the agreement.

Expected legal changes in Hungary

As the new Hungarian Civil Code is expected to enter into force in the near future and the rules of agency agreements will be incorporated in the new Hungarian Civil Code as a sui generis contract, the above provisions may change as of 15 March 2014. The text of the new Hungarian Civil Code is still forming, several amendments have been made to it recently and further amendments cannot be excluded either.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Hungarian law, a distribution agreement can be executed both verbally and in writing. There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to EU Competition law.

If the market shares of both parties are below 30%, non-complete clauses are valid provided that they do not exceed five years and are geographically limited and proportional to the rights and interests of the Principal.

A post-contractual non-compete clause may not be exempted save for the case when each of the below listed four conditions are met:

- it is related to products/services competing with the products/services subject to the agreement;
- it solely affects the premises and territory where the purchaser (distributor) operates during the term of the agreement;
- it is necessary for the protection of the know-how transferred to the distributor; and
- the term does not exceed one year after the expiration of the agreement.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be imposed on the distributor, but restrictions (e.g. anti-trust law, no abuse of dominant position) may apply.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

The notice period shall be agreed upon by the parties. It shall be a reasonable period.

Are there any formalities to be completed?

Pursuant to the Hungarian Civil Code, the right of termination shall be exercised by making a statement to the other party. Unless provided for in a specific regulation, the statement may be made orally, in writing or by implied conduct. The statement must always be unambiguous.

Is there any kind of compensation or goodwill indemnity to be paid?

Compensation may be claimed in case of unlawful termination; the compensation shall cover the damages suffered as well as lost profits. Further claims may be raised subject to the provisions of the distribution agreement in question (e.g. penalty).

There is no statutory right to goodwill compensation.

Is bankruptcy a reason for termination?

Bankruptcy is only a reason for termination if the agreement is concluded intuitu personae or if bankruptcy is expressly stipulated as a reason for termination in the contract.

What is the statute of limitations?

A statute of limitation of five years applies to all claims regarding the performance of a (distribution) agreement.

May parties choose litigation or arbitration?

Yes, the parties may choose the jurisdiction and may also opt for arbitration.

Expected legal changes in Hungary

As the new Hungarian Civil Code is expected to enter into force in the near future and the rules of the distribution agreement will be incorporated in the new Hungarian Civil Code as a sui generis contract, the above provisions may change.

Italy

Agency Agreements

Legislative decrees no. 303/1991 and no. 65/1999; law no. 422/2000

Are there any formal requirements upon concluding an agency agreement?

Under Italian law, the contract must be executed in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal in which case these contracts are directly binding for the Principal (of course, within the limits of the power given).

What are the primary duties of the Agent?

The Agent mainly has the following obligations:

- perform his obligations with due diligence, good faith and in compliance with the instructions provided for by the Principal;
- inform the Principal of the conditions of the relevant market segment, as well as of any other information useful in order to evaluate the profitability of the business.

What are the primary duties of the Principal?

The Principal has the following obligations:

- perform the agreement with due diligence and good faith;
- provide the Agent with the documents related to the concerned goods and services, as well as with all the necessary and relevant information concerning the products and services or the contract's performance;
- inform the Agent of any potential reduction in demand;
- notify the Commercial Agent without delay about the acceptance or rejection of a transaction;
- deliver to the Agent a statement of the due commissions at the latest on the last day of the month following the quarter in which the commissions have matured;
- within the same term the liquidated commissions must be effectively paid to the Agent. The Agent is entitled to require all information necessary to verify the amount of the liquidated commissions, as well as an abstract of the accounting books.

How is the Agent paid for his services?

During the agency agreement

The Commercial Agent can claim a commission fee if:

- the transaction has been regularly concluded as a result of his action;
- the transaction has been concluded with customers that were exclusively assigned to the Agent even for transactions concluded without the Agent's involvement;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent even for transactions concluded without the Agent's involvement;
- the transaction has been concluded with a third party whom he has previously acquired as a customer.

After the termination

The Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract terminated.

The Agent is in any case entitled to ask for compensation for the further damages suffered as a consequence of the termination, if any. Such provisions cannot be derogated to the prejudice of the Agent.

Can a del credere clause be inserted into the agreement?

According to Italian law, a del credere clause (the agreement which charges the Agent, in whole or in part, with the liability for a third party's breach) is null.

Exceptionally, however, parties can from time to time require the Agent to grant a specific guarantee for the executions of customers he has brought on, provided that this is limited to transactions of a special nature and for exceptional amounts. In any case the guarantee of the Agent shall not be higher than the commission that the Agent is entitled to for that transaction. In that case the Agent will also have to be specifically remunerated.



Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given, three months' notice must be given during the third year, four months' during the fourth year, five months' during the fifth year and during the sixth and any subsequent years a six months' notice must be given.

Parties may agree on a different notice period, but the minimum provided for by law must be respected.

Goodwill or other compensation

Following the termination of the agency agreement, the Agent is entitled to compensation of maximum one year's remuneration based on the average of last five contract years (or actual term, if shorter) if and to the extent that:

- the Agent has acquired new clients for the Principal or has improved the business with the Principal's former clients and the Principal has a substantial benefit from such client following the termination of the agency agreement; and
- if the payment of compensation is equitable with respect to all the circumstances and, in particular, the commission that would have been earned by the Agent from future transactions with solicited customers if the agreement had remained in force.

In some specific cases indicated by the law the indemnity will not be due.

In which cases compensation does not apply?

No compensation is due if the agency agreement is terminated for breach of the Agent.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years and it cannot exceed territory, customs activities and services covered by the pre-existent Agency agreement.

The Agent that is bound by a post contractual non-compete obligation is entitled to a compensation determined on the basis of the duration, the nature of the contract and the other compensations to which the Agent is already entitled upon termination. In the absence of an agreement between the parties, the compensation will be determined by the Court on an equitable basis taking into account:

- the average of the payments received by the Agent during the contractual relationship and their influence on the aggregate volume of the business during the same period;
- the reasons for the termination of the contract;
- the territory in which the Agent was active;
- the fact that an exclusivity was granted to the Agent.

What is the statute of limitation?

As a general rule, claims based on agency contracts expire within 10 years. However, the Agent's right to claim commissions (provided that they are not due for occasional transactions) expires within five years.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Italian law, Franchising agreements must be established in writing (Article 3 of the Law no. 129/2004).

Other distribution agreements can according to Italian law be executed both verbally and in writing.

There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

According to Article 2596 of the Italian Civil Code, a non-compete clause must be:

- in writing;
- limited to a specific territory or to a specific activity; and
- limited to five years. Non-compete clauses exceeding five years will only be valid for the first five years.

A majority of the case law does not apply Article 2596 for non-compete clauses included in agreements strengthening the cooperation between the parties, as, for example, in the case of vertical agreements.

Can distribution agreements include Minimum Sales Quotas?

Distribution agreements can include Minimum Sales Quotas, provided that the relevant clauses are not unreasonable or unrealistic.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share is over 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Contracts of definite duration end upon the expiry of their term, without prior notice, unless agreed otherwise in writing in the agreement.

Contracts of indefinite duration where no notice period was agreed upon, may only be terminated with a sufficient notice period. The notice period can take into account:

- the length of the contract;
- the investments made by the parties; and
- the level of the economic dependence of the distributor with respect to the Principal.

The contract can provide for the possibility to replace the notice period with a compensatory indemnity. The Italian Supreme Court stated that a contractual possibility to terminate the agreement cannot be abused.

Is there any kind of compensation or goodwill indemnity to be paid?

There is no statutory rule entitling the distributor to a compensation or goodwill indemnity upon termination of the contract.

Is bankruptcy a reason for termination?

According to art. 72 of the Italian Bankruptcy Law concerning outstanding relationships, 'if a contract is still unexecuted or not entirely executed by the parties at the time when one of them has been declared bankrupted, the execution of the contract, unless otherwise provided for by the bankruptcy law, is suspended until the receiver, by means of an authorization of the creditors' meeting, states (i) to succeed in the contractual relationship in place of the bankrupted, undertaking all the related obligations or, on the contrary, (ii) to back out of the contract unless, in contracts with real effects, the right had already been transferred. The contracting party has also the right to bring a default action against the receiver, asking the Court to assign a time limit up to 60 days, in order to proceed in compliance to the above mentioned provision, after whose expiration the contract shall be considered terminated'.

This rule applies both in the case of distributor's bankruptcy, and in the case of Principal's bankruptcy.

What is the statute of limitations?

A statute of limitation of 10 years applies to all claims regarding distribution agreements.

May parties choose litigation or arbitration?

The parties are free to choose jurisdiction as well as to opt for arbitration.

According to Article 1341 of the Civil Code, such clauses are considered onerous and, if drafted by only one of the parties, they must be signed by the other party.

The Netherlands

Agency Agreements

Art. 7:428 e.v. B.W.

Are there any formal requirements upon concluding an agency agreement?

Under Dutch law, an agency agreement can be executed both verbally or in writing. There are no special formalities to take into account. Upon request of either party however, the other party has to cooperate in formalising the content of the agreement in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

What are the primary duties of the Agent?

A general obligation to safeguard the interests of the Principal is imposed on the Agent. Amongst other things, this entails that he must carry out an examination into the solvency of the third party with which he is doing business.

The Agent is only obliged to refrain from activities that are competing to the undertaking of the Principal if this was expressly agreed upon.

What are the primary duties of the Principal?

The Principal must reasonably enable the Agent to perform his work.

How is the Agent paid for his services?

Parties are free to negotiate the method of remuneration.

The Agent is entitled to commissions for all agreements concluded through his negotiation.

The Agent will also be entitled to a compensation for his services if he has duly executed his obligations, but the Principal does not follow up on his efforts by accepting the offers made to the Agent or as a consequence of his negotiating skills or does so to a significantly lesser amount than might be expected.

Can a del credere clause be inserted into the agreement?

A del credere clause is only valid if parties agreed upon such mechanism in writing. The liability of the Agent will be limited to the agreed commission, unless the del credere clause is related to a specific contract or to contracts which the Agent has concluded in the name and for the account of the Principal.

Duration of the agency contract

Parties are free to decide on the duration of the agreement.

Notice period

If no period of notice has been agreed, the notice period is four months. An additional month is added for agreements exceeding three years. For contracts exceeding six years, the notice period is six months.

Parties can agree upon a different notice period. The following minima however apply:

- one month after a duration of a maximum of one year;
- two months for a duration between one and two years; and
- three months for the following years.

If longer periods are agreed, these may not be shorter for the Principal than for the Commercial Agent.

Notice is presumed to be given at the end of the month in which the notice was received.

Goodwill or compensations

Following termination of the agreement the Principal has to pay the Agent goodwill compensation of up to one year's commission based on the average commission over the last five years. The amount of compensation will be fixed by the Court and may vary from this maximum to nothing at all.



Compensation will only be awarded if the Agent has developed business and has thereby substantially increased the value of the Principal's business.

In which cases does compensation not apply?

There are exhaustive cases where no compensation is due, if:

- the agreement is terminated under circumstances that make the Agent liable for damages towards the Principal;
- the Agent terminates the agreement itself, unless this termination is justified by circumstances which can be attributed to the Principal or is justified by the age, invalidity or sickness of the Agent on basis of which he reasonably cannot be expected to continue his activities;
- the Agent has transferred, with approval of the Principal, his contractual position under the commercial agency agreement to a third party.

Is a post contractual non-compete obligation enforceable?

Although generally agency agreements provide for a post contractual non-compete obligation, which according to the Dutch civil code can be agreed upon in writing for a maximum period of two years provided that the obligation is limited to the territory and to products competing with the products for which the agency agreement was executed, such a post contractual non-compete clause may under circumstances infringe competition law rules. In this context, the enforceability of a post contractual non-compete obligation can be called into question.

What is the statute of limitation?

One year after the agreement has ended for a claim regarding goodwill compensation.

A right of action based on unlawful termination (compelling reason) or dissolution of the commercial agency agreement expires one year after the occurrence of the fact that gave rise to the claim.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Dutch law, a distribution agreement can be executed both verbally as in writing. There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to EU Competition law. If the market shares of both parties are below 30%, non-compete clauses are valid provided that they do not exceed five years and are geographically limited and proportional to the rights and interests of the Principal.

A post contractual non-compete obligation can be agreed upon in writing, provided that the obligation (1) is indispensable to protect know-how transferred by the supplier to the buyer (2) is limited to the point of sale from which the buyer has operated during the contract period and (3) is limited to a maximum period of one year.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be imposed on the distributor. A quota may, of course, be high enough to constitute a de facto non-compete if it can be shown that in the distributor's circumstances it would not buy competing products above the quota level.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices. Although the parties must be confident that the maximum or recommended price will not operate as a disguised fixed price. This point is important in all cases, but above all where the Principal's or distributor's market share exceeds 30%.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Contracts of definite duration without the possibility of an early termination end upon the expiry of their term, without prior notice, unless this leads to a result that is conflicting with the principle of reasonableness and fairness.

Contracts of indefinite duration where no notice period was agreed upon may only be terminated with a reasonable notice period. A reasonable notice period takes into account all circumstances of the specific case such as investments made, underlying reason for the termination, results of Principal and distributor, dependency of distributor upon product of the Principal, et cetera.

Are there any formalities to be completed?

There are no specific formalities. However, for obvious reasons, a written declaration to the other party is preferred.

Is there any kind of compensation or goodwill indemnity to be paid?

Upon expiry of the term of an agreement of definite duration, no compensation is due unless this leads to a result conflicting with the Principle of reasonableness and fairness.

Upon termination of contract of indefinite duration, a compensation for substantial investments that could not be recouped during the notice period will be due.

There is no statutory rule entitling a distributor to goodwill compensation. The prevailing doctrine in the Netherlands is that goodwill compensation is not due.

Is bankruptcy a reason for termination?

There is no automatic termination in case of bankruptcy.

A contractual provision allowing the termination in case of bankruptcy is valid.

What is the statute of limitations?

A statute of limitation of five years applies to all claims regarding the performance of a (distribution) agreement.

May parties choose litigation or arbitration?

Parties are free to choose jurisdiction or opt for arbitration.

Poland

Agency Agreements

Articles 758-764(9) of the Polish Civil Law

Are there any formal requirements upon concluding an agency agreement?

Under Polish law, an agency agreement can be executed both verbally and in writing. There are no special formalities to be taken into account.

Each party is entitled to demand that the other party confirm in writing the content of the agreement.

Can the Agent bind the Principal?

The Agent can conclude contracts binding the Principal only if he has a separate authorisation from the Principal (PoA). A contract concluded without authorisation or beyond the scope of the authorisation is deemed confirmed unless the Principal notifies the client (immediately after he receives information about it) that he does not confirm it.

What are the primary duties of the Agent?

Key examples of the duties of a Commercial Agent are:

- submit any significant information to the Principal (relating to the performance of the agency agreement);
- follow the Principal's instructions that are justified in given circumstances;
- undertake (within the scope of the conducted business) any acts necessary to protect the Principal's rights.

What are the primary duties of the Principal?

The Principal has the following key obligations:

- submit to the Agent all documents and information required for due performance of the contract;
- notify the Agent (within a reasonable time) of his acceptance/rejection of a proposal to conclude a contract and of the non-performance of a contract;
- notify the Agent (within a reasonable time) that the number of contracts to be concluded or their value will be much lower than the Agent could normally expect.

How is the Agent paid for his services?

There are no mandatory rules governing the remuneration of the Agent.

If the parties do not expressly agree upon a method of remuneration, the Agent is entitled to commission, which depends on the number or value of the executed contracts. If the agreement does not specify the amount of the commission it shall constitute a reasonable sum, based on what is the customary compensation for Commercial Agents for similar products in the region. If there is no such customary practice the Agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

During the agency agreement

Unless otherwise agreed, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action;
- the transaction has been concluded with customers that were exclusively assigned to the Agent;
- the transaction has been concluded within a territory that was exclusively assigned to the Agent;
- the transaction has been concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

After termination

Unless otherwise agreed, the Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is only valid if parties agreed upon such mechanism in writing.



Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

Notice period

Minimum notice periods must be respected. During the first year, one month's notice must be given, during the second year two months' notice must be given and during the third and any subsequent years a three months' notice must be given.

Notice periods cannot be contractually shortened. They may be prolonged, but the notice period for the Principal cannot be shorter than the one specified for the Agent. In that case the notice period for the Principal shall be deemed prolonged for the same term.

Notice is presumed to be given at the end of the month in which the notice was received.

Goodwill or other Compensation

Poland chose the indemnity model in cases of termination of an agency agreement – conditions for granting indemnity are the same as in EU directive 86/653/EEC.

A Commercial Agent is entitled to an indemnity after termination of the contractual relationship if and to the extent that:

- he has brought the Principal new customers or has significantly increased the volume of existing business; and
- it is to be expected that the Principal or its legal successor will be able to derive considerable benefits from this volume of business even after termination of the contractual relationship, and the amount of the indemnity may not exceed a figure equivalent to

one year's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.

The granting of such indemnity does not prevent an Agent from seeking damages.

In which cases does compensation not apply?

No indemnity is due when:

- the Principal has terminated the agency contract because of default attributable to the Commercial Agent which would justify immediate termination of the agency contract;
- the Agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the Principal or on grounds of age, infirmity or illness of the Commercial Agent in consequence of which he cannot reasonably be required to continue his activities.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years.

The Principal must pay the Agent an appropriate compensation for the entire duration of the non-compete (unless otherwise stipulated in the agency agreement or if the agency agreement was terminated due to circumstances which are attributable to the Agent). If the amount of the compensation was not stipulated in the agreement, it shall be calculated based on the benefits derived by the Principal as a result of the non-compete and the Agent's lost income.

What is the statute of limitation?

In general, claims based on an agency agreement expire within three years. But compensation is possible only if demanded by an Agent or his/her heirs within one year of the date of the termination of the contract.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Polish Civil Law, a distribution agreement can be executed both verbally as in writing. There are no special formalities to take into account.

Can exclusivities be granted?

Exclusivities can be granted, subject to the EU and Polish regulation on vertical restraints.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid subject to the EU and Polish regulation on vertical restraints. If the market shares of each of the parties are below 30%, non-complete clauses are valid provided that they do not exceed five years and are geographically limited and proportional to the rights and interests of the Principal.

A post contractual non-compete clause is exceptionally allowed for one year after the termination of the agreement, when it is limited to the specific territory and the scope of products, which may be regarded as substitute for the products under the agreement and it is indispensable to protect the know-how transferred by the supplier to the purchaser.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be imposed on the distributor, unless these in fact amount to exclusivity or non-compete provisions or the performance is impossible. Under Polish Civil Law, a general obligation to perform the impossible is deemed null and void.

Can the Principal influence resale price of the distributor?

The Principal can only impose maximum prices or suggest recommended resale prices, provided that the additional conditions stipulated in the EU and Polish regulation on vertical restraints are met.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Contracts of definite duration end upon the expiry of their term, without prior notice, unless agreed otherwise in writing in the agreement.

Contracts of indefinite duration where no notice period was agreed upon, may be terminated by either party immediately upon delivery of a notice to the other party. There are opinions in the legal doctrine that the rules regarding notice periods in agency agreements should apply to distribution contracts (this is however not confirmed by court rulings).

Are there any formalities to be completed?

General Polish Civil Law rules apply. If the agreement was concluded in writing, termination must also be in writing.

Is there any kind of compensation or goodwill indemnity to be paid?

There is no statutory rule entitling the distributor to compensation or goodwill indemnity upon termination of the contract.

There are opinions in the legal doctrine that to certain distribution contracts should apply the rules regarding compensation upon termination of agency agreements (this is however not confirmed by court rulings).

If the contract is terminated unlawfully, the Polish Civil Code, provides for a general provision to compensate the other party for all damages as a consequence of this fault.

The compensation shall cover the losses incurred (*damnum emergens*) and the benefits which the party that suffered could have obtained if the damage had not occurred (*lucrum cessans*).

Is bankruptcy a reason for termination?

Under Polish Bankruptcy Law any contractual clauses providing for automatic changes or termination of the contract in case of bankruptcy (declaration of bankruptcy) are invalid.

What is the statute of limitations?

General Polish Civil Law rules apply – claims expire within:

- for the supplier: two years – for claims arising from a sale made within the scope of the seller's business activity;
- for the purchaser: three years – for claims relating to its business activities.

May parties choose litigation or arbitration?

Parties can choose the jurisdiction (this includes the possibility to designate foreign) or opt for arbitration.

Russia

Agency Agreements

Are there any formal requirements upon concluding an agency agreement?

Under Russian law, an agency agreement can be executed both verbally and in writing and there are no special formalities to take into account.

Agreements between legal entities must however be in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

What are the primary duties of the Agent?

The Agent has the following obligations:

- act in accordance with lawful, feasible and clear instructions of the Principal. However, the Agent may deviate from the Principal's instructions in certain circumstances set out in the Civil Code including where such deviation is required in the interests of the Principal and the Agent had no opportunity to get prior instructions from the Principal;
- inform the Principal of any deviation as soon as possible;
- carry out the agency personally, unless otherwise agreed by the Principal;
- provide information about the execution of the agency agreement whenever requested by the Principal;
- account to the Principal for all benefits the Agent derives from his activities as an Agent for the Principal;
- prepare a report for the Principal on the conduct of the agency either periodically or once the contract is fulfilled.

What are the primary duties of the Principal?

Principal has the following obligations:

- pay the Agent his agency fees in the amount and as stipulated in the agreement;
- accept all the benefits and obligations incurred by the Agent for the Principal under the agency agreement; and
- reimburse expenses and/or provide the Agent with funds required to execute the agency.

How is the Agent paid for his services?

There are no other mandatory requirements for the payment of the Agent under Russian law, but the contract is deemed onerous.

The Agent can either be paid during or upon termination of the agreement.

If the parties did not expressly agree upon remuneration, the remuneration shall be according to trade customs.

If remuneration is provided for in the contract, the Principal must pay the Agent within one week following a report of the Agent for a respective period.

Can a del credere clause be inserted into the agreement?

A del credere clause is valid but must be in writing.

Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agency agreements can be executed for definite or indefinite duration.

Termination of the agency contract

Parties are free to decide on the circumstances in which the agreement may be terminated. The Civil Code states that contracts of indefinite duration may be terminated at any time by either party. If the Agent is a physical person, the agency agreement can also be terminated for death and/or incapacity of the Agent.

Notice period

There are no mandatory rules regarding notice periods. If no notice period is specified, the contract can be terminated with a reasonable notice period of minimum 30 days.

Goodwill or other compensation

If an agreement with a Commercial Agent is terminated before the end of its term, not for breach by the Agent, the Agent is entitled to compensation for its damages including loss of profit as well as a proportionate amount of the fee and the Principal must reimburse the expenses incurred by the Agent up to the date of termination.



In all other cases (including in the case of termination of a commercial agency agreement for the Agent's breach) the Agent is entitled to a proportionate amount of the fee and the Principal must reimburse the expenses incurred by the Agent up to the date of termination.

A Principal is entitled to compensation for its damages in the case of unlawful termination by the Agent before the end of its term or in case of termination for breach by the Agent.

In which cases does compensation not apply?

No compensation is due when the Agent is in breach (as above).

No compensation is due for any activities of the Agent undertaken after the Agent knew or should have known that the agreement was terminated.

Is a post-contractual non-compete obligation enforceable?

The Agent or Principal may stipulate contractual provisions by which the other party shall be prevented from concluding similar agency agreements with other persons in the same territory as defined by the agency agreement.

Although the competition authority and the courts have not developed a consistent approach to post-contractual non-compete obligations, such clauses risk to be unenforceable in Russia. More importantly, they may also fall foul of the Competition Law.

What is the statute of limitation?

Any claim arising from an agency agreement is subject to a three-year limitation period, starting from the date the creditor gained or should have gained knowledge of violation of its right. The parties cannot agree a different limitation.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Distribution agreements are not governed by any specific mandatory Russian laws and there are no formal legal requirements for executing distribution agreements. Certain formal requirements can apply to particular distribution agreements if they contain elements of other specific types of civil contracts which are governed by mandatory laws (i.e. sale-purchase, supply, agency and commission agreements).

Can exclusivities be granted?

Generally, exclusivity clauses are rather often included in distribution agreements.

Although they are not caught by the per se prohibitions of the Russian Competition Law applicable to vertical (distribution) agreements (prohibition on selling competitors' products and resale price fixing, except for maximum resale price fixing, please see below), under

certain circumstances such provisions may be viewed as a violation of the so-called 'general' restrictions. More specifically, an exclusivity clause can be interpreted as a refusal of one of the parties to act independently in order to benefit from the distribution agreement which in turn might constitute a restriction of competition as expressly prohibited by the Competition Law.

The key difference between the application of the general restrictions and per se prohibitions is that the mere inclusion of such anti-competitive restrictions into the agreements is not sufficient for the Federal Anti-monopoly Service (the 'FAS') to hold the undertakings involved liable. The FAS is always required to provide sufficient proof of an adverse effect on competition (actual or potential) resulting from the agreement.

In any case, the exclusivity clause cannot be structured as a prohibition on selling competitors' products.

Should one of the parties be a dominant undertaking the exclusivity clauses may also amount to an abuse of dominance.

Is a contractual non-competition clause enforceable?

The FAS' treatment of non-competition clauses in commercial contracts has always been rather controversial and in most cases their enforceability and compatibility with the Competition Law is far from obvious. As of today, there is not much FAS/court practice on this matter.

This being said, in any case from the Russian competition law perspective, it is not possible to impose prohibition on the distributor to sell competitor's products.

Can distribution agreements include Minimum Sales Quotas?

In principle, distribution agreements may include Minimum Sales Quotas; still, it is quite probable that such provisions would result in the restriction of competition, e.g. by creating barriers to market entry. The risks of infringement are significantly higher should the Principal be a dominant undertaking. The basic recommendation is to refrain from using such clauses to the extent possible.

Can the Principal influence the resale price of the Distributor?

The Principal may only impose maximum resale prices. The prohibition relating to resale price fixing (being one of the per se prohibitions applicable to 'vertical' agreements (except for admissible vertical agreements mentioned below)) concerns mainly fixed and minimum resale price maintenance. However, the competition authority is generally biased against recommended resale prices, especially when 'recommended' prices are maintained by distributors in practice and/or distribution agreements provide for sanctions in case of the distributors' non-compliance with the 'recommended' prices. In several cases such an influence was interpreted as an anti-competitive restriction resulting in a violation of the Russian Competition Law.

To be viewed as 'admissible' (ideally, such vertical agreements are not caught by the Competition Law and may contain any restrictive provisions) a vertical agreement must be either:

- a vertical agreement pursuant to which the market shares of each party do not exceed 20% of any product market in Russia; or
- a franchise agreement (which is not relevant to the situation in question).

As far as the first exemption is concerned, please be advised that the market share is defined by the FAS. The FAS' market analysis often leads to arbitrary results and the relevant market may be narrowly determined.

Consequently, it cannot be fully relied on as in practice even if the parties believe that their market shares is below 20 % the FAS may come to different conclusion. To this end, it is advisable to avoid including 'recommended' resale price maintenance clauses into vertical (distribution) agreements (of course, except for maximum resale prices).

Termination of the distribution agreement and indemnities

Is a notice period necessary?

There are no mandatory rules regarding notice periods. Except when contractually agreed otherwise, the distribution agreement can be terminated giving a reasonable notice (normally 30 days).

Are there any formalities to be completed?

There are no formal requirements upon termination a distribution agreement.

Is there any kind of compensation or goodwill indemnity to be paid?

There is no statutory right to compensation. Parties are free to provide contractual rights of compensations.

Is bankruptcy a reason for termination?

Under Russian law an agency agreement is only terminated as of right in case of bankruptcy of an Agent, being an individual entrepreneur.

As for legal entities, there are no such definite provisions. However, under the Civil Code, a legal entity shall be liquidated provided it is held bankrupt by the court in accordance with the Russian bankruptcy law.

Liquidation of a legal entity results in its termination per se without assignment of its rights and obligations to third parties. Consequently, the distribution agreement is terminated as of right. The Principal becomes one of the creditors of the distributor.

What is the statute of limitations?

Any claim arising from a distribution agreement is subject to a three-year limitation period, starting from the date the creditor gained or should have gained knowledge of violation of its right. The parties cannot agree a different limitation.

The parties are free to choose jurisdiction as well as to opt for arbitration. The jurisdiction/arbitration clause must be in writing. Parties are free to choose the applicable law upon execution of the agreement or afterwards. Nevertheless, the Civil Code imposes certain limitations of the right to choose applicable law, such as public order etc.

Besides, if the circumstances of the case provide that the agreement is de facto connected only with one country (i.e. Russia) the parties' choice of foreign law cannot prevent the application of the mandatory rules of the law of said country.

Spain

Agency Agreements

(Law 12/1992 of 27 May 1992, on Agency Agreements)

Are there any formal requirements upon concluding an agency agreement?

Under Spanish law, the agency agreement can be executed both verbally as well as in writing. However, either party may require the other to formalise the agency agreement in writing.

Can the Agent bind the Principal?

The contract can grant the Agent the power to negotiate and conclude agreements in the name and for the account of the Principal.

What are the primary duties of the Agent?

The Agent has the following obligations:

- obligation of good faith and loyalty towards the Principal, as well as the obligation to watch over the Principal's interests;
- take responsibility for the promotion of the transactions he was entrusted by the Principal and, where appropriate, carrying them out;
- when necessary, report to the Principal any information available, in particular related to the solvency of a third party with whom transactions are being carried out;
- follow the instructions of the Principal, as long as it does not affect his independence;
- receive, on behalf of the Principal, any claim related to a defect or fault of the object sold or the service provided within the transactions carried out;
- keep account of the transactions carried out;
- non-compete obligation: the Agent cannot accept to represent one of the Principal's competitors without the Principal's authorization.

What are the primary duties of the Principal?

The Principal has the following obligations:

- obligation of good faith and loyalty towards the Agent;
- pay the Agent;
- provide the Agent with disposition catalogues, samples, rates etc. to enable the transactions under the agency agreement;

- inform the Agent of any relevant information, especially when the volume of the transactions is going to be slightly below what the Agent is usually expecting; and
- advise the Agent, within 15 days, of his acceptance or rejection of the proposed transaction. He shall also inform the Agent, within the shortest term possible, of any execution, default or partial execution of the transaction carried out.

During the agency agreement

The remuneration of the Agent comprises either:

- a fixed amount;
- a variable commission; or
- a combination of both systems.

In the last two cases, the Commercial Agent can claim a commission fee if:

- the transaction has been concluded as a result of his action;
- the transaction has been concluded with a third party whom he has previously approached or acquired as a customer for transactions of the same kind.

After the termination

The Commercial Agent is entitled to a commission if:

- the transaction is mainly attributable to the Commercial Agent's efforts during the period covered by the agency contract and if the transaction was entered into within three months after that contract was terminated; or
- the order of the third party reached the Principal or the Commercial Agent before the agency contract was terminated.

Can a del credere clause be inserted into the agreement?

A del credere clause is only valid if parties agreed upon such mechanism in writing and if the Agent is compensated for such additional guarantee.



Duration of the agency contract

Parties are free to decide on the duration of the agreement. Agreements of definite duration are converted to agreements for indefinite duration if they continue to be performed after the fixed term.

Oral agreements are deemed to have an indefinite duration.

Termination of the agency contract

Where an agency contract is concluded for an indefinite period either party may terminate it by written notice. Minimum notice periods must be respected. An agency contract for an indefinite term may be terminated by notice equal to one month for every year that the contract remains in force, with a maximum of six months.

However, minimum notice periods do not apply when the other party has infringed its obligations or in case of bankruptcy of the other party.

Goodwill or other Compensation

Following the termination of the agency agreement, the Agent is entitled to compensation if and to the extent that the Agent has acquired new clients for the Principal or has improved the business with the Principal's former clients and the Principal has a substantial benefit from such client following the termination of the agency agreement ('goodwill compensation').

Besides this, the agent is also entitled to compensation for the losses and damages that the unilateral termination of the agreement by the principal may have caused, as long as such termination does not allow the agent to fully amortize the expenses in which he has incurred as a direct consequence of the agreement ('compensation for damages').

In which case does compensation not apply?

No goodwill compensation is due if the agency agreement is terminated for breach of the Agent or to an insolvency filing.

No compensation for damages is due if the contract was correctly terminated or if there are no non-amortised investments of the Agent.

Is a post contractual non-compete obligation enforceable?

A post contractual non-compete obligation can be agreed upon in writing for a maximum period of two years after termination of the agreement. The obligation must be limited to a specific geographical and product sector and to the type of goods or services which the latter represents under the contract.

What is the statute of limitation?

The Agent has one year to claim for the compensation resulting from the termination of the agreement.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Spanish law, there are no specific formal requirements upon concluding a distribution agreement.

Can exclusivities be granted?

Exclusivities can be granted subject to the EU rules on vertical restraints. In particular, a supplier may restrict the territory into which, or the customers to whom the buyer party to the agreement may sell the contract goods or services, provided that such a restriction does not limit passive sales by the buyer.

Is a contractual non-competition clause enforceable?

Non-compete clauses may in some cases restrict effective competition in the market and, thus, be prohibited under national or EU Competition Law.

According to the EU Block Exemption Regulation 330/2010, directly applicable in Spain, non-compete clauses will be exempted from prohibition if the market shares of both parties are below 30% and provided that they do not exceed 5 years and are geographically limited and proportional to the rights and interests of the Principal. Should this not be the case, the clause will not be automatically prohibited but a self-assessment would have to be carried out taking into account the EU Guidelines on vertical restraints in order to determine its validity.

Post contractual non-compete clauses may be covered by the Regulation 330/2010 and thus, be exempted from prohibition if the market shares of the parties are below 30% and its duration is limited to one year, provided that they relate to goods or services which compete with the contract goods or services, refer to the premises and land from which the buyer has operated during the contract period and are indispensable to protect know-how transferred by the supplier to the buyer. Should this not be the case, a self-assessment would have to be carried out according to EU Guidelines on vertical restraints.

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be interpreted as non-compete obligations if they make the buyer purchase more than 80% of its requirements on a particular market from only one supplier and therefore, should this be the case, they will have to be treated as such in order to determine their validity.

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices. However, minimum or fix resale price obligations may in specific circumstances be exempted from prohibition by efficiency reasons.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

If no notice period was agreed between parties, the Spanish Agency Act could, in theory, be applied by analogy or a reasonable notice period will be determined upon terminating contracts of indefinite duration.

The Spanish Unfair Competition Act exceptionally imposes a six months' notice period upon terminating distribution agreements where the distributor could be considered as being economically dependent on the Supplier, regardless of the actual duration of the distribution agreement.

Is there any kind of compensation or goodwill indemnity to be paid?

This matter is dealt with by the Spanish Courts on a case-by-case basis, according to general principles of contract law.

A goodwill compensation could be granted by applying the Agency Act by analogy. Recent case-law limits this to agreements where the Distributor's situation is deemed to be 'identical' to the Agent's.

Is bankruptcy a reason for termination?

According to the Spanish Bankruptcy Act, contractual clauses providing for automatic termination of the contract in case of bankruptcy are not permitted, although it is argued whether the agency rules, which admit this possibility, may be applicable by analogy.

What is the statute of limitations?

Any claim arising from a distribution agreement is subject to a 15 year limitation period.

May parties choose litigation or arbitration?

Parties are free to choose jurisdiction or opt for arbitration.

Switzerland

Agency Agreements

Swiss Code of Obligations (CO) article 418a ff.

Are there any formal requirements upon concluding an agency agreement?

Under Swiss law, an agency agreement can be executed both verbally as in writing. There are no special formalities to take into account. If the parties want to deviate from certain non-mandatory provisions of the CO, however, such deviations have to be agreed on in written form.

Can the Agent bind the Principal?

Without another specific agreement between the parties (the Principal may grant special mandates to the Agent), the Agent is deemed only to have the authority to

- (i) act as an intermediary in business transactions, to
- (ii) receive notices and other declarations of defect or non-performance by which the customer asserts his rights arising out of faulty performance by the Principal, or reserves such rights, and to
- (iii) exercise the Principal's rights to secure evidence thereof. The Agent is, however, not deemed to have the authority to accept payments, to grant terms of payment, or to agree with the customers upon other alterations of the contract.

What are the primary duties of the Agent?

A general obligation to safeguard the interests of the Principal is imposed on the Agent. Amongst other things, he must not exploit or inform others of business secrets of the Principal.

What are the primary duties of the Principal?

The Principal must:

- do everything in his power to enable the Agent to successfully perform his activities;
- immediately inform the Agent if he anticipates that a considerably lower volume of business can be concluded than was agreed or was to be expected in the circumstances;
- pay the agreed commission fee;
- pay an adequate compensation to the Agent if the Agent is prohibited from simultaneously representing other Principals and is prevented without fault from performing his function due to illness, compulsory Swiss military service or similar reasons.

How is the Agent paid for his services?

Parties are free to negotiate the method of remuneration.

During agency contract

The Agent is entitled to the agreed or customary commission on all transactions that he facilitated or concluded and, unless otherwise agreed in writing, on transactions concluded by the Principal without the Agent's involvement provided that the Agent has solicited the third person as a customer for business transactions of such kind.

The Agent, to whom a certain territory or a certain clientele is allocated exclusively, is even entitled to the agreed or customary commission on all business which is concluded with customers in that territory or of that clientele.

After termination

The Agent will, unless otherwise agreed or customary, be entitled to a commission only for subsequent orders received prior to the termination of the agency contract, and made by a customer who was solicited by the Agent during the period of the agency contract.

Further, in cases in which the Agent has been instructed to collect debts for the Principal, unless otherwise agreed or customary, the Agent is entitled to collect commission on any amounts he collects and delivers to the Principal in accordance with the latter's instructions.

The Agent loses his claim for a commission to the extent that the performance of a concluded business transaction does not occur for reasons for which the Principal is not responsible.



The claim for commission, however, becomes fully extinct, if the performance by the third party, in consideration of which the Principal has already performed, does not occur, or fails to such a substantial extent that the Principal cannot reasonably be expected to pay a commission.

The claim for commission is finally also forfeited if the Agent acts contrary to the interests of the Principal or in bad faith.

Can a del credere clause be inserted into the agreement?

A del credere clause can be agreed on for an unlimited amount, but such agreement must be in writing. With the agreement to such a clause, the Agent automatically acquires an inalienable entitlement for an adequate special remuneration.

Duration of the agency contract

Parties are free to decide on the duration of the contract. If an agency contract with a fixed period of time is continued by both parties by tacit consent after expiration of such period, the contract is deemed to have been renewed for the same period of time, but not for longer than one year.

Notice period

If the agency contract was concluded for an indefinite term and its duration is not limited by virtue of its purpose, it may be terminated by either party during the first year of the contract by giving one month notice to the end of the following month.

Parties can agree upon a shorter notice period in writing.

Thereafter, the agency contract may be terminated as of the end of a calendar quarter by giving two months' notice. While the parties may agree upon a longer notice period or upon another termination date, no agreement shall provide for different notice periods for the Principal and for the Agent.

Goodwill or other compensation

If the Agent, through his activity, has substantially increased the Principal's clientele, and if, even after termination of the agency contract, the Principal or his successor in title benefits substantially from the business relations with the acquired clientele, the Agent has an inalienable right to an adequate compensation to the extent that such compensation is not inequitable ('goodwill indemnity'). Such claim shall not exceed the net earnings for one year derived from this contractual relationship, computed on the average of the last five years.

In which cases does compensation not apply?

No claim exists if the agency contract was terminated for a reason for which the Agent was responsible.

Is a post contractual non-compete obligation enforceable?

There is no statutory non-compete duty of the Agent after termination of the agency contract.

The parties may agree, in writing, on post contractual non-compete obligations. However, for competition law reasons, such non-compete clause should not exceed one year. Furthermore, such prohibition must, for civil law reasons, be appropriately restricted with regard to place, time and scope.

The court may, at its own discretion, impose restrictions on an excessive non-compete clause, taking due account of all the circumstances.

Where such a post-contractual non-compete clause has been agreed, on termination of the contract the Agent has an inalienable entitlement to an adequate special remuneration.

A post contractual non-compete clause is not applicable upon termination of the agency contract by the Principal (unless based on a breach committed by the Agent).

What is the statute of limitation?

The Agent's recurrent claims (general and special commissions) are time-barred five years after they became due. Other claims are time barred after 10 years.

Distribution Agreements

Are there any formal requirements upon concluding distribution agreements?

Under Swiss law, a distribution agreement can be executed both verbally or in writing. There are no special formalities to take into account. Certain statutory provisions, however, imposing formal requirements for specific contractual clauses may be applicable by analogy for certain types of distribution contracts (e.g. the conclusion of a non-compete clause for the time after the termination of a distribution contract must always be in writing).

Can exclusivities be granted?

Exclusivities for distributors are not per se illegal but they may not unduly restrict competition. For instance, clauses according to which passive sales of other distributors into the exclusive territories are prohibited are not permitted under Swiss competition law.

If the market shares of the Principal and of the distributor each are less than 30% then the exclusivity is likely to be justifiable on grounds of economic efficiency (if such grounds of economic efficiency can be established). Hardcore restrictions such as resale price maintenance or absolute territorial protection, however, are usually very difficult to justify even if market shares are lower than 30%.

Exclusive purchase agreements (single branding) are usually unproblematic if they are concluded for a limited duration of no longer than five years and if the market shares of both parties do not exceed 30%.

Is a contractual non-competition clause enforceable?

Non-compete clauses are valid during the term of the agreement (limited to a five year duration).

Post-contractual non-compete clauses must be concluded in writing and should, for competition law reasons, not exceed one year. Furthermore, such post-contractual non-compete clauses must, for civil law reasons, be appropriately restricted with regard to place, time and scope. Finally, depending on the circumstances, the distributor may be entitled to an adequate compensation for such post-contractual non-compete obligations (in exclusive distribution agreements, such compensation always becomes due; in other distribution contracts, it depends on the specific circumstances).

Can distribution agreements include Minimum Sales Quotas?

Minimum Sales Quotas can be imposed on the distributor.

The limitations of such freedom are set by the abuse of rights principle and the principle that no person may restrict itself to a degree which violates the law or public morals. Such excessive agreements are (partially) void. If the agreed Minimum Sales Quotas amounts to 80% or more of the requirements of the distributor with regard to the product in question, the rules applicable to exclusive purchase agreements have to be observed (cp. above).

Can the Principal influence resale price of the distributor?

The contract can only impose maximum prices or suggest recommended resale prices unless this has the same effect as resale price maintenance.

Termination of the distribution agreement and indemnities

Is a notice period necessary?

Ordinary termination

Generally, the parties are free to agree on the termination conditions.

Termination of an exclusive distribution agreement
For other distribution contracts (such as, for example, franchising agreements), the relevant issues have to be analysed separately. However, for most distribution contracts the conclusions will be the same or at least similar.

Exclusive distribution agreements for an indefinite term/ an excessive duration without the possibility of termination are not permissible under Swiss law. Such contracts are, however, not void but rather will be adjusted by the courts (i.e. the courts will define the applicable termination conditions). In one case, the Swiss Federal Supreme Court considered the duration of eight years (without termination possibilities) to be the maximum acceptable duration for an exclusive distribution agreement; after expiry of a duration of eight years a notice period of six months was deemed appropriate.

If the parties did not agree on any specific notice periods and contract periods, the notice period for the first year of the exclusive distribution agreement is one month and thereafter six months.

Are there any formalities to be completed?

There are no specific formalities, unless provided otherwise in the specific contract.

Is there any kind of compensation or goodwill indemnity to be paid?

No general compensation (damages) is owed by the terminating party in the case of an ordinary/extraordinary termination in compliance with the relevant notice period/for valid reason.

An extraordinary termination may even give the terminating party claims for damages provided that such termination is based on a breach of contract by the other party.

Contrary to agency agreements, with regard to distribution contracts a goodwill indemnity is, in principle, not owed. However, the question is highly disputed amongst scholars. The newer doctrine seems to accept a right to an indemnity at least in certain situations, provided that the distributor is strongly integrated in the distribution organisation of the Principal (similar to an Agent) and the further requirements applicable to agency agreements are fulfilled (this view has recently been confirmed by the Swiss Federal Supreme Court with regard to an exclusive distribution agreement).

Is bankruptcy a reason for termination?

Bankruptcy of distributor

There is no automatic termination of the distribution contract in case of bankruptcy of the distributor.

The contract may, however, be terminated for valid reason. A contractual provision allowing termination of the contract in case of bankruptcy is also valid. Upon bankruptcy of the distributor, the bankruptcy administrator will decide on whether the distributor shall continue with the contract or not.

No party is entitled to claim compensation for lack of notice period; the distributor is further not entitled to claim a goodwill indemnity.

Bankruptcy of Principal

Applying art 418s CO by analogy, a distribution contract will automatically terminate with ex nunc effect if the Principal becomes bankrupt. Some scholars are, however, of the opinion that the bankruptcy administrator has the right to continue the contract, if the distributor is provided with sufficient security.

Upon bankruptcy of the Principal no party is entitled to claim compensation for lack of notice period. It is questionable, whether the distributor is entitled to claim goodwill compensation.

What is the statute of limitations?

A statute of limitation of five years applies to all recurrent claims of the distributor.

For other claims a statute of limitation of 10 years applies.

May parties choose jurisdiction/arbitration?

The parties are free to choose jurisdiction as well as to opt for arbitration.

According to art 5 of the Swiss Private International Law Act, a jurisdiction agreement must fulfil certain formal requirements (e.g. it has to be agreed upon in writing).

The same is true for an arbitration agreement (art 178 of the Swiss Private International Law Act).

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