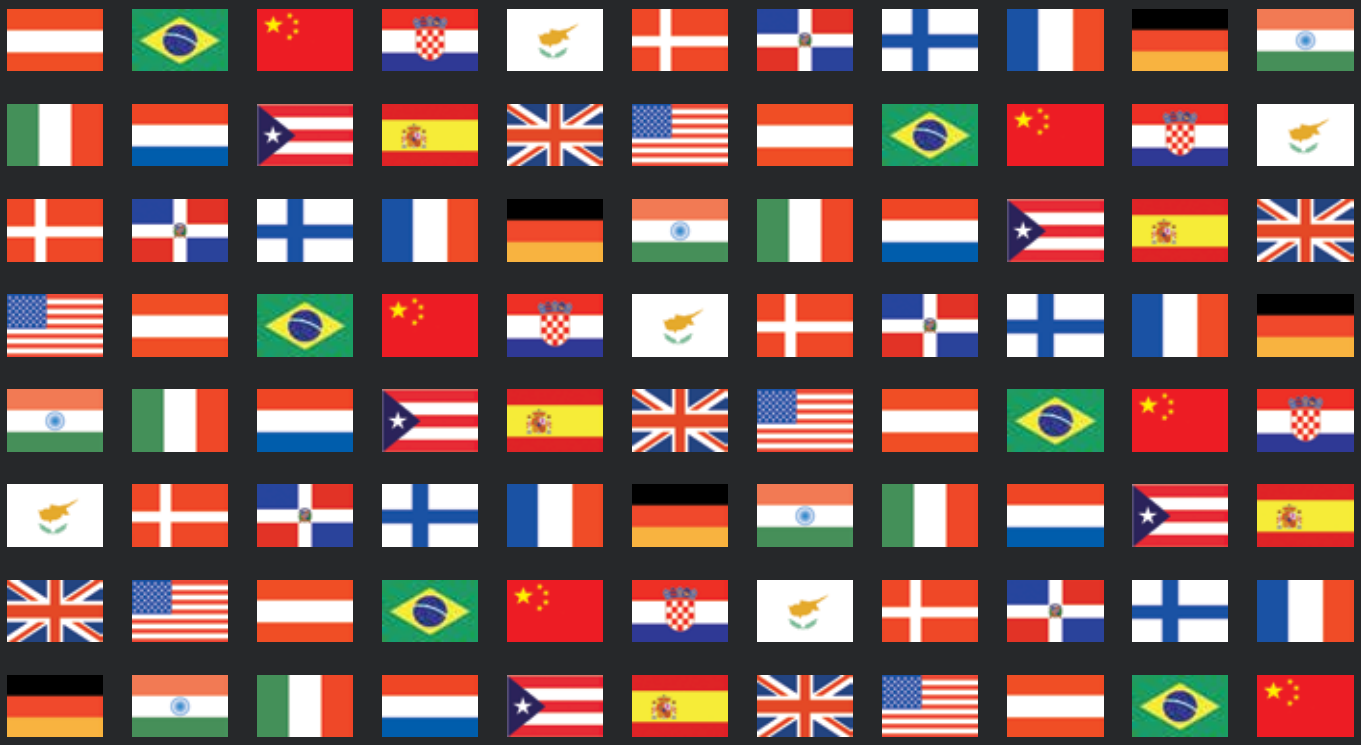
Distribution & Agency

In 17 jurisdictions worldwide

Contributing editor
Andre R Jaglom



2015

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Distribution & Agency 2015

Contributing editor

Andre R Jaglom

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2015
First edition
ISSN 2058-5608

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Distribution & Agency 2015

First edition

Getting the Deal Through is delighted to publish the first edition of *Distribution & Agency*, which is available in print, as an e-Book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 17 jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Andre R Jaglom of Tannenbaum Helpern Syracuse & Hirschtritt LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
March 2015

Global Overview

Andre R Jaglom

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Global commerce depends, to a very great extent, on the relationships between manufacturers and suppliers, on the one hand, and their distributors and commercial agents around the world, on the other. These relationships are the linchpin to moving goods and services to new markets around the world, and they are governed not only by the contracts negotiated between suppliers and their distribution partners, but by a wide range of laws and regulations, which vary widely from country to country.

With the growing importance of e-commerce, consolidation by mergers and acquisitions at all levels of distribution chains that create larger suppliers and distributors in industry after industry, and new forms of relationships between suppliers and distributors that are created to meet developing needs of businesses, the global distribution and marketing of products in today's economy raise a host of legal questions with different answers in each jurisdiction. The effective distribution lawyer must understand the client's business objectives, culture and industry, and then apply the legal and regulatory environment of each jurisdiction to help the client find the most effective, least risky method, among many alternatives, of bringing its goods or services to market.

Those alternatives cover a spectrum of possibilities, from direct distribution by the supplier itself or through a wholly owned subsidiary; to engagement of a local commercial agent that does not take title to the goods, arranges sales on behalf of the supplier and receives a commission; to independent distributors, which buy from the supplier and resell in the market country at a profit; to franchising, which amounts to the use of independent distributors who are licensed to use the supplier's trademarks, required to follow a prescribed marketing plan or method of operation, and pay a franchise fee to the supplier. All these options may be implemented through a joint venture by having the local distribution entity owned in part by the supplier, or the revenues and expenses shared in another manner. Another option is for the supplier to license a manufacturer in the market country to use its intellectual property – patent, copyright, trademark or trade secrets – to make its products locally and sell them. And private label methods amount to a reverse licensing arrangement, where a distributor or retailer in the market country distributes the supplier's products under its own trademark.

These options carry different costs, levels of control and sharing of revenues, different legal and business risks, tax consequences and potential liability. Guiding clients through these options requires counsel to understand the clients' objectives, culture and ways of doing business, industry customs and practices, as well as the legal environment in the relevant jurisdictions.

The practice of distribution law is necessarily interdisciplinary, for assisting clients in structuring and managing distribution relationships requires an understanding of each relevant jurisdiction's contract law; antitrust and competition law; dealer protection and business franchise law; privacy and data protection laws; consumer protection laws; advertising and unfair competition regulation; intellectual property law; international trade law; mergers and acquisitions law; and litigation, arbitration and dispute resolution.

By way of example, Europe provides for an indemnity payment on termination of commercial agents without good cause, but not for distributors – except in Belgium, where distributors are covered. The United States has no such provision – except for a few states' business franchise laws, and laws governing certain industries – yet Puerto Rico, a US territory, has one of the most stringent laws in the world protecting distributors.

The collection and transfer of consumer data is tightly regulated in Europe, Canada and many other countries. Except for certain industries and types of data (eg, financial firms, children's data and medical information), the US adopts a much more laissez-faire approach, requiring principally that US businesses give clear notice of their data collection and transfer practices and then abide by their promises, and secure personal information appropriately, with little substantive regulation.

Supplier control of resale prices is generally illegal in Europe, as are prohibitions on sales by distributors over the internet or outside of defined territories, but in the US all are typically permitted, with some exceptions.

In most jurisdictions the licensing of intellectual property such as trademarks between suppliers and their distribution partners is a matter of private contract. However, some jurisdictions, such as Mexico, require trademark licences to be publicly filed.

Even within a jurisdiction, different industries have different customs and practices that have a practical effect on how distribution relationships are structured. In the US, for example, beer distributors share detailed data on their sales to every customer with their suppliers on a monthly – and for the larger brewers, daily – basis, but soft drink bottlers and distributors zealously guard such customer sales data and generally will not share them with suppliers.

These legal and practical differences can have a major impact on how suppliers and their distribution partners do business, and counsel cannot possibly give sound advice without an understanding of these major differences in the regulatory framework around the world.

While *Getting the Deal Through – Distribution & Agency* will not make you an expert in all the relevant laws of every jurisdiction, it will provide a handy reference for the key issues in many important jurisdictions. It will remain essential to engage qualified local counsel with expertise in the many facets of law affecting distribution before embarking on distribution in a new market, but this book should enable you better to understand the issues and the questions to ask.

Austria

Gustav Breiter

Viehböck Breiter Schenk & Nau Rechtsanwälte

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes. It is also possible to be a partial owner.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The type of business entity best suited for a foreign supplier depends on several factors, especially liability and tax aspects (see also question 6). In most cases, foreign suppliers choose to establish a limited company (Gesellschaft mit beschränkter Haftung, GmbH), which can be founded very easily and within days. Where the supplier fully owns the company (as a 100 per cent daughter company), the company contract can also be flexible and can be established with the minimum content. The governing law is the law on limited companies (GmbH-Gesetz RGBl 1906/58 in the current version).

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

In principle, no. There are only a few exceptions regarding services of public interest. The details are contained in the regulations of public law which have no special impact on agencies and distributors in general.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes. As discussed, the supplier is entitled to found a 100 per cent daughter company. Therefore, it is, of course, also possible and permitted to own equity interests. There are, apart from special regulations under public law, no conflict rules that would prohibit such interests.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Capital gains and dividend income are taxed at 25 per cent and are withheld at the source. There is no wealth tax, however, the implementation of such a tax is being discussed at the time of writing. Individuals pay an income tax of up to 50 per cent. For entrepreneurs it is possible to reduce the tax especially by certain investments in real estate funds, the costs for business cars, etc. In practice, the business type of the GmbH & Co KG is also used to legally reduce taxes. All details, of course, have to be checked by the tax consultant, for example, the internal accounting between the entity and the foreign supplier, the effects of double taxation agreements (DTAs), etc.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The supplier may choose between distributors, commercial agents and sales representatives, franchisees, trademark licensing, joint ventures and other relationships as non-permanent acting sales partners or a simple reseller-business. The type of distribution structure most suitable and effective for the supplier depends on the circumstances such as the products and the branch, liability questions, the tax aspects, the necessity to control the distribution channel (especially concerning price and marketing policy), the wish to know the customers (which is not given in any case if the supplier appoints a distributor), etc.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

According to Council Directive 86/653/EEC, Austria has implemented special rules on self-employed agents (HVertrG). This Act contains all special regulations on agents, some of which are mandatory, as provided in the Directive. Some questions have to be answered with respect to the rules of the General Civil Code.

In Austria there are no specific rules on distribution contracts. In practice, the courts consider some of the rules on agency as applicable also on distribution cases. According to an unbroken line of decisions, only the regulations on premature termination (article 22 HVertrG), claims in the event of premature termination (article 23 HVertrG) and compensation claims (article 24 HVertrG; and also the regulation that this claim is mandatory according to article 27 HVertrG) are applicable on distribution by analogy (eg, Austrian Supreme Court (OGH) 9 Ob 2065/96h: article 21 HVertrG on termination notice periods is not applicable). In particular the rules on compensation claims have to be applied only under specific conditions. Other questions have to be decided on the basis of the General Civil Code (eg, the valid conclusion of the contract, its interpretation and questions of warranty) or the Austrian Commercial Code (eg, the requirement of immediate complaint in respect of defect goods or the reimbursement of non-amortised investments of the distributor, agent or franchisee).

Concerning antitrust law in practice, the decisive question is whether the contract is in compliance with the EU regulations on vertical restraints.

Concerning the automotive sector, one has to consider the Motor Vehicle Sector Protection Law (KraSchG) protecting car dealers.

For franchise systems, the regulations as shown above are applicable depending on whether the franchisee is acting as an agent or as a distributor (if acting similar to an agent, some regulations on agency are applicable by analogy).

There are no industry self-regulatory constraints or other restrictions that may govern the distribution relationship.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

If not regulated in the contract, the supplier is not required to have a cause to terminate it. But in any case, the supplier must obey the relevant legal provisions stating the terms and notice periods as follows.

For agency contracts, the parties must observe minimum periods of notice with a maximum of six months (article 21 HVertrG). The parties can agree on longer periods of notice. In this case, the period the principal has to observe must not be shorter than the agent's period.

The mandatory notice periods on agencies are not considered to be applicable by analogy to distribution contracts. Therefore, in Austrian legislation there is no specific regulation on minimum termination notice periods for distribution contracts. If the contract does not contain a regulation on notice periods they will be fixed by the courts deciding whether the period kept by the terminating party is reasonable or not.

Also in case of agreed notice periods the court will check its validity. There are two main circumstances that are relevant for this decision: first, the reasonable investments of the distributor and second, the term of the contract. If the distributor invested in a contract for an indefinite period the courts will protect it establishing a sufficient notice period. But if the contract was concluded for a fixed period of, for example, only one year and there were no relevant investments, the court will consider a period of three months as reasonable (OGH 1 Ob 238/02k).

Again, one has to consider the KraSchG protecting car dealers by an adequate notice period of one or two years.

For franchise systems, the regulations are applicable depending on whether the franchisee is acting as an agent or distributor.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Under Austrian law, in case of termination the agent is entitled to compensation according to article 24 HVertrG implementing Council Directive 86/653/EEC. Nevertheless this does not apply where the agent terminated the contract without good cause or the principal terminated because of an important reason the agent is responsible for.

For the calculation of such an indemnity, the main criteria are new customers acquired by the agent or an enlargement of existing business relations of the principal. The common opinion on this point demands an increase of at least 100 per cent. In practice, the parties calculate the respective turnover of the principal. Of course, it would be correct to calculate on the basis of the quantities sold by the principal. The maximum amount of compensation is a yearly indemnity, calculated on the five-year average of every remuneration (commission, fixed salary, etc) earned by the agent. If the contract lasted for a shorter period, this period is relevant. This rule is mandatory; there is a one-year deadline.

The distributor can claim a goodwill compensation if the provisions for the analogous application of article 24 HVertrG are given. The following criteria are relevant to decide whether the distributor is similar to an agent. In practice, most of the decided cases concern car distribution:

The relevant criteria are the distributor's non-competition obligation, a minimum turnover, the duty to keep spare parts in stock, the duty to report and the supplier's right to control the books, etc.

Furthermore, one has to regard the legislation whereby the distributor (and also an agent or franchisee) is entitled to claim its non-amortised investments during the contractual period (article 454 of the Commercial Code (UGB)). This legislation should, in the first place, protect car distributors who have, in practice, the vastest obligation to invest according to the contractual provisions and directions of the supplier (personal staff, show room, obligation to buy the cars presented to the customers, etc). The legal provisions for the reimbursement of investments are:

- the partner made brand-specific investments it was obliged to after 21 August 2003 (eg, personal staff for a certain brand);
- at the termination of the contract this investment was not already amortised and otherwise it is not reasonably exploitable; and
- the partner terminated the contract because of an important reason or the supplier terminated without an important reason.

The amount the supplier has to reimburse is the non-amortised difference to a 'normal', non-brand-specific equipment. This rule is mandatory; there is a one-year deadline. The compensation claim of article 24 HVertrG remains unaffected.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

In principle, yes. Prohibiting the transfer of the distribution rights or of the business as such prevents the distributor from unilaterally changing the supplier's contract partner respectively to undermine the character of the distribution contract.

On the other hand, especially regarding the ownership, one has to consider that by prohibiting any changes, the distributor's freedom is restricted. Such regulations could be considered as invalid where they have not been individually negotiated as they are to the detriment of the distributor.

In practice, distribution contracts with entities sometimes contain change-of-control clauses leading to the same effect (the distributor needs the supplier's approval if it wants to avoid the termination of the contract). There is no Austrian jurisprudence published whereby such a regulation would be ineffective.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

There is no Austrian published jurisprudence considering the effectiveness of such confidentiality provisions in agency or distribution agreements. In practice, such provisions are accepted as valid.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Even without any provision in the contract the agent is obliged not to compete. According to Austrian law this obligation is deducted from the agent's obligation to act in favour of the principal's interests (article 5 HVertrG). The agent is not allowed to promote business of competitors, neither as an agent nor as a buyer-reseller. Of course, there is no such obligation if the principal agreed on the activity of the agent. Implied consent of the principal is possible.

However, a post-contractual non-compete obligation (not to compete after the termination of the contract) is invalid (article 25 HVertrG).

Unless otherwise agreed in the contract the distributor is free to conclude other distribution (or agency) contracts with competitors of the supplier. The principle whereby the agent must not to compete with his or her principal is not applicable to a distribution relationship (OGH 3 Ob 10/98m). If the distribution contract provides for a non-competition clause, it has to comply with the EU regulation on vertical restraints (maximum of five years). If the regulation is not applicable, such a clause will be against the antitrust rules.

Contrary to the law on agencies, whereby such a post-contractual non-compete obligation is invalid (article 25 HVertrG), there is no specific regulation in Austrian law on distribution contracts. Under certain circumstances article 25 HVertrG could be applied by analogy (OGH 9 Ob 2065/96h). Furthermore, a post-contractual non-compete clause will be problematic under antitrust rules, in fact it will be invalid in most cases (article 5, paragraph 3 regulation on vertical restraints: permissible only concerning the business premises; maximum duration one year after termination of the contract, etc).

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Concerning agents, the supplier is fully entitled to fix its prices as the commercial agency contract does not fall under EU antitrust rules. This only applies for the 'real' agents who do not bear any commercial risks (despite selling the products or services). If the agent bears such risks (such as having to maintain adequate stock or the like), there is a tremendous risk that he or she will not be seen as a 'real' agent – EU antitrust rules will then be applicable, losing all advantages of agency contracts in this respect.

Resale price maintenance violates Austrian and EU antitrust law. Such a regulation has to be considered as a cartel, therefore such a regulation would be invalid. According to the wording of article 1 KartG the fixing of maximum prices would also be covered by this rule. The OGH itself stated there is no decision in the past whereby the fixing of maximum prices would have been deemed as a cartel. Therefore, it seems that the highest court considered maximum prices as permissible (16 Ok 5/96). Of course, if very low 'maximum prices' have the same effect as minimum prices, they will be against antitrust law.

Violations of antitrust law are enforced by very high fines of up to 10 per cent of the yearly turnover.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

The supplier should refrain from all attempts to evade antitrust law. Suggested resale prices are, in principle, allowed, but they must be expressly designated as non-binding and there must not be any pressure to comply with them (article 1 paragraph 4 KartG). Nevertheless, compliance with the non-binding suggested prices could be qualified as a concerted practice, which also constitutes a violation of the prohibition of cartels of article 1 KartG (see OLG Wien 26 Kt 369/96 under the old KartG). For an agreement of a vertical restraint according to article 101 TFEU, the European Court of Justice considers a certain behaviour of the parties, expressing a common intent, sufficient. (ECJ, 13 July 2006, C-74/04 P, paragraph 37).

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Yes. Such a best price guarantee has nothing to do with a cartel as it is just part of the parties' agreement on the prices between them.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

In principle, no. The seller is, apart from and outside forbidden cartels, free to fix different prices for different customers. The seller is, of course, free to conclude contracts, therefore he or she must also be free to fix the prices. There is an exemption only for dominant firms in the sense of article 4 KartG (abuse of dominance) – they may not penalise other companies by different conditions according to article 5 KartG.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

According to the respective EU regulation on vertical restraints, restrictions of a certain area or of a certain group of customers are only allowed if the supplier has reserved this area or group for itself or for another distributor. This only applies for active sales; passive sales must always be allowed. If the regulation on vertical restraints is not applicable, such restrictions will be in conflict with the antitrust rules.

'Active' sales means actively approaching individual customers by, for instance, direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory.

'Passive' sales means responding to unsolicited requests from individual customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups is considered passive selling. Advertising or promotion is general in this sense, if it would be attractive to undertake these investments and also if they would not reach customers in other distributors' (exclusive) territories or customer groups.

One has to consider the 30 per cent market share threshold under the Block Exemption Regulation. If this threshold is exceeded, the exemption rules are not applicable – and the restrictions will be, in most cases, in conflict with EU antitrust law.

If those regulations are not met, one must be aware that violations against the antitrust law are enforced by very high fines up to 10 per cent of the yearly turnover.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

The supplier is free to conclude contracts. There is an exception only for dominant firms in the sense of article 4 KartG (abuse of market domination) – they may not penalise other companies.

To the restrictions concerning customers see question 18.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

The EU block exemption regulation on vertical restraints contains further provisions concerning selective distribution, spare parts, etc. For dominant entities, there are further regulations to avoid the abuse of its position by, for example, different conditions to the detriment of the contract partners.

Violations are investigated and punished by the relevant authorities, namely the Austrian Competition Authority (BWB) and the courts responsible for cartels (OLG Wien as the Cartel Court and the OGH as the Supreme Cartel Court).

Private parties can bring their statements to those authorities asking for investigations. Furthermore, the private enforcement of cartel rules is also discussed in the Austrian literature and practice. There is a tendency to allow damage claims based on violations of antitrust rules.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

No. According to article 4(b)(i) of the EU block exemption regulation on vertical restraints, restrictions of active sales, if allowed, may in any case not restrict sales by the dealer's customer.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

In principle, there are no such restrictions according to contract law. Therefore, it is possible for a supplier to pass all or part of its costs of advertising on to its distribution partners and also to share the costs.

Concerning agency contracts, one has to consider that where the agent bears costs for advertisement and marketing, he or she is not a 'real' agent in the sense of the EU antitrust law – which is then applicable with all negative consequences, especially for the supplier.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

It is up to the supplier to protect its intellectual property by patents and trademarks – protecting it against third parties and, of course, also against its distribution partners. The same applies for copyright. If there is a protection under the Austrian Copyright Law, it will apply also in the relationship with the distributor or agent.

In most distribution and agency contracts, there are provisions that additionally protect the supplier (eg, the regulation whereby the partner needs prior approval to use the supplier's trademarks on its own website). Contractual regulations are recommended especially concerning trade secrets and know-how. As there is no specific legislation, it should be, for example, contractually stipulated that trade secrets may not be used outside the distribution contract – and also not after its term. The same applies for know-how as specific technology-transfer agreements are not common in agency and distribution practice.

24 What consumer protection laws are relevant to a supplier or distributor?

When contracting with a consumer, the supplier or distributor has to obey various consumer protection laws. This especially concerns web shops (e-commerce) and contracts concluded outside the business premises. The consumer must be given all relevant information especially about the firm of his or her contract partner, the relevant characteristics of the goods or services, price and payment conditions, his or her right to withdraw from the contract, etc. The supplier or distributor has to prove that it has given this information before the contract was concluded. Various detailed regulations are contained in the Austrian Consumer Protection Act (KSchG) and in the Distance Selling Act (FAGG).

In practice, those regulations are relevant only in direct sales (B2C). In Austria, most of the agency and distribution contracts concern the B2B business in which consumer protection rules do, in principle, not apply. There is one exception: where the agent, franchisee or sales partner begins its business activity with the conclusion of the agency, franchise or sales partner contract, this conclusion can be considered as 'establishing business'. The regulations of the KSchG will then apply to the contract (article 1 paragraph 3 KSchG).

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

In Austrian legislation, there are no specific regulations for recalls. In the relationship with the customer, the contract partner is responsible. In principle, distribution partners can stipulate internal regulations on which party has to carry out the recall and which party has to bear the costs.

A transfer of risk to the distributor should be adequate otherwise the regulation could be considered as immoral and invalid especially where the distributor would take over a tremendous financial risk without any compensation. Anyhow, there is no Austrian jurisprudence on this topic.

Concerning agency contracts, the agent may not bear any substantial risks otherwise antitrust law is exceptionally applicable to the agency contract.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

In B2B cases, it is possible to limit the warranty. This applies to the relationship between the supplier and its distributors and also between distributors and customers. Usually, such limitations are contained in the general conditions of sale. Concerning new products, a total exclusion of the warranty regulations would be considered as immoral. In practice, it is important to stipulate regulations also on damage claims and other remedies (and, of course, the applicable law and the place of jurisdiction).

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Under Austrian law there is no privilege for distributors and suppliers to exchange customer data. Therefore the general rules of the Austrian Data Protection Act apply. According to this Act, the processing and transfer of customer data is generally prohibited, however there are exceptions to this rule.

A transfer of customer data from a distribution partner to the supplier may be justified, for example, if it is necessary for the fulfilment of a contract of the distributor. In practice the safest way to transfer customer data is to ask for the explicit consent of the customer concerned. A consent clause is common in practice. It is subject to certain, rather demanding criteria – it must, inter alia, include a precise description of the recipient and purpose of the transfer, it may be included in standard business terms but must not be hidden in them, it must be highlighted within the text, signed separately and it must be revocable at any time.

If data shall be transferred among a group of affiliated companies, it is very likely that the Data Protection Authority must be notified of a so-called data application or even a joint information system (if different business divisions in an affiliated company can access customer data). There are narrow exemptions to this rule, for example, in case of publicly available data.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

The supplier is not entitled to approve or reject the personnel of its distribution partner unless the contract provides for such a right. In practice, sometimes such a provision is included, especially concerning the director's board and the relevant sales team.

In any case, the supplier is entitled to terminate the contract if it is not satisfied with the management as it does not need any reason for a termination under the legal or contractual notice periods. An immediate termination is, for that reason, only possible if the management's misconduct leads to a loss of confidence or constitutes a breach of the contract which makes it impossible to continue. Such a procedure needs to be carefully considered and prepared in practice to avoid indemnity and compensation claims.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

In extreme cases it is possible that courts may consider the agent or distributor as an employee (especially when acting as an individual and not as an entity). If the agent has to submit timetables to the principal, has to join daily or weekly meetings, earns a fixed remuneration, the principal has to reimburse the expenses of the agent, or the agent has to visit customers daily or weekly as instructed by the principal, etc, the agent will be considered as an employee. This question would not be decided on one of these criteria; all circumstances would be relevant.

The agent or distributor should not be treated like an employee otherwise the social security institutions (and also the tax authorities) will qualify the agent as an employee claiming for social contribution and income tax. That can be very expensive for the supplier as the relevant period can be up to the last five years of the contract. The supplier is entitled to claim the employee for regress of the income tax, but not for the social contributions.

Furthermore, if the agent or distributor is in fact an employee, claims are possible based on Austrian labour law, including minimum wage, overtime, benefits, termination consequences, etc. Under Austrian law there is no severance payment at the end of an employment contract (the employer has to currently pay to specific provident funds as long as the contract is effective). Thus, in most cases the employee's claims are already covered or nearly covered by the commission or the margin. The risk that is more important for the supplier is, as mentioned, the social contributions.

As it is not possible to evade this mandatory law, there is no possibility for the supplier to protect itself against such a financial risk – apart from treating the agent or the distributor, as far as possible and necessary, as an independent entrepreneur.

In any case, the supplier should ask the agent or distributor to submit his or her business licence according to public law (Trade Regulations). Although this licence has no effect on the qualification of the contractual relationship, it helps under the specific aspect of article 4 paragraph 4 of the General Social Insurance Act (ASVG). The requirements as stated above remain unaffected.

30 Is the payment of commission to a commercial agent regulated?

There are no rules under Austrian law limiting the parties' freedom to agree upon the rate of commission. Where there is no contractual provision, the rate of the commission is fixed by the courts according to the usual rates concluded in the region of the agent's seat (article 10, paragraph 1 HVertrG).

Furthermore, article 9 paragraph 2 HVertrG has to be observed, according to which the commission arises not only if the customer performed the contract but also if the customer would have performed the contract if the principal had performed it (mandatory). In other words, in cases of defects the supplier is responsible for, the commission claim remains unaffected.

The payment is (at the latest) due at the last day of the month following each quarter (articles 14 and 15 HVertrG; mandatory).

31 What good faith and fair dealing requirements apply to distribution relationships?

There are no specific regulations for agency and distribution in Austrian legislation. The principle of good faith and fair dealing depends on the circumstances in the individual case. For example, a terminating party will lose an important reason for immediate termination if it does not terminate within due time and without hesitating after knowledge of the circumstances constituting the important reason.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

There are no such regulations in Austrian law.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Concerning specific regulations on distribution, the answer is no (unless agency regulations apply by analogy – see question 8). Regarding, for example, general civil obligations within a sales contract, of course there are some dispositive regulations in civil law that will apply to the single sales contracts if not changed or excluded.

Concerning agency, there are some important mandatory legal provisions (implementing Council Directive 86/653/EEC) – see question 8. The law also contains some dispositive provisions, for example, the regulation whereby the agent is also entitled to commission for business acquired and concluded during the contract but executed afterwards – and even for business that is concluded afterwards where the agent has largely prepared it during the contract; see article 11 HVertrG.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Concerning agency, the parties are free to agree on the choice of law to govern the contract if both parties are located within the EU. If the principal is located outside the EU, it is not possible to choose its law especially if that law does not know any indemnity for the customer stock at the end of the agency contract. The European Court of Justice decided in the *Ingmar* case that such a choice of law is invalid because of the mandatory character of article 17 of Directive 86/653/EEC.

Concerning distribution contracts, the parties are free to choose the applicable law as the Directive does not apply to distribution contracts. Nevertheless, Austrian courts could consider the choice of law as invalid if, according to that law, there is no indemnity foreseen or at least possible by analogy for distributors similar to agents (see question 10). To date, there has been no Austrian jurisprudence on this topic.

Update and trends

There are no proposals for new legislation or regulation, or to revise existing legislation or regulation.

At the moment, there are some interesting cases pending at various courts concerning petrol station dealers. Apart from the question of whether such dealers are, in principle, entitled to indemnity for shop and washing business, there are some basic questions to solve. This concerns the requirements to a sufficient action based on the merits of the law as, first of all, the acquisition of new customers to be proven by the claimant. If the trend should enable the station operator just to estimate the stock of (permanent) new customers, probably supported by an expert opinion, this method of presentation will also apply to other dealers such as operators of branches of restaurant chains.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Within the EU, the parties are free to choose the relevant forum (including arbitration). If the principal or supplier has its seat outside the EU, the jurisdiction clause could be considered invalid if, according to that law, there is no indemnity foreseen (or possible by analogy for distributors similar to agents – see question 10). To date, there has been no Austrian jurisprudence on this topic.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

In Austria it is possible to choose between state courts and arbitration. Foreign businesses are not restricted in any way and they can, in general, expect fair treatment. The advantage for foreign undertakings is that the Austrian jurisprudence is known for its high standards including, in principle, three instances in civil matters.

Austrian civil procedure law enables the parties to request that the opponent is obliged to present a certain document. The applying party has to describe the content of this document, the relevant facts to be proven by this document and the circumstances that make it likely that the document is in the opponent's possession. There are further details contained in articles 304 to 307 of the Austrian Code of Civil Procedure.

Viehböck Breiter Schenk & Nau Rechtsanwälte

Gustav Breiter

Jasomirgottstraße 6
1010 Vienna
Austria

Tel: +43 2236 22 050
Fax: +43 2236 49 239
office@vbsn.at
www.vbsn.at

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

As Austria is a party of the New York Convention 1958 and the Geneva Convention 1961, a foreign arbitration award will be recognised according to these conventions. Vice versa, Austrian arbitration decisions are recognised abroad under the said rules. The rules on arbitration are contained in articles 577 to 618 of the Austrian Code of Civil Procedure. Distribution contracts are arbitrable, as well as agency contracts.

According to Austrian law, parties can choose between institutional arbitration and ad hoc arbitration. Examples for institutional arbitration are the Vienna International Arbitral Centre established at the Austrian Chamber of Commerce or the ICC Austria. As long as their statutes are met, there are no specific restrictions for foreign companies.

The advantages and disadvantages of arbitration in Austria are no different from elsewhere. All the pros and cons internationally discussed (specialisation of the judges, lack of public, costs, limited possibility to appeal if any, duration, etc) also apply to Austria.

Brazil

René Gelman, Valéria Kasabkojian Schramm and Eliana Rozenkwit
Chaves, Gelman, Machado, Gilberto e Barboza Advogados

Background
There is yet no law in Brazil that deals specifically with distribution relationships as such (ie, a relationship where the distributor buys goods from the supplier and resells to its clients, and the distributor's earnings are in the difference between its purchase and sale prices). The tendency of Brazilian courts and scholars has been to treat the distribution agreement as an 'atypical contract', and apply to it the general rules of contracts set forth in the Brazilian Civil Code of 2002 (the Civil Code). This is the line we have adopted in our answers.

The distribution of land automotive vehicles, their parts and additions is regulated by specific legislation in Brazil (Federal Law 6729/1979 (the Ferrari Law)), and is not covered by our answers below.

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. However, there are certain minimum requirements. Under Brazilian law, a minimum of two quotaholders or shareholders (depending on which kind of entity is established) is required to establish a legal entity. Therefore, although the supplier may be the quotaholder or shareholder holding the majority of the entity's capital stock, it shall have at least one partner, which may be individuals or legal entities, Brazilian nationals or foreigners, resident or domiciled in Brazil or not. The second quotaholder or shareholder may have a small equity interest in the entity such as one quota or share. In case of quotaholders or shareholders that are not domiciled in Brazil, they must appoint a Brazilian resident (not necessarily Brazilian national) to represent them before the Federal Revenue Service and have powers to receive services of process and summons addressed to such foreign quotaholder or shareholder.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes, provided that local company complies with the requirements mentioned in question 1. There are no general minimum requirements as to quota or share participation; one quotaholder or shareholder may own a small interest in the entity, such as one quota or share.

In both types of entities, the equity interests are fractions of the capital stock, with some differences: while in corporations they are represented by 'shares', which may or may not have a par value, be common, preferred or fruition shares, shall be in registered form and their assignment or transfer will only be valid after their registration in the company's share registry and share transfer books, in limited liability companies they are represented by 'quotas', with par value, which are fractions of the capital stock, and their assignment or transfer is made via an amendment to the articles of association of the company, filed and registered with the Commercial Registry.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Both the limited liability company and the corporation are equally suited as business entities for such purposes. Most Brazilian companies (including Brazilian subsidiaries of international companies) are organised as limited liability companies, especially because, in general terms, these companies are less complex, easier to organise and cheaper to maintain than corporations, which are more sophisticated and subject to more elaborate rules, most of which deal with capital structure, corporate governance and minority shareholders' rights. For that reason, corporations are commonly used to implement joint ventures as they have features that are more suitable to accommodate the interests of joint venture partners. Both types of entities are formed through the registration of their articles of association (for limited liability companies) or by-laws (for corporations) with the Commercial Registry of the state where it is headquartered. The most important legal requirements to be observed to incorporate a legal entity in Brazil are:

- minimum of two quotaholders or shareholders, with the observance of the requirements set forth in question 1;
- a corporate name;
- an address for the headquarters;
- initial corporate capital, with no minimal amount for this type of business; and
- at least one officer, who must be an individual and a Brazilian resident (not necessarily a Brazilian national).

Corporations are mainly governed by the Corporations Law (Federal Law 6404/1976, as amended). Limited liability companies are mainly governed by the Civil Code, and, complementarily, by the Corporations Law.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

According to article 1134 of the Civil Code and to Federal Decree 4657/1942, foreign businesses are allowed to operate in Brazil provided that:

- they constitute a domestic business entity or a Brazilian subsidiary;
- they obtain an authorisation from the Brazilian government; or
- through the ownership of an equity interest in a national entity.

To obtain an authorisation to operate from the Brazilian government, the foreign business must:

- prove that the foreign entity is incorporated in accordance with the laws of its country;
- present a copy of its articles of association or by-laws;
- provide complete information regarding the composition of its management bodies;
- provide a copy of the corporate document that authorised such entity to operate in Brazil;
- prove the appointment of an attorney-in-fact in Brazil, and
- provide a copy of its most recent balance sheet.

In order for documents issued in a foreign country and in a foreign language to be effective in Brazil, they will have to be dated and signed, notarised by a public notary office of the place where they were signed, legalised by the applicable Brazilian consulate, translated into Portuguese by a sworn translator and registered with the registry of deeds and documents in Brazil.

According to Law 4131/1962 and its subsequent amendments, foreign capital is generally treated equally to domestic capital. Moreover, foreign investment is customarily permitted in Brazilian companies, except for a few specific areas of public services or sectors that are of strategic importance, such as industries closed to private enterprise, entities that develop activities involving nuclear energy, aviation, coastal and freshwater

shipping, communication, mining, health care/hospitals, armed security and hydroelectricity. All foreign investment must be registered with the Central Bank of Brazil and the repatriation of capital and earnings is permitted.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes. Except for businesses where foreign investments are restricted (see question 4), foreign quotaholders or shareholders can hold up to 100 per cent of the equity interest of local entities.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

The Brazilian importer must pay the following taxes prior to customs clearance:

- import tax (II) over the customs value at rates that vary depending on the fiscal classification of the good under the international harmonised code;
- excise tax (IPI) over customs value plus import tax, at varying rates depending on the fiscal classification of the good;
- social contributions on imports (PIS/COFINS Importação) charged at a combined rate of 9.25 per cent over the customs value (also applicable to services imported by a Brazilian company); and
- state value added tax (ICMS) over customs value plus the other taxes mentioned herein at rates varying depending on the state where the importer is located.

Brazilian tax authorities do not charge any withholding taxes to the foreign supplier with respect to payments made for importing goods.

A Brazilian subsidiary of a foreign supplier which imports products from the foreign supplier or other related parties is submitted to the same tax burden of a Brazilian company owned by non-foreign legal entities or individuals, and should also comply with Brazilian transfer pricing rules. In accordance with the latter rules, if the purchase price paid to the foreign related party for the products exceeds a given parameter, this additional amount will be subject to adjustments whereby the excess amount of imported goods, services or rights is considered a non-deductible expense in the determination of taxable profits by the Brazilian company. Brazilian transfer pricing rules set forth a few methods to establish the 'parameter price' and the Brazilian importer can choose which method to use.

Funds remitted from Brazil to a foreign entity or individual for the payment of services, interest, royalties and lease trigger withholding income tax at rates that vary depending on the nature of the payment and, in certain cases, withholding service tax (ISS) at rates varying depending on the municipality where the source of payment is located.

The most relevant taxes applicable to the activities conducted by a Brazilian company that conducts importation activities are:

- corporate income tax (IRPJ) and the social contribution on net profits (CSLL): the worldwide profits made by the company and its branches are subject to IRPJ and CSLL at the rate of 15 per cent plus a surtax of 10 per cent, when the monthly profits exceeds 20,000 reais, and 9 per cent, respectively;
- social contributions on gross income (PIS/COFINS): PIS/COFINS are charged at a combined rate of 3.65 per cent or 9.25 per cent, depending on the PIS/COFINS tax regime chosen by the company;
- state value added tax (ICMS): ICMS over good sales value at rates varying depending on the state where the company is located. The most common rate is 18 per cent;
- excise tax (IPI): IPI are charges over manufactured products, at varying rates depending on the fiscal classification of the good;
- municipality service tax (ISS): ISS over services provided by Brazilian companies at rates varying from 2 to 5 per cent depending on the municipality where the company is located; and
- contribution on royalties and technical service fees (CIDE): CIDE is charged at the rate of 10 per cent on royalties and technical service fees paid by a Brazilian company to a foreign company. Please note that such rate is reduced to zero in transactions involving the assignment of software licences.

The distribution of profits from a Brazilian company to its foreign shareholder(s) is free of Brazilian withholding income tax.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Because there is no specific regulation in this regard, under Brazilian law any distribution structure that is not expressly forbidden by law would be available to a supplier – all of the structures mentioned in the question would be possible and are effectively used by foreign and Brazilian companies. The consequences of and rules applicable to each structure, however, are different. For example, sales representation is specifically regulated and imposes particular obligations on a supplier, trademark licensing requires the licensor to have a trademark registered in Brazil, etc.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Supplier–distributor relationships are regulated by the Civil Code. Supplier–agent relationships are regulated by the Civil Code combined with the Sales Representatives Law (Federal Law 4886/1965, as amended). There are no governmental agencies that regulate supplier–distributor and agent–representative relationships in Brazil. Regulatory or self-regulatory restrictions may apply if the industry involved is regulated by an agency or self-regulatory body (such as the pharmaceutical, telecom and audiovisual industries, for example), but such restrictions customarily concern the commercialisation of the goods and not the distribution relationship itself.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

If the contract permits termination without cause, there are no restrictions on a supplier's right to terminate. The supplier is, however, required to provide written notice of the termination to the distributor, which notice must be compatible with the investments made by distributor in connection with the agreement (pursuant to the Civil Code). If the notice is deemed insufficient, then termination without cause will only become effective once a period compatible with such investments has elapsed (such period to be determined by a judge if the parties cannot reach an agreement).

No specific cause is required to terminate a distribution relationship.

For a decision not to renew the distribution relationship, the difference is that the law does not require the supplier to provide notice period compatible with investments.

As to land automotive vehicles, the distribution of which is specifically regulated by the Ferrari Law, the distribution agreement may only be terminated in accordance with the provisions of such law, in the following cases:

(i) if the parties so agree or due to force majeure;
(ii) if the determined term of the agreement ends; or
(iii) if the innocent party so requires due to breach of the Ferrari Law, of the agreement or of other rules that may apply to this distribution relationship, provided gradual penalties are previously applied to the breaching party.

In any case of termination of this type of distribution agreement, the parties will agree on the period required to finalise their relationship and the distributor's operations, which can never be shorter than 120 days.

Also, an agreement with a determined term will automatically be converted into an agreement for an indefinite term if neither party notifies the other party in writing of its intention not to renew with at least 180 days' advance of the end of the original term.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

In distribution relationships in general, there is no mandatory compensation or indemnity required in the event of termination with or without

cause. If either party deems the termination to be a breach of the agreement, it may demand that the agreement remain valid for its remaining term or indemnification for losses and damages.

In sales representation relationships agreed for an undefined term, the minimum compensation for termination without cause by the supplier or with cause by the sales representative must be at least one-twelfth of all adjusted remuneration received by the sales representative during the whole term of the representation. Also, if the agreement is for an undefined term, either party must provide prior notice of at least 90 days or a period compatible with the nature and magnitude of the investments required from the sales representative to enter into the agreement.

In sales representation agreements for a defined term, the indemnity amount shall be equivalent to the average monthly remuneration received until termination, multiplied by the number of months left in the agreement's term.

If the sales representative terminates for convenience, it must provide notice or indemnify as per (ii) in question 9. In case of termination with cause by supplier, the latter is entitled to indemnification for losses and damages (and may retain commissions due as reimbursement of such losses and damages).

Also, if renewed, a sales representation agreement that is for a defined term becomes valid for an undefined term.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

The Civil Code does not address these issues specifically. However, the Civil Code does set forth, as a basic rule of contracts, that the parties must observe the principles of good faith and fair dealing when performing the contract. Also, the Brazilian Federal Constitution sets forth that no one may be forced to do or refrain from doing something unless by virtue of law.

That being said, our jurisdiction will customarily enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products.

As to distribution contract provisions prohibiting the transfer of all or part of the ownership of the distributor or agent or of the distributor or agent's business to a third party, our research showed that Brazilian courts would not likely enforce such a provision in the manner of specific performance but, depending on the circumstances of the case, might award damages to the supplier in case of its breach by distributor.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Brazilian law does not specifically regulate confidentiality provisions in contracts. Thus, the limitations on the enforcement of confidentiality provisions will depend on the application of the general principles of contracts (mainly the requirements of good faith and fair dealing) and the judge's scrutiny, especially with regard to the consequences of a breach of confidentiality. Please note, however, that there is case law in the sense that confidentiality obligations must be set forth for a certain term, so that such obligations cannot be perpetual.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

The Civil Code does not address this issue specifically. As a rule, restrictions in distribution agreements on the distribution of competing products during the term of the relationship, which are clearly set forth in the underlying agreement, are enforceable. As to restrictions on the distribution of competing products applicable after the relationship ends, case law shows that their enforcement will depend on the court's scrutiny (eg, a judge will consider the market repercussions of the distributor's competition to determine whether the restriction should be enforced).

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Under article 36, section 3, IX, of the Brazilian Competition Law (Law No. 12529/2011), it is a violation of the economic order to 'impose on distributors, retailers and representatives of a certain product or service resale prices, discounts, payment conditions, minimum or maximum quantities, profit margins, or any other marketing conditions related to their business with third parties', to the extent such conducts produce any of the following effects:

- limiting, restraining or in any way injuring open competition or free enterprise;
- controlling a relevant market of a certain product or service;
- increasing profits on a discretionary basis; and
- abusing one's market control.

Case law from the local competition authority (CADE) points out that only companies with a significant market share (or 'market control') can be found guilty of resale price maintenance. Market control occurs when a company or group of companies controls a substantial share of a relevant market; a dominant position is presumed when a company or group of companies controls 20 per cent of the relevant market.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

The Brazilian Competition Law and CADE have a different approach when the case involves 'suggested resale prices'. In this scenario, the manufacturer simply recommends a resale price and the retailer unilaterally decides to adhere or not to that suggested price. According to CADE's case law, one of the main issues that may arise in connection with suggesting resale prices is determining where the line falls between unilaterally suggesting a resale price and persuading the retailer to adhere to it, which is permissible, and coercing them to do so or demanding and receiving their express agreement, which is not. Therefore, it would be illegal for a company with market control (see question 14) to announce that it will not deal with customers who do not follow its pricing policy.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Yes. In this scenario there would be no violation to the limitations imposed by the Brazilian Competition Law.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Price discrimination (ie, charging different prices to different customers) may be a violation of the Brazilian Competition Law (article 36, paragraph 3, X) if the seller has market control (see the concept provided in question 14). However, case law by CADE shows that if there are objective reasons – such as location, history of paying on time, quantities purchased, etc – justifying the difference between the prices charged to one customer and to another, there would be no violation of the law.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Although the Civil Code does not address these issues specifically, Brazilian law does not forbid these types of provisions, and they are customary in distribution agreements in Brazil: it is usual for a supplier to restrict the geographic areas or categories of customers to which a distributor resells, to assign exclusive territories and even to reserve certain customers to itself.

The terms 'active sales efforts' and 'passive sales efforts' are not defined in Brazilian law with respect to distribution, but they may be defined in the contract.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

According to the Brazilian Consumer Defence Code (Federal Law 8078/1990), a 'consumer' is any individual or entity that acquires or uses products or services as the final user. In the case of 'abusive practices' (as described in the Consumer Defence Code), all persons (whether determinable or not) exposed to such practices are also deemed to be consumers.

The Consumer Defence Code describes as abusive practices, inter alia, the refusal to comply with consumers' demands if there is availability in stock and in accordance with custom, and the refusal to sell goods and services directly to whoever is willing to pay for it promptly (excluding intermediation cases regulated by law, such as distribution, agency and intermediation relationships). Thus, the refusal to deal with a customer, whether by supplier or by distributor upon supplier's instructions, would be restricted if the customer in question is deemed to be a 'consumer' for the purposes of the Consumer Defence Code.

For suppliers and distributors to determine whether restrictions to deal with certain customers would be allowed, it would be essential to determine whether such customers are final users of the distributed products or services. If the customers are final users, there would be a risk that such restrictions would not be enforced. Refusing to deal with customers without legal support may subject the supplier in question to the following penalties, among others: (i) a fine; (ii) temporary suspension of the supplier's activities; or (iii) cancellation of the concession or permission of use (if the supplier holds any).

However, if the customer is not deemed to be a consumer protected by the Brazilian Consumer Defence Code (ie, most likely entities that use the acquired products in their production process), the general rules of the Civil Code would apply, in which case we understand that the supplier would be able to refuse, and to restrict its distributor's ability, to deal with particular customers.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

No, Brazilian antitrust and competition laws do not constrain the relationship between suppliers and their distribution partners in any other ways. CADE is an independent federal agency with powers to investigate, prosecute and – if necessary – punish companies and individuals found guilty of violations to the Brazilian Competition Law. Fines can range from 0.1 per cent to 20 per cent of the company's gross turnover in the year before the opening of the antitrust investigation. Private parties can bring actions under antitrust laws, seeking remedies, reparations, etc.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

If so allowed by the contract or otherwise (such as by a separate power-of-attorney), a distributor or agent may file one or more injunctions to prevent the importation or sale of parallel or grey market products into its territory. In order to obtain an injunction, the distributor will need to evidence that its rights have been breached or provide very strong evidence that a breach is extremely likely to occur. Preventative measures without any evidence of a breach of rights are unlikely to be upheld by a Brazilian court.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

Restrictions on advertising are set forth in the Consumer Defence Code, in the Self-Regulation Advertising Code of the National Advertising Council (CONAR) and in specific legislation. CONAR is not a governmental authority, but it is a very well respected non-governmental entity that is seldom questioned by the players in the Brazilian advertising market.

The Consumer Defence Code forbids any abusive or misleading advertising, and any marketing that does not provide all essential information about the products or services provided. According to the Consumer Defence Code, misleading advertising is 'any information or public communication that is entirely or partially false or is in any way, even by omission, capable of inducing a consumer to make a mistake regarding the nature, characteristics, quality, quantity, properties, origin, price, and any other information about products and services'. Abusive advertising is defined as 'any advertisement of discriminatory nature, or that incites violence, explores fear or superstition or takes advantage of a child's lack of judgement or experience, disrespects environmental values or may cause the consumer to behave in a way that will jeopardise his health or safety'.

The Consumer Defence Code also forbids publicity by telephone if the call is charged to the consumer.

CONAR's Self-Regulation Code sets forth the general principles for advertising ethics, and specific rules as to the advertising of certain types of products. In general, this Code requires advertising to be respectful, lawful, honest, truthful and ostensive, and should consider the social responsibility of the announcer.

The advertising of the following products is regulated by specific laws, which may impose particular restrictions: firearms, children's food, products directed at children, alcoholic beverages, crop therapies and protection products; food in general; the use of wild animals in advertising; and the advertising profession.

The advertising on television of smoking products, whether or not derived from tobacco, is forbidden.

Sharing advertising costs with distributors is not regulated, nor is it forbidden. The parties customarily regulate this in the agreement.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

It is advisable to have in place contractual provisions limiting the distributor's right to use the supplier's intellectual property.

Also, a supplier may safeguard its industrial property (trademarks, patents, industrial designs, geographic indications and maskworks) from infringement by registering it with the Brazilian Patents and Trademarks Office (INPI) – this registration will assure protection within Brazil.

Rights of authorship (copyrights) are protected by the Rights of Authorship Law regardless of registration. Works created by foreign individuals resident abroad are protected by this law if their country of residence extends the same protection to Brazilians by comity.

Trade secrets and know-how are not protected as property in Brazil. However, the Brazilian Industrial Property Law, in the chapter related to Crimes of Unfair Competition, characterises as crimes certain conducts involving the unauthorised use of trade secrets. As a result, there is legal protection against the violation of trade secrets and know-how.

Technology-transfer agreements are common in Brazil, although not so much in the context of distribution or sales representation arrangements that do not require the distributor or sales representative to manufacture, assemble or otherwise render services with regard to the products.

24 What consumer protection laws are relevant to a supplier or distributor?

The most relevant consumer protection law is the Consumer Defence Code, which applies to all product and service providers, including suppliers and distributors. Under such law, all parties in the supply chain (which would include the supplier – even if foreign – and the distributor) are joint and severally liable to consumers for defects or vices in a product or service, regardless of actual responsibility (negligence) for the defect or vice. The parties in the supply chain may demand from each other if they understand they are not liable.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Rules concerning recalls are set forth generally in the Consumer Defence Code and in detail by Ordinance 487/2012 of the Ministry of Justice. Where a distributed product reveals any harmfulness or danger to consumers' health and safety, its 'supplier' must immediately inform the relevant authorities and consumers by means of announcements in newspapers, on

radio or on television. Responsibility for the recall is attributed generally to the figure of the 'supplier' and, in view of the provisions of the Consumer Defence Code, we understand such term to mean all parties involved in the chain of supply (including, without limitation, supplier and distributor).

The parties may, in the contract, regulate which of them is responsible for carrying out and bearing the costs of a recall. This contractual arrangement, however, will not change or affect the responsibility set forth at law as described above (ie, even if the distributor is by contract responsible for carrying out a recall, if the distributor does not comply with this obligation, the supplier may be held liable for it with respect to the public). The supplier may, afterwards, demand indemnification from the distributor based on its breach of contract. And the distributor may demand indemnification from the supplier for losses arising out of defects in the products under recall.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

A supplier may limit the warranties it provides to distribution partners up to the minimum warranties required by the Civil Code. Under the Civil Code, a purchaser may make claims for apparent defects within up to 30 days for chattel and within up to one year for real property, both periods counting from actual delivery. If the defect is latent and only becomes known in the future (because it is not latent), the purchaser may make a claim within up to 180 days of discovery for chattel, and within up to one year after discovery if related to real property. Under the Civil Code, the purchaser has the right to return the purchased item or to claim a price reduction.

Both the supplier and distributor may limit warranties to customers up to the minimum warranties required by the Consumer Defence Code, which applies to their relationship with the consumer. Under the Consumer Defence Code, the right to complain about apparent or easily noticeable defects can be invoked by consumers within 30 days of delivery, for services and non-durable goods, and within 90 days of delivery for services and durable products. In case of latent defects, the period for complaints begins when the defect becomes evident. Under the Consumer Defence Code, the supplier must repair the defect within 30 days. If the supplier does not do so, the consumer may choose among: (i) replacement of the defective product; (ii) immediate reimbursement of the amount paid, adjusted for inflation and without prejudice to damages that may be claimed; or (iii) proportional price reduction.

Finally, the Consumer Defence Code sets forth that contractual warranties are supplementary to the legal warranties.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Brazil has not yet enacted a specific, comprehensive data protection law like many European countries. There are general principles and provisions on data protection and privacy in the Federal Constitution, in the Civil Code and in other specific laws and regulations, including the Consumer Protection Code and the new law on internet matters, the (Law 12965/2014). In this regard, specifically regarding information collected online, Law 12965/2014 expressly establishes the data subject's right not to have his or her personal data shared with third parties, except upon the subject's express free and informed consent or as provided by law.

Unless such specific regulations apply, there are no express restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products. Nevertheless, in view of the general privacy principles, it is always advisable to perform a case-by-case analysis to determine the convenience for distributors to obtain prior consent to disclose personal information about customers or end-users to suppliers.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

There is no rule forbidding a contracting party from approving or rejecting the individuals who manage the other party's business, so it is possible for a supplier to do so and to set forth the related rules in the contract. There is no specific rule either about termination of a distribution agreement owing to unsatisfactory management; therefore, if the parties agree in the contract, the supplier will be able to terminate the relationship if not satisfied with the management. Brazilian courts, however, may review the cases where the enforcement of such provision could be considered abusive or used without reasonable grounds.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Yes, there are. Under Brazilian labour law, facts prevail over form. Therefore, regardless of how the companies formalise the hiring of people (eg, distributor, agent, etc), if the requirements of an employment relationship are met, the person will be deemed an employee for all legal purposes. An employment relationship is characterised if the following requirements are concurrently met: individuality, habitual basis, compensation and subordination, the latter being the key aspect to differentiate an employee from a self-employed professional.

A relationship may be reclassified into an employment relationship by means of a labour lawsuit filed by the individual or an audit by a public authority. If such reclassification occurs, the consequences may comprise:

- payment of labour charges, such as:
  - minimum salary established by law or by collective bargaining agreement;
  - 13th salary, which is an additional month of salary paid to employees yearly, in two instalments;
  - vacation in the amount of a monthly compensation (which may include the average payments of variable gains, such as commissions) plus a bonus of one-third of such amount;
  - any additional rights granted by the company or set forth in the collective bargaining agreement; and
  - severance pay fund (FGTS) deposits, which is a mandatory monthly deposit of 8 per cent of the employees' compensation on the relevant month;
- payment of differences of social security contributions based, as a rule, on a rate ranging from 26.3 per cent to 31.8 per cent on top of the amounts received by the individual or invoices paid to the individual's company, plus penalties that vary between 75 per cent and 150 per cent, and legal interest;
- payment of fines for the non-observation of ancillary obligations;
- severance payments in accordance with the rules of the CLT, which include:
  - at least 30 days' prior notice of termination (and subject to a maximum notice period of 90 days);
  - FGTS penalty of 40 per cent on the amounts deposited by the company into the relevant account;
  - salary balance for the days worked in the month he received the prior notice; and
  - one month's salary if the employee's contract is terminated in the month prior to the annual salary adjustment determined by the collective bargaining agreement (this date varies based on type of business of the employer and location);
- an additional cost of 10 per cent on top of the amounts deposited into the FGTS account that reverts to the government; and
- payment of social security contributions on certain termination amounts. Criminal consequences in connection with deceitful acts to avoid the payment of social security contributions, although not frequent, may apply.

As regards the supplier's protection against its responsibility for potential violations of labour and employment laws by its distribution partners, the supplier may include clauses in the contracts stating that the distributors will comply with the labour laws and setting forth indemnification provisions, and constantly monitor the distributor's compliance with the labour and employment laws by requesting the presentation of clearance certificates and evidence of payment of salaries and taxes.

30 Is the payment of commission to a commercial agent regulated?

Pursuant to the Sales Representatives Law:

- the sales representative becomes entitled to a commission upon payment of the related purchase orders or proposals;

Update and trends

Bill of Law 181/2014, currently in discussion, sets out principles, guarantees, rights and obligations relating to the protection of personal data.

Bill of Law 7477/2014 (the Distribution Bill), currently in discussion, sets forth rules to specifically regulate distribution relationships (where a distributor buys manufactured products (excluding cars) and then resells them within a certain territory) and the related contracts.

According to the Distribution Bill, the following provisions would be mandatory in a distribution contract:

- specification of the products to be distributed;
- definition of distributor's areas of performance;
- exclusivity in favour of the distributor;
- description of the investments that are required for the implementation of business, for which negotiations have already started;
- details of the facilities required to store products; and
- a list of the equipment necessary to distribute the products.

The Distribution Bill also suggests obligations that would apply even if absent from a contract, and minimum indemnifications in case of termination. Also, according to this Bill a distribution contract should be entered for an initial term of at least five years, provided such period would suffice for distributor to recover its investments, and that upon renewal the agreement would become valid for an indefinite term.

Discussion of the Distribution Bill is in the early stages and it is unlikely that any changes will take place in 2015.

- commissions must be paid no later than the 15th day of the month following the month on which invoices were paid;
- commissions paid at a different time must be adjusted for inflation;
- commissions must be calculated based on the total invoiced amount;
- the sales representation agreement cannot be altered in a manner that directly or indirectly entails a reduction of the representative's average earnings in the preceding six months;
- the agreement must set forth whether the sales representative is entitled to commissions on sales made in their territory regardless of their participation and whether the representation is exclusive; and
- if the agreement is silent about a supplier's refusal of proposals submitted by the sales representative, the latter will be entitled to commissions.

31 What good faith and fair dealing requirements apply to distribution relationships?

The general rule set forth in the Civil Code, which requires that the parties to a contract must use good faith and fair dealing in terminating and performing a contract, applies to distribution relationships.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

Distribution agreements are not required to be registered or approved by government agencies. International industrial property licences and technology-transfer agreements, as a rule, must be registered with the INPI. Copyright licences are not required to be registered with any government agency.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

As per our introduction, distribution contracts are deemed to be atypical contracts under Brazilian law. As such, there are no specific restrictions on provisions, no mandatory provisions or provisions that local law will deem included even if absent, in distribution contracts specifically. Possible limitations on enforceability may occur if the distribution contract is drafted without observing the general principles of contracts set forth in the Civil Code, as mentioned above.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

The parties may choose any law to govern a distribution contract. However, if a dispute about the law applicable to the contract is brought before a court in Brazil, then certain Brazilian rules (set forth in the Introductory Law to the Civil Code) will apply, namely that:

- obligations are governed by the law of the country in which they are created; and
- obligations are considered created in the country of residence of their proponent.

Thus, even if the parties choose foreign legislation to apply to the contract, there is a risk that such choice will be disregarded if the application of the above rules determines that Brazilian law must apply.

In arbitration, any law can be chosen provided it does not violate customs and public order.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

In distribution agreements, the parties may choose any court within or outside Brazil to resolve disputes. However, if a dispute is brought to a Brazilian court, the judge will apply the rules set forth in the Introductory Law to the Civil Code and in the Civil Procedure Code to determine whether he or she has jurisdiction. In this regard, the Law sets forth, generally, that Brazilian courts will have jurisdiction when the defendant is domiciled in Brazil or if the obligation is to be performed in Brazil; the Civil Procedure Code sets forth that Brazilian courts have jurisdiction if the dispute arises out of a fact occurred or act practised in Brazil. The Civil Procedure Code also states that a foreign company with an agency or branch in Brazil is deemed to be domiciled in Brazil.

The Sales Representatives Law sets forth that the Brazilian state courts of the sales representative's domicile have jurisdiction to resolve disputes between principals and sales representatives. Thus, there are restrictions on the contractual choice of courts in a sales representation agreement.

As to arbitration, the existing restrictions (under the Arbitration Law – Federal Law No. 9307/1996) are: the parties to the arbitration must have the legal capability to enter into a contract, and the subject matter of the dispute must be related to patrimonial rights over which the parties may dispose. If these requirements are complied with, the parties may freely choose arbitration tribunals, within or outside of Brazil. Also, in 'adhesion contracts' specifically, the Arbitration Law requires that the arbitration clause be expressly agreed to by the adhering party, whether in a separate written document attached to the adhesion contract or by signing or initialing the arbitration clause in the contract (which must be written in boldface). Otherwise the clause will not be valid. Brazilian law understands adhesion contracts as written agreements drafted by one of the parties and which, in principle, cannot be amended by the other party.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

State courts would be available in Brazil for a dispute concerning a distribution contract between two private parties. If any party to the contract is a governmental entity, then the specific court with jurisdiction over such entity would be available (eg, when the federal government or a federal agency is involved, federal court). As the dispute progresses, it may go to courts of other levels (such as the second level state court and the Superior Court of Justice, which is a federal court). Arbitration would also be available for dispute resolution.

To resolve disputes, suppliers and distribution partners may avail themselves of any procedure and remedy available at law that is adequate for the case at hand (as a rule, the adequate procedure depends on the nature of the plaintiff's demands, not on the nature of the relationship of the parties).

Foreign businesses are not restricted in their ability to make use of these courts and procedures, and they can expect fair treatment. There is however a special requirement generally applicable to plaintiffs that are domiciled outside Brazil or absent from Brazil during the lawsuit and do not own real estate in Brazil that may be given as a guarantee: these plaintiffs must post a bond sufficient to cover court costs and attorneys' fees of the opposing party (in case they lose and are condemned to pay such expenses).

A litigant can require disclosure of any documents and testimony from the adverse party. However, the request will be subject to the judge's scrutiny, and the judge may deny discovery of any document or testimony of any person he or she deems irrelevant to the case.

The advantage, for a foreign business, of resolving disputes in Brazilian courts is that, being a plaintiff, the foreign business is closer to the assets of the defendant and therefore it should be simpler and easier to obtain indemnification. Also, with the process being conducted in Brazil, there would be no need to recognise and enforce a foreign decision, which can be a cumbersome process. The disadvantages are mainly the costs of translating foreign documents into Portuguese (translation is required in order to submit any such document to a court); and the fact that Brazilian courts can be very slow and unpredictable.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

An agreement to mediate may be enforced in Brazil. However, mediation is not a legally recognised means of dispute resolution in Brazil, so any decision in mediation is subject to questioning in court or arbitration.

A written agreement to arbitrate would be enforced. It is necessary for an arbitration provision to include some details about the arbitration (such as the arbitration chamber and applicable rules) to avoid discussions in this regard (which discussions might occur in court). There are no limitations such as those mentioned on the terms of an agreement to arbitrate (see question 35).

The advantages, for a foreign business, of resolving disputes by arbitration in Brazil are the same as the advantages of resolving a dispute in Brazilian courts. Plus, arbitration is faster in Brazil than going through the courts. The disadvantage is mainly the high cost of arbitration in Brazil. Finally, in Brazil an arbitration sentence is final and unappealable, which may be deemed an advantage or, for the defeated party, a disadvantage.

René Gelman **rene.gelman@cgmlaw.com.br**
Valéria Kasabkojian Schramm **valeria.schramm@cgmlaw.com.br**
Eliana Rozenkwit **eliana.rozenkwit@cgmlaw.com.br**

Av. Brig. Faria Lima, 1.663 – 5º andar
01452-001 São Paulo
Brazil

Tel: +55 11 2394 8900
Fax: +55 11 2394 8902
www.cgmlaw.com.br

China

George Ribeiro and Dominic Hui
Ribeiro Hui

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Under the current regulatory environment, a foreign supplier may establish its own entity (wholly-owned) to import and distribute its products in China, subject to some exceptions such as certain audio-visual work, agricultural products and gasoline where joint venture arrangements remain as the requisite structure to attain approval. There are some product categories that are still not open to foreign investors such as genetic testing equipment and military products, and local importers and distributors have to be engaged for importing these products.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

As mentioned, a foreign supplier may enter into a joint ownership arrangement with a local company or importer for import of its products, except in products that are still not open to local trading by foreign investors. There are two major joint ownership structures, the first being a joint venture. The choice of the joint venture type may vary depending on the type of product, for example, a contractual joint venture to import and distribute audio-visual work (excluding films), or an equity joint venture to import and distribute shoes where the investor holds share capital in a limited liability company established in China.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Unless it is required by law that a joint venture be established, from a corporate management perspective, a wholly foreign-owned enterprise (WFOE) is generally the preferred type of business vehicle for a foreign supplier to import and distribute its own products. A WFOE will be incorporated as a limited liability company in which the foreign supplier is the only shareholder. The establishment, operation and termination of the WFOE is governed by the Company Law of the People's Republic of China and the Law of the People's Republic of China on Foreign-invested Enterprises. There are different local approval procedures for certain businesses, for example, in Shanghai, for conducting online sale of products by a Shanghai free trade zone WFOE, the application has to be approved by a city level authority instead of the free trade zone authority.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

The Chinese regulatory environment is more focused on regulation of business instead of ownership of business entities, and the scope of business of a business entity is specifically defined in the corporate formation documents. In essence, conducting any business beyond the approved scope of business is illegal. Foreign investors are required to follow the Catalogue of Industries for Guiding Foreign Investment (the Catalogue) to verify whether the proposed business is restricted under national and local regulations. All industries are divided into three groups in the Catalogue: (i) encouraged industries; (ii) restricted industries; and (iii) prohibited industries. Foreign investors are not allowed to conduct businesses or invest in prohibited industries and are subject to several restrictions for investing in restricted industries. The Catalogue may be subject to changes by the government from time to time.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

See question 3.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

The major relevant taxes are corporate income tax, value added tax and custom duties. China also follows the OECD model on the issue of transfer pricing. The tax authority in China has been using the industrial average profit margin generated from its database to determine whether the assessable income should be adjusted due to certain transfer pricing arrangements between related companies.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Various distribution structures are available in China, including the typical structures of distributorship, commission agency, franchise, trademark licence and joint ventures that are common. Apart from the usual business considerations such as whether the model can achieve better penetration into the market and serve the objectives of the brand owner, the tax issue and actual logistic arrangements are also crucial in determining whether a certain structure is preferred. For example, it is common to use local agencies for importing cosmetic products due to certain testing procedures of the drugs authority of China, and the distributors are supplied through such local agencies.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Generally, the Contract Law of the People's Republic of China governs the relationship, and there is no specific governmental agency regulating the distribution aspect, provided that in the context of franchising, the Ministry of Commerce is the regulatory authority that oversees compliance pursuant to the franchise laws and regulations such as the Regulations of Administration of Commercial Franchising. Recently, the government has released a series of national standards for different sectors stipulating the necessary standards for management of different contractual relationships. However, the legal position of these national standards has not yet been defined.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

The Contract Law of the People's Republic of China does not restrict the supplier's contractual rights to terminate a distribution relationship without cause. The contractual provisions regarding termination are usually descriptive and elaborate in contracts with Chinese parties, because some common concepts such as 'time being of the essence' in other jurisdictions do not exist under Chinese laws.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

The Contract Law of the People's Republic of China does not require the brand owner to provide a mandatory compensation or an indemnity at the termination of the distribution or similar relationship. There is no requirement under the law to compensate the distributor for the goodwill established by the distributor.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

It is common to have change of control provisions in distribution or agency contracts enabling termination of the agreement in the event of transfer of ownership of the distributor or agent to a third party, and so far there is no specific judicial precedent refusing the enforcement of such contractual provisions.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality provisions in distribution agreements are generally enforced contractually and there are also statutory protections under the Anti-Unfair Competition Law of the People's Republic of China. However, the usual challenges relate to the mechanism implemented to protect the confidential nature of the information involved (eg, document marking, restrictions to access etc) and it is necessary to devise a system to protect the confidential information.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

So far the judicial precedents have not shown a very systematic approach towards the determination of enforceability of non-compete provisions. In-term non-competition provisions are generally enforceable in the context of distribution relationships. It is generally agreed that post-term non-competition provisions are enforceable if the restricted period is not excessively long (eg, a two-year post-term non-compete provision for the original distribution territory is generally acceptable). In determination of reasonableness of certain restrictions, the general 'fair and reasonable' test, which is relatively vague, is adopted.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Generally, distributors can be required to follow the supplier's pricing policy. However, under the Anti-Monopoly Law of the People's Republic of China, price-fixing arrangements between the supplier and distributors to monopolise the market are prohibited, and there are also other restrictions mentioned below.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Minimum advertised price policies that only regulate the advertised resale prices without restricting the actual resale prices to be negotiated by the distributors and the customers are common nowadays, but such provisions remain relatively untested. It is necessary to mention that a supplier may violate the Anti-Monopoly Law of the People's Republic of China if it enters into an arrangement with a distributor to fix resale prices or set minimum resale prices to achieve market monopoly. It is advisable to make the termination provisions related to violation of the pricing policy and minimum advertised price policy more detailed.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

The general belief is that this type of 'most-favoured customer' provision is enforceable. Having said that, the Anti-Monopoly Law of the People's Republic of China prohibits a distributor from abusing its dominant position in the market to secure certain trading conditions that restrict market entry by other parties.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

The law generally does not intervene in the freedom of dealings between the parties on pricing issues. The exception is that under the Anti-Monopoly Law of the People's Republic of China, a supplier who is in a dominant position in the market is not allowed to offer different transactional terms and conditions (eg, sale prices) to customers (which means the distributor in the present context) with the same background without proper reason. There is no statutory definition of 'customers who are with same background', and the court has wide discretion to determine who may be caught with reference to the facts.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

It is common to agree on exclusive territory for a particular distributor, and the contractual provisions remain decisive in determining how to define the territories and markets. The law so far has not provided sufficient guidance on construing the contractual provisions of active sales and passive sales that are not actively solicited which are heavily litigated in other jurisdictions.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

The Anti-Monopoly Law of the People's Republic of China prohibits businesses that are in a dominant position in the market from refusing to deal with particular customers without proper reasons or from restricting their distributors from dealing with certain parties without proper reason. There is no statutory definition for 'proper reason', which is subject to the determination by the courts at their discretion on a case-by-case basis. However, if there is no abuse of a dominant position, the prohibition should not be relevant, and the supplier is free to devise a policy on selection of customers.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

The Anti-Unfair Competition Law of the People's Republic of China and the Anti-Monopoly Law of the People's Republic of China are the primary relevant legislation in this respect. Apart from the points discussed in other

questions above, under the Anti-Monopoly Law of the People's Republic of China, a supplier abusing its dominant position in the market and requiring their distributors to purchase products from the suppliers designated by them for the purpose of excluding fair competition is prohibited.

The regulatory authority under the Anti-Unfair Competition Law of the People's Republic of China is the Administration for Industry and Commerce and the regulatory authority under the Anti-Monopoly Law of the People's Republic of China is the Anti-Monopoly Commission. Both authorities have the necessary powers to investigate and impose administrative penalties.

Affected parties are entitled to bring actions under the Anti-Unfair Competition Law of the People's Republic of China or the Anti-Monopoly Law of the People's Republic of China for damages, loss of profits and reasonable investigation costs.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

At present, Chinese law only allows parallel imports of patented products. The law does not specify whether parallel import of products under registered trademarks is prohibited or not, but there are cases where parallel import of products under registered trademarks is regarded as infringement of trademark rights. It is common to include contractual provisions to restrict parallel import, but instead of simply relying on the contractual arrangements, brand owners may record their registered trademarks with customs, and as a result, customs will monitor the shipments and seize any infringing products that bear the trademark. A registered patent is also recordable, but generally customs has difficulties to make a ruling due to lack of technical capability.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

A supplier may advertise and market its products pursuant to the Advertisement Law of the People's Republic of China at its own costs or pass all or part of its costs on to its distributors or share in its costs upon mutual agreement.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

China is a party to major international conventions on intellectual property protection. Following international practice, patents and trademarks should be registered in China in order to secure protection under local laws. Although a copyright work created overseas is automatically protected under local laws, in practice, a separate copyright recordal should be filed before the judicial and administrative authorities will recognise such rights. Trade secrets and confidential information are protected under the Anti-Unfair Competition Law of the People's Republic of China. Know-how that is not trade secrets or confidential information heavily relies on the protection as stipulated in the relevant contractual documents between the parties. It is common for owners of intellectual property to enter into different kinds of agreements such as licensing agreements and technology-transfer agreements with the local parties.

It is prudent to conduct an audit to review the portfolio before entering into any negotiation with the local party, as usually there are some additional issues to be resolved (eg, Chinese transliteration of the brand should be registered).

24 What consumer protection laws are relevant to a supplier or distributor?

A distributor is not protected by the Consumer Interests Protection Law of the People's Republic of China, as such distributor is not a consumer as defined by the Consumer Interests Protection Law of the People's Republic of China. However, the supplier or distributor shall fulfil its statutory obligations under chapter 3 of the Consumer Interests Protection Law of the People's Republic of China as a business. For example, when selling its products to a consumer, the supplier or distributor cannot impose unfair or unreasonable transactional conditions on the consumer (eg, tie-in sale). Apart from the Consumer Interests Protection Law of the People's Republic of China, the Tort Law of the People's Republic of China and the Product Liability Law of the People's Republic of China set out the general obligations and liabilities of the suppliers and distributors.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

China does not have a general law regulating product recalls, but there are several regulations concerning product recall of specific categories of products, including automobiles, drugs, children's tools and foods. The requirements and procedures for product recalls are basically the same. Generally, manufacturers are responsible for product recalls and distributors or retailers are obliged to coordinate. A detailed action plan of the product recall must be filed with the authority.

Except in product recalls of automobiles where the relevant regulations stipulate that the manufacturer has to bear the cost thereof, other regulations are silent on which party is responsible for the cost. The parties in cases other than automobiles can negotiate the apportionment of liabilities and financial exposure in such product recall situations.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Except the mandatory warranties as set out in the Product Quality Law of the People's Republic of China, which covers the basic requirements on safety, use, and written descriptions and instructions of use, the supplier and distributors are free to negotiate additional warranties in their contractual arrangements, and agree on the warranties to be offered to their downstream customers.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Although the law is silent on the ownership of personal data of customers and end-users, according to the Consumer Interests Protection Law of the People's Republic of China, business operators that collect the personal data of their consumers (including end-users) are required to keep such information strictly confidential. Consent has to be obtained from the consumers before exchange of personal data between a supplier and its distributor. Furthermore, the Provisions on Protecting the Personal Information of Telecommunications and Internet Users, which is a general set of rules for the internet environment, further regulates the collection and use of personal data on the internet by dividing personal data into different categories. Different protection is offered for each category.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Chinese laws do not restrict these kinds of provisions, but it is advisable to have detailed provisions in this respect, as the court normally adopts a relatively restrictive interpretation for these types of clauses.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

In general, all businesses in China have to secure a business licence. From the administrative point of view, contracting with a business that has a business licence effectively designates a commercial relationship between two separate businesses. In the event that the distributor is an individual and a dispute arises on whether there has been employment, the PRC courts will consider the following aspects to determine whether there has been an employment relationship ('Notice on determining whether an employment relationship exists' Lao She Bu Fa [2005] No. 12):

- written agreement between the parties;
- whether the distributor is on the payroll and whether the supplier has paid any statutory social insurance for the distributor;

- whether the distributor has acquired any corporate identification, uniform from the supplier and made any authorised representation as the supplier's representative to the public; and
- whether the distributor completed any job application forms.

With respect to minimum wage, the amount varies in different cities. For Beijing and Shanghai, the current minimum monthly wage is 1,560 renminbi and 1,820 renminbi respectively. The employer is also liable to pay the employer's contributions of social security payments. As for overtime, the law requires 150 per cent salary for overtime work on weekdays, 200 per cent salary for overtime work during weekends, and 300 per cent salary for overtime work during statutory holidays. Generally, an employee is entitled to severance payment at the termination of the employment relationship, except in fault-based termination or resignation. The general rate (subject to some technical rules) is one month's salary for each year of service.

30 Is the payment of commission to a commercial agent regulated?

There are no specific laws or regulations governing payment of commission to a commercial agent. The general contractual law principles apply.

31 What good faith and fair dealing requirements apply to distribution relationships?

There are no 'good faith and fair dealing' requirements applicable to distribution relationships in Chinese laws. There is a 'fair and reasonable' principle under the Contract Law of the People's Republic of China but such principle is not frequently applied. If applied, it is usually used to determine whether certain contractual provisions are oppressive instead of examining the course of dealing between the parties.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

There is no specific requirement governing distribution agreements to be registered with any government agencies. Instead, there are recordal requirements for intellectual property licence agreements. A trademark licence agreement should be recorded with the Trademark Office, and recordal is mandatory otherwise the licensing arrangement will not bind other third parties and foreign exchange approval cannot be secured. A patent licence agreement should be recorded with the State Intellectual Property Office and is mandatory otherwise the licensing arrangement will not bind other third parties and foreign exchange approval cannot be secured. A copyright licence agreement should be recorded with the Copyright Protection Centre and is voluntary.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Save and except the issues covered above, the Contract Law of the People's Republic of China does not impose any specific restrictions or mandatory provisions on distribution contracts. The general contractual principles apply.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Chinese laws do not impose any restrictions on the governing law of distribution contracts. However, in practice, if a local party files a lawsuit at the local court and the court proceeds with the case, it is unlikely that the local court will apply the governing law as set out in the distribution contract. Instead, the Chinese laws are likely to be the applicable law.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Chinese laws do not impose any restrictions as to the choice of courts or arbitration tribunals. However, since the performance of the distribution contract takes place within China, it is possible for the Chinese courts to assume jurisdiction over the case despite the choice of venue provisions.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

The procedures of the Chinese courts are relatively simple and normally a case can be closed within about a year. Under the present court rules, remedies are limited and certain relief such as injunctions and specific performance are not generally available.

Foreign parties' participation in Chinese court proceedings are common nowadays. Quality or predictable judgments can be seen in the courts of major coastal cities, although sometimes foreign parties may elect to have the disputes resolved in alternative venues such as arbitration in Hong Kong due to the language barrier and Hong Kong arbitral awards are enforceable in China. Under Chinese court and arbitration rules, there are no general disclosure obligations and evidence rules are less flexible (eg, electronic records and evidence should be notarised, evidence outside China should be legalised, and special attention should be paid at the stage of preparation).

RIBEIRO HUI
HONG KONG • SHANGHAI • BEIJING

George Ribeiro **g.ribeiro@ribeirohui.com**
Dominic Hui **d.hui@ribeirohui.com**

1702A & 1705, Silver Court
218 South Tibet Road
Shanghai 200021
China

Tel: +86 21 6386 6110
Fax: +86 21 6386 6112
www.ribeirohui.com

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

There is no formal mediation process under the rules, but judges and arbitrators usually suggest ad hoc mediation before the conclusion of the case.

Arbitration clauses are generally enforced, and the choices of the parties such as language, number of arbitrators and venue are generally respected. There are now several arbitration commissions within China, such as the China International Economic and Trade Arbitration Centre (CIETAC) in Beijing, the Shanghai International Arbitration Centre, and the Shenzhen Court of International Arbitration. The second and third institutions were formerly sub-commissions of the CIETAC in Shanghai and Shenzhen. Since both sub-commissions are now independent, an arbitration clause previously designating CIETAC Shanghai sub-commission and Shenzhen sub-commission should be revised otherwise there may be an issue regarding the identity of the institution.

Arbitration is gaining popularity in cross-border commercial disputes because arbitrators are usually practitioners with substantial experience in the relevant areas and arbitration proceedings are more flexible in terms of the procedure.

Croatia

Boris Porobija, Dražen Grubišić-Čabo and Iva Tokić Čuljak

Porobija & Porobija

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Generally, a supplier may choose to distribute its products itself, such as through a subsidiary, or by using third parties, such as distributors or agents. In any case, the supplier's presence on the market needs to be assessed under Croatian antitrust rules, in particular:

- the Croatian Competition Act 2009 (as amended) (the Competition Act), which regulates, inter alia, the application of article 101 of the Treaty on the Functioning of the European Union (TFEU); and
- implementing regulations under the Competition Act, such as the Regulation on Vertical Block Exemptions 2011 (the Vertical Block Exemption), which regulates the application of the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, and other sector-specific implementing regulations, such as the Regulation on Block Exemption Granted to Certain Categories of Technology Transfer Agreements 2011, the Regulation on Block Exemption Granted to Agreements on Distribution and Servicing of Motor Vehicles 2011, the Regulation on Block Exemption Granted to Insurance Agreements 2011 and the Regulation on Block Exemption Granted to Agreements in the Transport Sector 2011.

In principle, article 101 TFEU does not apply to agreements between companies that form part of a 'single economic entity', such as in case of the supplier distributing its products through a subsidiary.

In certain cases, such as horizontal agreements and dominant position, other antitrust rules may need to be taken into account, which are not covered here.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

A joint venture between a foreign supplier and a local company creating a local importer of the foreign supplier's products regularly needs to be assessed under Croatian antitrust rules, both in terms of merger control and in terms of cooperative agreements. In principle, if a joint venture is found to be a full-function joint venture, it will constitute a concentration and thus be subject to merger control assessment (even though assessment under article 101 TFEU cannot be entirely excluded). If a joint venture is not found to be a full-function joint venture (or if the relevant merger control thresholds are not met), it will need to be assessed under article 101 TFEU.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Foreign suppliers are usually commercially present on the Croatian market through branch offices (which represent the minimum form of commercial presence), limited liability companies or joint-stock companies. Limited liability companies are by far the prevailing form of commercial presence in Croatia, due to their low minimum share capital (approximately €2,600 in comparison to approximately €26,000 for joint-stock companies), flexible corporate governance and lower costs associated with their corporate governance (eg, the company's accounts do not have to be audited unless the relevant conditions regarding share capital, number or employees and/or revenues are met), etc.

The establishment of a limited liability company is mainly governed by the Croatian Companies Act 1993 (as amended).

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Both under the Croatian Constitution and the Companies Act, foreign investments are generally subject to the same rules as domestic investments, including protection of proprietary rights and investment incentives.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes. Please see questions 1 and 2.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

A local subsidiary of the foreign supplier as a tax resident will be subject to, inter alia, profit tax and VAT laws and regulations. Various tax and other benefits or incentives are available for investments, such as tax and customs incentives, incentives associated with creating new jobs or requalification of employees, etc.

Profit tax rate currently amounts to 20 per cent and the standard withholding tax rate to 15 per cent. For example, the payment of dividends to non-residents is subject to the withholding tax rate of 12 per cent, unless it can be reduced or is exempt under a tax treaty or the EU Parent-Subsidiary Directive. The payment of interests in subject to the standard withholding tax rate of 15 per cent, unless it can be reduced or exempt under a tax treaty or the EU Interest and Royalties Directive. However, in case of payment of interest to an entity located in the country outside the EU with an average profit tax rate of below 12.5 per cent and without a tax treaty concluded with Croatia, the withholding tax rate of 20 per cent shall apply.

In any case, applicable taxes and potential incentives should be checked with a local tax adviser before taking up the investment.

Further information regarding taxes on investments is available in *Getting the Deal Through – Tax on Inbound Investment*.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Available distribution structures include vertical agreements that may be exempt under the Vertical Block Exemption, such as exclusive distribution agreements, selective distribution agreements, exclusive purchase and supply agreements and franchising agreements, and 'genuine' agency agreements governed by the Croatian Code of Obligations 2005 (as amended) (the Code of Obligations).

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Distribution agreements are called 'non-nominated agreements' because they are not regulated by special provisions of the Code of Obligations, but are governed by general provisions of the Code of Obligations as well as by the Competition Act and its implementing regulations. Both in theory and in practice, the application of special provisions of the Code of Obligations, such as provisions governing sales contracts and agency agreements, to distribution agreements is being discussed.

Agency agreements are governed by general provisions and special provisions of the Code of Obligations on trade agency (which transpose the Council Directive of 18 December 1986 on the coordination of the laws of the Member State relating to self-employed commercial agents (86/653/EEC)) as well as by the Competition Act and its implementing regulations if they are not considered as 'genuine' agency agreements.

To the extent that an agreement is subject to the Competition Act and its implementing regulations, it falls within the competence of the Croatian Competition Agency (the Agency).

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

The Vertical Block Exemption does not provide for any guidance as to the termination of distribution agreements with or without cause. Thereby under the general provisions of the Code of Obligations a definite term agreement shall end upon expiry of its term, unless it is agreed or prescribed by law that after expiry of such term the agreement is prolonged for an indefinite term unless terminated in good time (without cause). In case of an indefinite term agreement, each party may terminate the agreement without cause. The notice may be given at any time, except at an inappropriate time, by respecting the agreed notice period, or if not agreed, by respecting a prescribed or appropriate notice period. The parties may also agree that the agreement shall terminate with delivery of the notice, unless the law prescribes otherwise.

Without prejudice to the above, special requirements for termination are prescribed by antitrust laws and regulations in the motor vehicles and transport sector:

- In the motor vehicles sector, the Regulation on Block Exemption Granted to Agreements on Distribution and Servicing of Motor Vehicles 2011 transposes the Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, including its provisions on termination.
- In the transport sector, the Regulation on Block Exemption Granted to Agreements in the Transport Sector 2011 transposes the Commission Regulation (EC) No. 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), including its provisions on termination.

With respect to termination of agency agreements, special provisions of the Code of Obligations provide that an agency agreement is entered into for an indefinite term, unless agreed otherwise. If the agreement is entered into for a definite term and the parties continue to perform the agreement after the expiry of its term, it shall be deemed that they entered into the same agreement but for an indefinite term.

In case of an indefinite term agreement (including a definite term agreement that has moved into an indefinite term), each party may terminate the agreement without cause by respecting the prescribed notice period that depends on the duration of the agreement (ie, the notice period shall be one month for each commenced year of the agreement and if the duration of the agreement exceeds five years, the notice period shall be six months). The parties may agree upon a longer, but not upon a shorter, notice period, which must be the same for both parties. Unless the agreement provides otherwise, the notice period shall start to run on the first day of the month following the month of sending the notice and shall end on the last day of the last month of the notice period.

Both indefinite and definite term agreements may be terminated with cause, such as due to non-fulfilment of agreed obligations or due to changed circumstances, which needs to be specified in the notice. The parties cannot exclude or limit this right to termination with cause. If the agreement has not been terminated with due cause, the other party shall be entitled to terminate the agreement without respecting the notice period.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

The Vertical Block Exemption does not provide for any guidance as to the payment of indemnity in case of termination of distribution agreements with or without cause. However, the general provisions of the Code of Obligations provide that the parties shall be released from their obligations in case of termination of an agreement with cause, except from their obligations regarding compensation of damages.

In case of agency agreements, special provisions of the Code of Obligations provide for payment of a special compensation in case of expiry or termination of the agreement. Namely, the agent shall be entitled to this special compensation if it succeeded in finding new clients for the principal or in increasing the volume of the principal's business with the existing clients and the principal realised significant benefits from such clients after expiry or termination of the agreement, and provided that the circumstances of the case justify the payment of this compensation, such as the loss of commission in dealing with these clients. When determining the amount of the special compensation, the agent's commission realised on the account of agreements entered into after expiry or termination of the agency agreement and potential non-compete restrictions after expiry or termination of the agency agreement should be taken into account. In any case, the amount of the special compensation cannot exceed the annual average commission paid in the preceding five years or, if the duration of the agreement is less than five years, the annual average commission paid during the term of the agreement.

Payment of the special compensation does not exclude the right to compensation of damages exceeding the amount of the special compensation. However, the agent's right to special compensation and the compensation of damages shall be forfeit where the agent fails to inform the principal that it shall request their payment within one year as from expiry or termination of the agreement.

The principal is not required to pay the special compensation where (i) the agent terminated the agreement with or without cause, except where the termination was caused by the principal or due to the agent's illness or old age, (ii) the principal terminated the agreement due to the agent's fault, or (iii) the agreement is transferred to a third party with the principal's agreement.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

In principle, retention of ownership is prescribed by special provisions of the Code of Obligations governing sales contracts. Namely, the seller may retain ownership title to the products sold to the purchaser before full payment of the purchase price. Such provision contained in a moveables sales contract shall be effective in relation to the purchaser's creditors only if it has been made in the form of a document publicly certified before the purchaser goes bankrupt or before the moveables are seized. Retention of ownership title to moveables that are registered in special registries (such as ships and aircraft) is possible only under conditions prescribed by special laws.

Other forms of security interests (such as pledge of shares, moveables, etc) are governed by special laws and regulations, including the Act on Registry of Court and Notary Public Creditors' Claims on Moveables and Rights 2005, which governs the registration of security interests not registered in other public registries, such as retention of ownership title of moveables based on an agreement exceeding one year in duration.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

The Vertical Block Exemption does not provide for any guidance as to the confidentiality provisions of a distribution agreement.

In case of an agency agreement, special provisions of the Code of Obligations provide that the agent is obliged to keep business, professional and official secrets of its principal that it learned in performance of its duties and shall be liable to the principal for use or disclosure of such information after expiry or termination of the agency agreement.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

In case of a distribution agreement, the Vertical Block Exemption regulates the application of the EU Vertical Block Exemption, including its non-compete provisions. In addition, the Regulation on Block Exemption Granted to Agreements on Distribution and Servicing of Motor Vehicles 2011 transposes the relevant Commission Regulation in the motor vehicle sector, including its non-compete provisions.

In case of an agency agreement, special provisions of the Code of Obligations provide that, without the principal's approval, the agent may not work for another principal in the same territory and for the same business. Furthermore, the parties may agree that, upon expiry or termination of the agency agreement, the agent shall not, entirely or partially, perform agency activities, provided that such restriction is made in writing and relates to the same territory, same persons or same products as the agency agreement concerned. Where the agency agreement is terminated due to the principal's fault, the subject restriction shall be binding for the agent only if the principal pays to the agent a special compensation upon termination of the agreement and a monthly compensation during the term of the non-compete restriction (in the amount of average monthly commission paid in the preceding five years or, if the duration of the agreement is less than five years, the average monthly commission paid during the term of the agreement). In any case, the non-compete restriction may be agreed upon for the term of up to two years upon expiry or termination of the agreement.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

The supplier's ability to determine sale prices is considered as a hard-core restriction under the Vertical Block Exemption, but this restriction is without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentive offered by, any of the parties. Since the Vertical Block Exemption does not provide for any further guidance regarding pricing matters in distribution agreements, the Commission's Guidelines on Vertical Restraints and other sector-specific supplementary guidelines as well the practice of the European Court of Justice need to be consulted on a case-by-case basis.

Further information regarding vertical agreements (including pricing matters) is available in the European Union chapter of *Getting the Deal Through – Vertical Agreements*.

In case of an agency agreement, special provisions of the Code of Obligations provide that the agent is generally required to act upon instructions of the principal who is required to make available to the agent any and all information needed for performance of the agent's duties, such as price lists, general terms and conditions and promotional materials.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Please see question 14.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Please see question 14.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Please see question 14.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

The supplier's ability to restrict the geographic areas or categories of customers as well as passive and active sales matters are considered as hard-core restrictions under the Vertical Block Exemption in the same way as provided under the EU Vertical Block Exemption and, if applicable, under the relevant sector-specific regulations. Since the Vertical Block Exemption does not provide for any further guidance in that respect, the Commission's Guidelines on Vertical Restraints and other sector-specific supplementary guidelines as well the practice of the European Court of Justice need to be consulted on a case-by-case basis.

Further information regarding vertical agreements and the relevant restrictions is available in the European Union chapter of *Getting the Deal Through – Vertical Agreements*.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Please see question 18.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

As outlined under question 8, the Agency is competent, *inter alia*, for infringements of the Competition Act (or article 101 TFEU). The initiative for initiation of proceedings falling in the competence of the Agency – a request, proposal, notice or a complaint – may be submitted in writing by any legal or natural person, professional association or economic interest group or association of undertakings, consumers association, the government of Croatia, central administration authorities and local and regional self-government units.

Damages claims for infringements of the Competition Act or article 101 TFEU may be filed with a competent commercial court. Without prejudice to article 267 TFEU, when deciding on the compensation for damages, the competent commercial court must take into account the final and enforceable decision of the Agency on infringement of the Competition Act or article 101 TFEU or the final decision of the European Commission on infringement of article 101 TFEU.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Please see question 18.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

The Vertical Block Exemption does not provide for any guidance regarding advertising costs, so Commission's Guidelines on Vertical Restraints and

other sector-specific supplementary guidelines as well the practice of the European Court of Justice need to be consulted on a case-by-case basis.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Under the Vertical Block Exemption, agreements containing provisions that relate to the assignment to the buyer or use by the buyer of intellectual property rights are subject to the block exemption provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale and/or resale of contract products by the buyer or its customers.

In addition, technology-transfer agreements are governed by the Regulation on Block Exemption Granted to Certain Categories of Technology Transfer Agreements 2011, which transposes the Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology-transfer agreements.

24 What consumer protection laws are relevant to a supplier or distributor?

Consumer protection is regulated by the Consumer Protection Act 2014 and its implementing regulations, which govern consumer rights such as the right to protection of consumers' economic interests, right to protection from risks to life, health and property, right to legal protection, right to consumer information and education, right to collective protection, etc. In terms of consumer protection laws and regulations, a trader means any person entering into a contract or acting on the market within the framework of its commercial, business or other professional activity, including a person acting in the name or on account of the trader.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

General safety requirements for products, obligations of the manufacturers and distributors and informing the public are regulated by the General Product Safety Act 2009 (as amended), which applies to all products not regulated by special laws and regulations. In principle, any person able to influence safety characteristics of a product is considered as its manufacturer and any other person participating in the distribution chain, but not able to influence safety characteristics of a product, is considered as its distributor. The manufacturer and/or the distributor are liable for undertaking the relevant actions (including product recall) in case of safety hazards. The General Product Safety Act does not provide for specific guidance regarding recall costs, other than that the manufacturer shall compensate the costs of inspection if the product was found to be unsafe due to the manufacturer's fault.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Special provisions of the Code of Obligations governing sales contracts regulate product warranties. Pursuant to the Consumer Protection Act 2014, these provisions apply to any product sold to a consumer.

Where the manufacturer issues a warranty for its products, the customer may request the compliance with such warranty (repair or substitution of the product) both from the seller and from the manufacturer of the product in question. Where the seller issues such warranty, the customer may request compliance with such warranty from the seller.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Neither the Vertical Block Exemption nor the Code of Obligations provide any guidance with respect to the exchange of information about customers and end-users. Under the Consumer Protection Act 2014, a trader is prohibited from disclosing consumers' personal data to third parties without the consumer's consent, in accordance with a special law governing data protection. According to the Data Protection Act 2003 (as amended), personal data may be transferred outside Croatia for the purpose of further processing only if the state or the international organisation to which the personal data is being transferred has adequately regulated protection of personal data and has ensured an adequate level of protection. In case of doubt, the data controller is obliged to obtain the opinion of the Croatian Data Protection Agency.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Neither the Vertical Block Exemption nor the Code of Obligations provide any guidance with respect to the distributor's or the agent's staff; however, under the Regulation on Block Exemption Granted to Agreements on Distribution and Servicing of Motor Vehicles 2011 (which transposes the relevant Commission Regulation in the motor vehicle sector) an obligation imposed on the distributor of new motor vehicles to have brand-specific sales personnel for different brands of motor vehicles shall constitute a prohibited vertical restraint, unless the distributor of new motor vehicles decides to have brand-specific sales personnel and the supplier pays all the additional costs involved.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

In cases where the distributor or the agent is a physical person, the Labour Act 2014 provides that, where the employer and the employee enter into contract for performance of certain work, which in terms of its nature and type has characteristics of work that requires entry into an employment contract, it shall be deemed that the employer and the employee entered into an employment contract and not some other contract, unless the employer proves otherwise. Thereby, the nature and type of work requiring the entry into an employment contract means that the employer shall award certain work to the employee and pay certain remuneration to the employee for such work, and the employee shall work under instructions of the employer given in accordance with the nature and type of work and shall personally perform the undertaken work. Accordingly, the nature and type of work as actually performed, and not as described in the contract, is relevant, which particularly refers to the independence of the provider from, or dependence on, the contractor, in terms of scope of work, time for performance of work, instructions for performance of work, use of work tools, presence in the contractor's structure and organisation, etc.

With respect to potential consequences, these may include, inter alia, penalties in misdemeanour proceedings for breach of provisions of the Labour Act as well as for breach of the provisions of laws and regulations governing taxes and mandatory contributions; various measures that may be undertaken in inspection or misdemeanour proceedings; application of the Labour Act, instead of provisions governing the relevant contract type (particularly with respect to the termination of contract, compensation of damages, etc); payment of taxes and mandatory contributions in accordance with the laws and regulations governing taxes and mandatory contributions payable in cases of employment, etc.

30 Is the payment of commission to a commercial agent regulated?

Yes. Under special provisions of the Code of Obligations governing trade agency agreements, the principal is required to pay a commission to the agent for the contracts entered into during the term of the agency agreement as a result of the agent's mediation or entered into by the agent in the name of or on account of the principal. The agent having exclusivity over a territory or group of clients is also entitled to commission for the contracts entered into by the principal on that territory or with those clients without the agent's mediation. The agent is also entitled to commission for contracts entered into by the principal after expiry or termination of the agency agreement, if the contract is entered into primarily as a result of the agent's activities and if the contract is entered into within a reasonable term after expiry or termination of the agency agreement (or if the agent or the principal received a third party's offer for entry into the contract before expiry or termination of the agency agreement).

If the commission is not set by agreement or applicable tariff, the agent shall be entitled to commission in the amount that is customary for the relevant activities and the relevant place.

The agent who is authorised by the principal to collect a principal's claim shall also be entitled to a special commission calculated based on the collected amount of the claim. Likewise, the agent who provides a written guarantee to the principal for fulfilment of an obligation arising from a contract entered into as a result of the agent's mediation or entered into by the agent in the name of or on account of the principal, shall be entitled to a special commission ('del credere commission').

In principle, the agent is entitled to receive the commission at the time when the principal or the third party, as applicable, fulfilled or ought to have fulfilled its obligation under the contract. The agent's right to the commission shall be forfeit if the contract between the principal and a third party remains unperformed due to reasons not attributable to the principal.

The principal is required to submit to the agent, at least every three months, the calculation of the commission that the agent is entitled to, expressed on a monthly basis. The principal is required to calculate and pay to the agent the three months' commission by the end of the month following the last month of the three-month calculation period, whereby the parties may agree upon shorter calculation periods.

The agent has a retention right over amounts collected for the principal and over the principal's assets received in connection with the agency agreement as security for its due claims under the agency agreement.

31 What good faith and fair dealing requirements apply to distribution relationships?

According to the general provisions of the Code of Obligations, the parties to an agreement are free to regulate their relations, subject to the provisions of the Croatian Constitution, mandatory laws and society's morals. In entering into contractual relations and performing the rights and obligations arising therefrom, the parties are required to abide by the principles of good faith and fair dealing.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No. However, licences of certain intellectual property rights may be subject to registration with the State Intellectual Property Office, such as registration of a trademark licence in order to realise effects in relation to third parties.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

As outlined in question 31, the parties to an agreement are in principle free to regulate their relations. Accordingly, the relevant general or special provisions of the Code of Obligations shall apply to agreements to the extent that these provisions are mandatory or, in case of non-mandatory provisions, to the extent that the parties have not agreed otherwise.

In principle, the Vertical Block Exemption and the relevant sector-specific regulations shall apply provided that the relevant agreement contains their relevant mandatory provisions and does not contain the relevant restrictions.

Update and trends

We are not aware of any announcement or proposal to change the legislation in the area of distribution or agency agreements, other than announcements regarding the proposed EU directive to govern actions for damages under national law for infringements of competition law.

The Competition Act and its implementing regulations are aligned with the EU competition rules, which provides a firm basis for their local implementation. In terms of enforcement, the Agency has been engaged in assessment of prohibited agreements (vertical and horizontal) as well as in testing of new competition law instruments in practice (such as commitments and dawn raids). The Agency announced that its enforcement priorities from 2014 to 2016 in the area of prohibited agreements (vertical and horizontal) will include scrutiny over non-compete obligations, pricing arrangements, limitations on passive sales and exchange of commercially sensitive information, particularly in sectors that have been or are being liberalised (such as telecommunications, water supply and electricity).

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

In principle, the parties are free with respect to their contractual choice of a country's law to govern a distribution contract. According to the Conflict of Laws Act 1982 (as amended), in cases of agreements with an international element, the governing law shall be the law agreed between the parties and, if not agreed and if the circumstances of the case do not point out otherwise, the law of the offeror's residence or registered office shall generally apply.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

According to the Civil Procedure Act 1977 (as amended), the parties may agree upon the competence of a court in terms of court's location provided that the subject court is competent for the dispute in question and that there is no exclusive competence of another court in terms of the court's

Porobija & Porobija
Law Firm

Boris Porobija **boris.porobija@porobija.hr**
Dražen Grubišić-Čabo **drazen.grubisic@porobija.hr**
Iva Tokić Čuljak **iva.tokic@porobija.hr**

Galleria Importanne
Iblerov trg 10/VII
PO Box 92
10000 Zagreb
Croatia

Tel: +385 1 4693 999
Fax: +385 1 4693 900
www.porobija.hr

location. In principle, the court competent for the dispute in question (in principle commercial courts for relations between entrepreneurs) located at the defendant's residence or registered office shall be competent in terms of the court's location.

According to the Arbitration Act 2001, in case of arbitrable disputes, the parties may agree upon a domestic or, in disputes with an international element, upon a foreign arbitration.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Equal treatment before law is guaranteed by the Croatian Constitution. However, in practical terms, language barriers (eg, all documents submitted to the court need to be provided in local language or as certified translations into local language made by licensed court translators), lengthy proceedings and somewhat undeveloped local court practice, particularly in sophisticated legal areas such as antitrust law, may represent obstacles in resolving disputes before local courts.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Under the Mediation Act 2011, no prior mediation agreement is required for mediation of a dispute locally and mediation may be conducted irrespective of ongoing court, arbitration or other proceedings.

The Arbitration Act 2011 governs all domestic arbitral proceedings, recognition and enforcement of arbitral awards (including recognition and enforcement of foreign awards). Further information regarding arbitration agreements is available in *Getting the Deal Through – Arbitration*. In terms of distribution agreements, under the Regulation on Block Exemption Granted to Agreements on Distribution and Servicing of Motor Vehicles 2011 (which transposes the relevant Commission Regulation in the motor vehicle sector), the subject block exemption shall apply provided that the distribution agreement sets out for each of the parties the right to refer disputes resulting from the agreement to the Conciliation Centre of the Croatian Chamber of Commerce, without prejudice to the right of each party to the agreement to settle their disputes at the court of law or by arbitration.

Both mediation and arbitration are popular forms for resolving commercial disputes, particularly in disputes with an international element.

Cyprus

Chrysanthos Christoforou
Andreas Neocleous & Co LLC

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

There is no obstacle to a foreign supplier establishing its own entity to import and distribute its products in Cyprus and many international businesses adopt this approach. Cyprus has a business-friendly environment: there are simple administrative procedures for businesses from overseas to set up operations in Cyprus and the Constitution guarantees the rights to private property both for nationals and non-nationals.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Cooperation with a local company may have commercial benefits, such as the ability to use the local company's existing distribution channels and other infrastructure, and a joint venture approach is not only possible, but very common.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The most commonly used structure is the limited liability company, incorporated under the Companies Law. Alternatively, the overseas company may register a branch in Cyprus under the Companies Law. It is also possible, but much less common, to structure the business as a partnership, under the Partnership and Business Names Law.

Limited liability company
A company may be limited by shares or by guarantee and may be public (where shares are freely transferable) or private (where there are restrictions on the number of shareholders and on the transferability of shares. Most companies established by overseas suppliers are private companies limited by shares. A company can be registered within a few days through a local lawyer. There is an expedited process at a slightly higher cost. Generally, in order to maintain control, the company is wholly owned by the supplier, though local participation (eg, by the local distributor) is possible. Single-member companies are permitted. The company must have a registered office and at least one director and a secretary. Companies or individuals may act in these capacities. A sole director may not also act as secretary.

There are many providers of corporate and fiduciary services (including service providers owned by law and accounting firms) that will provide directors, a secretary and a registered office facility. Service providers offering their services on a commercial basis are regulated under the Law Regulating Companies Providing Administrative Services and Related Matters (Law 196(I) of 2012 as amended).

Branch of an overseas company
A branch of an overseas company may be registered under the Companies Law. This task is usually undertaken by a local lawyer. There must be at least one person resident in Cyprus authorised to accept service of any notice on behalf of the company. This requirement may be fulfilled through a corporate service provider.

The final choice of structure will also be influenced by taxation (including VAT) considerations.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

As a member of the EU, Cyprus has an open inward investment regime. There are no restrictions on foreign ownership other than in regulated areas such as media, telecommunications, education and financial services.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes, there is no restriction.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Cyprus is a low-tax jurisdiction with a modern, business-friendly tax regime that is fully compliant with EU and OECD norms and a wide network of double taxation agreements. Cyprus-resident companies and permanent establishments of overseas companies are subject to corporate income tax on taxable income at a rate of 12.5 per cent. There is no taxation of capital gains, apart from gains derived from real estate located in Cyprus. There are no withholding taxes on dividends and interest and Cyprus is a popular location for international businesses to base their regional headquarters in the eastern Mediterranean region. It has a wide participation exemption and no thin capitalisation or CFC rules, making it an ideal base for international holding and finance structures. The arrangements for taxation of income derived from intellectual property are particularly beneficial. Four-fifths of income from intellectual property are exempt from tax, giving an effective tax rate of less than 2.5 per cent on such income, by far the lowest in Europe. This makes Cyprus a highly attractive jurisdiction in which to receive intra-group royalties and similar revenues.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

As Cyprus is an island, with limited domestic manufacturing capacity, it is heavily reliant on imports, and all these structures are available and used in practice. The main factors determining the structure chosen are primarily commercial, for example the nature of the goods, the extent of the ability to manufacture them locally and the importance of brands, but tax considerations may also have an influence.

Numerous local companies specialise in acting as intermediaries for overseas suppliers. Some merely act as sales agents, receiving and passing on orders for goods that are supplied direct by the manufacturer, who deals with delivery and invoicing of the goods and collection of the debt. Others may act as resellers, buying the goods from the manufacturer and selling them through their own distribution channels. Yet others, for example in the motor trade, provide a comprehensive sales, distribution and after-sales service channel. Local manufacture under licence also takes place, particularly in the fast moving consumer goods (especially food and soft drinks), beer and pharmaceutical sectors.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Cyprus law on agency follows the principles of English common law except where there are express statutory provisions. Sections 142 to 198 of the Contract Law (the Contract Law), which reflect these common law principles, are the main legislative provisions in this area.

European legislation, particularly Directive 86/653/EEC of 18 December 1986 relating to self-employed commercial agents, has been transposed into domestic law through the Commercial Agents Law, 76 of 1986, as amended by the Commercial Agents (Amendment) Law, 21(I) of 1994, and Law 148(I) of 2000 (the Commercial Agents Law) and the Regulation of Relations between Commercial Agents and Principals Law, 51(I) of 1992, as amended by Law 149(I) of 2000 (the Regulation of Relations Law).

In addition the Council of Ministers has issued regulations under the Commercial Agents Law, namely the Commercial Agents (Formation and Functioning of the Board, Registration of Members and Charges) (Amendment) Regulations of 2003 (the Commercial Agents Regulations), which came into force on 1 May 2004.

Which particular law governs a particular agreement is determined by the date of the agreement and whether it is in writing or oral. Written agency agreements made before July 1992 are governed by the Contract Law. All the provisions of the Regulation of Relations Law apply to oral agreements made before July 1992 and written agreements made after July 1992. Oral agreements made after July 1992 are not commercial agency agreements as defined in the Regulation of Relations Law but mere agency agreements and as such are governed by the Contract Law and general contract law.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Agreements governed by the Contract Law

Under the Contract Law there is no restriction on the right to terminate a distribution relationship without cause if this is permitted by the contract, nor is any specific cause required. Section 161 of the Contract Law provides that an agency is terminated by the following:

- revocation of the agent's authority by the principal;
- renunciation of the business of the agency by the agent;
- completion of the business of the agency;
- death or unsoundness of mind of either the principal or the agent; or
- adjudication of the principal as bankrupt or insolvent under the provisions of any law relating to bankruptcy or insolvency.

Section 162 of the Contract Law provides that where the agent him or herself has an interest in the property which forms the subject matter of the agency, in the absence of an express term in the contract the agency cannot be terminated to the prejudice of such interest. Subject to this provision the principal may revoke the agent's authority at any time before the authority has been exercised so as to bind the principal. If the agent's authority has been partly exercised, the principal cannot revoke the agent's authority concerning actions and obligations arising from acts already undertaken by the agent.

Where there is an express or implied contract that the agency should continue for a particular period of time, the parties must compensate each other (as the case may be) for any earlier revocation or renunciation of the agency (which may be express or implied from the conduct of the principal or agent) without sufficient cause. The parties are obliged to give reasonable notice of revocation or renunciation to each other and unless they do so, any resulting damage to the one must be made good by the other.

The termination of the agent's authority cannot take effect before it becomes known to him or her and to third parties. The termination of an agent's authority also terminates the authority of all sub-agents appointed by him or her. If the agency is terminated because of the principal's death or unsoundness of mind, the agent is bound to take, on behalf of the representatives of his or her principal, all reasonable steps to protect and preserve the interests entrusted to him or her.

Agreements governed by the Regulation of Relations Law

Part IV of the Regulation of Relations Law deals with the execution and expiration of commercial agency agreements. It imposes an obligation on both parties to sign a written agreement that determines the term of the agency and any subsequent terms to be agreed. Under article 15 of the Regulation of Relations Law, where the parties continue to perform a fixed-term commercial agency agreement after its expiration, it is considered to have become a commercial agency agreement of indefinite duration. Article 16 provides that such an agreement can be terminated by written notice by either party. The period of notice, which is the same for both parties, is one month for the first year of the agreement, two months for the second year, three months for the third year, four months for the fourth year, five months for the fifth year and six months for the sixth and subsequent years. When calculating the period of notice any previous fixed terms are also taken into account. It is not possible for the parties to agree a shorter period of notice, but they can agree a longer period, provided that the notice to be given by the principal is not shorter than that by the commercial agent. If the parties have not agreed otherwise, the expiration of the notice must coincide with the end of a calendar month.

Article 17 gives either party the right to terminate the agreement at any time on account of the failure of one of the parties to comply with the entirety or any part of their obligations or due to exceptional circumstances. Anomalously, article 17 does not specify that the fault must be on the part of the non-terminating party: on a literal reading it would appear to allow a party to take advantage of its own mischief, in the sense that a party who is in breach of the agreement may terminate it without notice. This has never been tested in the courts but it seems most unlikely that a court would follow such an interpretation.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

In contracts governed by the Regulation of Relations Law, the commercial agent is entitled to damages under article 18 if and to the extent that:

- he or she has introduced new customers to the principal or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from business with such customers; and
- the payment of an indemnity is fair and equitable, having regard to all the circumstances and in particular the commissions lost by the commercial agent on the business transacted with such customers.

The circumstances referred to in the second sub-clause include the application or otherwise of a restraint of trade clause. The amount of the indemnity may not exceed one year's remuneration calculated on the basis of the average annual remuneration over the preceding five years; if the contract goes back less than five years, the indemnity is calculated on the average for the period in question.

The award of such damages does not preclude the commercial agent from claiming damages for any loss suffered.

The Regulation of Relations Law also provides that the agent is entitled to compensation for any damage he or she suffers as a result of the termination of his or her relations with the principal, and in particular when the termination takes place in circumstances that have:

- deprived the commercial agent of the commission which proper performance of the agency contract would have procured for him or her while providing the principal with substantial benefits linked to the commercial agent's activities; or
- prevented the commercial agent from amortising any costs and expenses incurred during the performance of the agency contract at the principal's behest.

The agent loses any right to claim indemnity and damages if he or she does not notify the principal of his or her intention to pursue a claim within one year after termination of the agreement. The Regulation of Relations Law provides that any deviation from these provisions that adversely affects the commercial agent is invalid.

Article 19 sets out the circumstances in which damages are not due, namely where:

- the principal terminates the agreement due a fault on the agent's part that would justify an immediate termination under the law;
- the commercial agent terminates the agreement, unless the termination is due to the fault of the principal or is justified due to the agent's age or state of health making it impossible reasonably to request him or her to continue his or her activities; or

- by agreement with the principal, the commercial agent assigns his or her rights and obligations under the agreement to a third party.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Courts will respect the terms agreed between the parties, including those set out above, unless the court is persuaded that the restriction is invalid due to inequality of bargaining power between the parties or is unreasonably in restraint of trade.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

The courts will enforce confidentiality provisions in distribution agreements unless the confidentiality requirement is overridden by a statutory disclosure requirement (eg, under competition and merger control law and anti-money laundering law).

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

The court will respect the agreement between the parties set out in the contract unless it is persuaded that a particular term is invalid due to inequality of bargaining power between the parties or is unreasonably in restraint of trade.

Such restrictions could conceivably fall within the scope of article 3 of the Competition Law, which provides that any agreements between undertakings, decisions by associations of undertakings, and concerted practices that may affect trade and that have as their object or effect the prevention, restriction or distortion of competition within the Republic of Cyprus are prohibited and are void ab initio, with particular attention to agreements that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- discriminate between trading parties by applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

However, the restrictions would have to be unreasonable in order to be void.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

See question 13.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

See question 13.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

See question 13.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

See question 13.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

See question 13.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

See question 13.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Restrictions in distribution agreements could fall within the scope of article 3 of the Competition Law, which provides that any agreements between undertakings, decisions by associations of undertakings, and concerted practices that may affect trade and that have as their object or effect the prevention, restriction, or distortion of competition within the Republic of Cyprus are prohibited and are void ab initio, with particular attention to agreements that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- discriminate between trading parties by applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

The Control of Movement of Goods which Infringe Intellectual Property Rights Law allows the proprietor of a registered trademark to apply in writing on a specific form to the Customs Department requesting the Department to suspend the import or intended import of goods that violate the proprietor's intellectual property rights.

In addition, it is possible to take action in the courts to obtain orders prohibiting the respondents from importing grey market goods, on the basis of the Trademarks Law, as amended, which implements Directive 89/104/EC, and the relevant ECJ ruling in *Silhouette International Schmied GmbH & Co KG v Hartlauer Handelsgesellschaft mbH* (Case C-355/96) as well as a number of other later cases before the ECJ.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

There are no legal restrictions on any of these matters and they are entirely a matter for commercial agreement between the supplier and the local distributor.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Cyprus has a comprehensive and effective regime for the registration and protection of intellectual property rights, which is fully aligned with EU norms. The distribution agreement should specify the terms of any assignment or licence of the supplier's intellectual property rights to the distributor and their reciprocal interests are protected by statutory provisions and common law principles. Protection extends to trademarks, trade names, patents, designs, copyright and all other forms of intellectual property rights.

An agent or distributor may be registered in Cyprus as the user of a registered trademark. Where this is done, the trademark is treated as still used only by the proprietor. It is also possible to license unregistered marks as if they were registered, either by the signing of a separate licence agreement or through the incorporation of a licence clause in the agency or distribution agreement.

A licensed user may be registered through an application made in writing to the Registrar of Trade Marks by the proposed registered user. The application must be accompanied by a statutory declaration by the proprietor that gives particulars of the existing or proposed relationship between the proprietor and the proposed registered user, the goods or services for which registration is proposed, the conditions or restrictions imposed on the use of the trademark, and the duration of the permitted use. The registration of a registered user of the trademark does not confer any assignable or transmissible right to its use.

It is advisable to register any licensed user of a trademark (whether registered or unregistered) with the Registrar of Trade Marks to avoid any possible issues that may arise about the rights of the licensee with regard to the licensed trademarks. In the event of non-registration of a licensed user, a clause preventing the franchisee from registering the franchiser's trade marks in the franchisee's name can be incorporated.

Unless the agency or distribution franchise agreement explicitly provides otherwise, an agent or distributor that becomes a registered user of a trademark is entitled to call upon the proprietor to take proceedings to prevent infringement of the mark, and if the proprietor refuses or neglects to do so within two months after being called upon, the registered user may institute proceedings for infringement in his or her own name as if he or she were the proprietor, making the proprietor a defendant.

The relief that may be granted by the court in relation to an infringement of a registered trademark includes an injunction restraining the future use of the mark by the wrongdoer, and damages. If the infringement is on a large scale, the court may order the delivery up of the products bearing the marks for destruction or order the defendant to tender an account of the profits made through the sale of goods or the provision of services in relation to which the proprietor's trademark was infringed. Further protection is available through the Control of Movement of Goods which Infringe Intellectual Property Rights Law (see question 21).

24 What consumer protection laws are relevant to a supplier or distributor?

In common with other EU countries Cyprus has comprehensive consumer protection laws. The main legal framework relating to product liability is contained in the Defective Products (Civil Liability) Law of 1995 as amended, which transposes Directive 1999/34/EC and the General Safety of Products Law of 2004 as amended. Claims may also be made in contract or tort under the Contract Law or the Civil Wrongs Law.

Under the Defective Products (Civil Liability) Law, liability principally rests on the 'producer' (the manufacturer), the importer of the product into the EU, or any person who, by labelling or the use of trademarks, holds him or herself out as being the producer of the product). The supplier (whether the retailer, distributor or a wholesaler) may be liable in place of the manufacturer if he or she fails to identify the producer or at least the person who supplied the product to him or her.

Contractual liability may pass along the supply chain through the various agreements between the manufacturer, distributor, retailer and customer, depending on proof of breach of the contractual terms in each case.

In negligence, fault rests on the party found to be negligent; this can be anyone in the supply chain.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

The Defective Products (Civil Liability) Law imposes strict liability for defective products, and suppliers (from manufacturers to retailers) may owe a duty of care in negligence to institute a recall or product withdrawal. If they become aware of safety issues affecting goods they have supplied they are obliged to draw attention to them and, if warnings are not adequate, to take action to modify the product or withdraw it from sale.

The distribution agreement may specify how any liability is apportioned between the parties and the costs are shared, but as regards third parties they will be jointly and severally liable for any damages that may have been caused by a defective product.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

These matters are for commercial agreement between the parties concerned, subject to the provisions of the Contract Law concerning unfair contracts.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

As in other areas, in the field of data protection and privacy, Cyprus law is fully compliant with EU norms. The Processing of Personal Data (Protection of the Person) Law of 2001, as amended, implements Directive 95/46/EC of the European Parliament and the Council Decision of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. There are no aspects of the legislation that specifically refer to distributors or agents.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

These matters are for commercial agreement between the parties concerned, subject to the provisions of the Contract Law concerning unfair contracts.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Statutory provisions govern certain aspects of an employment relationship such as termination, working hours, minimum pay, annual leave and social insurance contributions. The question of whether an employer–employee relationship exists is important for determining liability for payment of taxes and social insurance contributions, for determining to what extent the employer may incur vicarious liability for the individual's actions and for the application of statutory employment and other rights, such as the right to statutory compensation for unlawful dismissal. It may also determine whether a permanent establishment exists for tax purposes.

In answering the question the court will have regard to all the circumstances, including any agreements, whether written or oral, payment arrangements and the degree of supervision and control over the individual's activities.

30 Is the payment of commission to a commercial agent regulated?

Where there is an express term regarding payment in the agency or distribution agreement, this will determine the basis and amount of remuneration.

There is an implied agreement to pay remuneration whenever a person is employed to act as agent in circumstances which raise the presumption that he or she would, to the knowledge of his or her principal, have expected to be paid. As established under common law, subject to any special term in the contract, the agent will not be entitled to commission unless he or she can show that the transaction which the third party entered into was due to his or her direct intervention.

In the absence of express terms, the right to claim any remuneration and the amount and terms of payment are determined by such terms as may be implied. In deciding what terms are to be implied the court will consider:

- all the circumstances of the case;
- the nature and duration of the services;
- the express terms of the contract; and
- the customs and usage of the particular trade.

In the absence of any factors to the contrary, a term will be implied to hold that the agent is entitled to reasonable remuneration.

Part III of the Regulation of Relations Law reflects the above principles and provides that, in the absence of an agreement between the contracting parties in relation to the amount of the remuneration, the commercial agent is entitled to a remuneration according to the trade customs that prevail in the place where the agent carries on his or her business. In the absence of such trade customs, the commercial agent is entitled to a reasonable remuneration, taking into consideration all the material facts of the commercial transaction. The Regulation of Relations Law includes detailed rules determining entitlement to commission in respect of transactions contracted during the commercial agency agreement and those contracted after expiration of the commercial agency agreement.

The Regulation of Relations Law does not permit the parties to deviate from the statutory provisions relating to commission to the detriment of the commercial agent.

31 What good faith and fair dealing requirements apply to distribution relationships?

Section 3 of the Regulation of Relations Law places a commercial agent under a general duty to act according to the law and in good faith in relation to the principal and act in the best interests of the principal. Specifically, every commercial agent is under a duty to put every possible effort to negotiate or conclude the transactions entrusted to him or her and pass to the principal all necessary information he or she has acquired.

Under section 182 of the Contract Law, the principal is obliged to indemnify the agent against the consequences of every legal act of the latter within the authority conferred on him or her. The principal must indemnify the agent under the consequences of any act performed under his or her instructions by the agent in good faith even if they harm third parties' rights. However, the principal is not liable as against his or her agent to indemnify the agent for any act entailing criminal liability even if performed under his or her command. Under section 185, the principal is under a duty to compensate the agent for damage or any loss incurred by the agent as a result of the principal's omission or lack of skill.

The principal has the right to repudiate the agency agreement if the agent transacts for his or her own benefit and without the principal's consent, if it is shown either that the agent dishonestly failed to disclose to the principal any material fact or that the transactions of the agent have damaged the principal. In such case, the principal may claim from the agent any profit the latter has acquired from such transactions.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

As stated in question 23, it is advisable to register any licensed user of a trademark (whether registered or unregistered) with the Registrar of Trade Marks. However, there are no specific requirements to register distribution agreements.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Agreements will be interpreted against the general benchmark of the Contract Law.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

There are no restrictions as long as the choice is freely agreed by the parties.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

There are no restrictions as long as the choice is freely agreed by the parties.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Cyprus has a robust, independent, transparent court system. The procedures are based on those of the English courts. There is no discrimination against foreign litigants, apart from the fact that a litigant domiciled outside the EU may be required to provide security for costs. Costs are modest by international standards. Proceedings are thorough, though often protracted, and a wide range of effective interim measures are available.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

The courts will respect the parties' choices, including the forum and language, regarding resolution of disputes by arbitration or mediation. The International Commercial Arbitration Law provides a modern framework for resolution of disputes in Cyprus if that is the parties' choice.

NEOCLEOUS

Chrysanthos Christoforou

Neocleous House
Makarios Avenue
PO Box 50613
Limassol 3608
Cyprus

Tel: +357 25 110000
Fax: +357 25 110001
info@neocleous.com
www.neocleous.com

Denmark

Sidsel Marie Kristensen
Bech-Bruun

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. Freedom of establishment exists in Denmark, and there are no restrictions as to the permanent address and nationality of the supplier.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

When setting up a business in Denmark, a supplier may choose from a wide variety of corporate forms and forms of business enterprises ranging from business enterprises with personal liability to corporate forms with limited liability.

The supplier may run its business as a sole trader or enter into a partnership with others in a (general) partnership. Sole traders and general partnerships are both subject to personal and unlimited liability, however, the participants of a general partnership will also assume joint and several liability. Sole traders and general partnerships are governed by the Danish Act on Undertakings Carrying on Business for Profits, which contains only a few provisions, however.

A supplier will typically set up business as a private limited company. Private limited companies are business enterprises with limited liability on the part of all participants. In Denmark there are two types of private limited companies – 'anpartsselskaber' and 'aktieselskaber'. Both types of company are governed by the Danish Companies Act, which lays down requirements for a company's formation, share capital, articles of association, management, etc.

Natural as well as legal persons and public authorities with the requisite capacity to act and legal capacity may form a business enterprise or a company. Whereas sole traders may set up their business by commencing operations and general partnerships are formed by agreement between the participants, a number of statutory requirements apply to the formation of limited liability companies.

Private limited companies in the form of 'anpartsselskaber' must have a minimum share capital corresponding to 50,000 kroner and private limited companies in the form of 'aktieselskaber' must have a minimum share capital of 500,000 kroner. The promoters must sign a memorandum of association, which includes the articles of association of the company. The company's articles of association must include information about the company's name, the company's object(s), the amount of the share capital, the rights attaching to the shares, the company's governing bodies, notices of general meetings, and the company's financial year. The company must be registered with the Danish Business Authority no later than two weeks after the signing of the memorandum of association. A private or public limited company does not achieve legal capacity until registration has taken place.

As of 1 January 2014, it is now possible to set up business in the form of an entrepreneurial company, a variation on the private limited company. The minimum capital requirement is 1 krone only, but the company is under an obligation to retain at least 25 per cent of the annual profit until its share capital and reserves amount to 50,000 kroner at which point the entrepreneurial company may be re-registered into a private limited company. Entrepreneurial companies are also governed by the Danish Companies Act.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Foreign enterprises in Denmark are not subject to any restrictions. Denmark is a member state of the EU and must observe the fundamental principles of non-discrimination and free movement of goods, capital, persons and workers. Enterprises and persons from outside the EU are not subject to any restrictions either.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

As a general rule companies and individuals that are tax resident in Denmark are subject to a full tax liability and are liable to pay taxes on their worldwide income.

Companies and individuals that are not tax resident in Denmark may be subject to a limited tax liability with respect to certain income and gains derived from sources in Denmark.

Taxation of foreign suppliers

A foreign supplier that is not tax resident in Denmark may be liable to taxation in Denmark if it is deemed to have a permanent establishment in Denmark. A permanent establishment is generally defined as a fixed place of business, such as an office, factory or workshop, through which the business of an enterprise is wholly or partly carried on. Generally, activities such as cross-border sales from a foreign supplier to a Danish purchaser, purchases of stocks of goods and merchandise, collection of information, advertising and research and development do not constitute a permanent establishment. Also, selling through a Danish independent agent or distributor does not create a permanent establishment in Denmark when the agent or distributor is acting in the ordinary course of his or her business. If, on the other hand, an employee or other representative of a foreign supplier is authorised to conclude contracts in the name of the foreign supplier, the foreign supplier may be regarded as having a permanent establishment in Denmark.

If a foreign supplier has a permanent establishment in Denmark, it is subject to limited tax liability with respect to any income and gains derived from the permanent establishment. The taxable income is generally determined as if the supplier was subject to full tax liability and taxed at the tax rates applying to Danish tax residents, see below.

Foreign suppliers may also be subject to a limited tax liability in Denmark with respect to other income, including for example income from real property situated in Denmark and dividends, royalties or interest deriving from sources in Denmark. Denmark imposes withholding taxes on dividends (27 per cent), interest and royalties (both 25 per cent).

Exemptions from withholding tax and relief from double taxation may be available under Danish law, under the tax treaties concluded by Denmark or under applicable EU directives such as the Parent-Subsidiary Directive (Council Directive 2011/96/EU) or the Interest and Royalty Directive (Council Directive 2003/49/EC).

Taxation of Danish entities

In the event a foreign supplier decides to establish a limited liability company in Denmark, such company will generally be subject to a full tax liability and be liable to pay taxes on its worldwide income except for income from permanent establishments and real property located abroad.

A company is considered to be tax resident in Denmark if the company is registered with the Danish Business Authority or if the company has its seat of management in Denmark.

Danish companies and Danish permanent establishments belonging to the same group are subject to mandatory joint taxation. It is also possible to opt for international tax consolidation.

Operating costs, depreciations and losses may generally be set off against taxable income and gains. Tax losses may be carried forward indefinitely. However, certain limitations apply in the utilisation of tax losses and deduction of interest expenses.

Under Danish law, there is no limited tax liability with respect to capital gains on shares. Thus, a foreign supplier that sets up a subsidiary company in Denmark is not subject to Danish tax on capital gains realised on the transfer of shares in the Danish subsidiary.

Certain entities such as partnerships and limited partnerships are transparent for Danish tax purposes, meaning that taxes are levied on the partners in proportion to their shares of the partnership. Depending on the nature of the business carried on by the partnership, a permanent establishment may be held to exist in Denmark, see above.

Taxes and tax rates

Danish companies are taxed at a flat rate of 23.5 per cent (2015). As of the income year 2016, the corporate tax rate will be reduced to 22 per cent.

Individuals are taxed at progressive rates of up to 56.4 per cent (2015), including labour market contribution. Social contributions in Denmark are relatively small.

In addition to income taxes, suppliers operating in Denmark should pay attention to the applicable rules concerning value added tax, customs duties, excise duties, land and property taxes and payroll taxes. The Danish VAT rate is 25 per cent (2015).

As a general rule, no capital duties, stamp duties or transfer taxes are levied in Denmark.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The following distribution options are available in Denmark:

- Commercial agency: on behalf of and for a principal's account, a commercial agent undertakes, against remuneration, to perform the sale or purchase of goods by obtaining offers or orders for the principal or by entering into sales or purchase agreements in the name of the principal.
- Distributors: a supplier sells his products to a distributor who resells them in his or her own name.
- Commercial travellers: as part of an employment relationship, a commercial traveller undertakes to proactively contact customers to perform the sale or purchase of goods, which are not brought along, by obtaining offers or orders to the employer or, in the latter's name, by entering into sales or purchase agreements.
- Commission: a commission agent undertakes to sell products in his or her own name, but for the principal's account.
- Franchising: a franchisor, who controls the right of a business concept and, against consideration, assigns this right to a franchisee who operates within a defined geographical area and subject to specific conditions and guidelines.

Other distribution options include private label, joint ventures, toll manufacturing agreements and licence agreements.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

The Danish Competition Act (Consolidation Act No. 700 of 18 June 2013) applies to any form of business enterprise and to any type of financial activity taking place in a market for goods and services governed by the Act. The Act contains a general prohibition against agreements whose object is to restrict competition, either directly or indirectly. The prohibition against anti-competitive agreements does not apply to agreements subject to the Block Exemption Regulation.

The distribution relationship between the principal and the commercial agent is governed by the Danish Commercial Agents Act (Act No. 272 of 2 May 1990 on commercial agents and commercial travellers). This same Act also governs the relationship between a commercial traveller and his or her principal. The Act is administered by the Danish Ministry of Justice and applies the Commercial Agents Directive 86/653/EEC. The Danish Competition Act's restrictions do not apply to actual commercial agents.

Commission sales are subject to the Danish Commission on Trade Sales Act (Consolidated Act No. 332 of 31 March 2014) unless subject to other agreement or trade usage or custom. Only specific provisions on the principal's contracting on his or her own behalf cannot be derogated from. The Act is administered by the Danish Ministry of Justice.

Danish law does not include a specific body of rules about distribution agreements (fuel distributor contracts are subject to a special consolidated Act). Any matter not governed by the agreement will be subject to the general provisions on the sale of goods and general principles of the law of contract and tort. Moreover, distribution agreements are governed by legal principles and case law. Case law and standard agreements in this field show that the parties typically choose to include a number of standard clauses in their contractual basis. In respect of price adjustment clauses, binding resale prices, however, are prohibited according to the Danish Competition Act.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Under Danish law, a specific cause is generally not required to terminate a distribution agreement if the agreed notice period is otherwise observed.

Commercial agency

It follows from the Danish Commercial Agents Act that the notice period for both parties is one month in the first year of the contract term and that this notice is extended by one month for each new year or part thereof of the contract term. The notice period cannot exceed six months. It is not possible to agree on shorter notice periods than those laid down by statute. However, it may be agreed with legal effect that the commercial agent may terminate the agreement for convenience at three months' notice even though the agreement has existed for three years or longer. Agreed notice periods that are longer than those required by statute are valid, but the notice period of the principal must never be shorter than that of the commercial agent.

It also follows from the Act that one party may terminate the agreement for cause without observing the statutory notice period only if the other party has significantly failed to meet his or her obligation under the agreement or according to law.

If an agreement has been entered into for a fixed period, and this period expires, the parties are not under an obligation to renew the agreement. Consequently, there are no restrictions on the right not to renew the agreement. Time-limited agreements are subject to the presumption that the parties generally cannot terminate the agreement for convenience during the contract term unless agreement has been made to this effect, or there has been a breach. If an agreement concluded for a definite period is renewed while still being effective, the renewed agreement will be considered to run for an indefinite period of time.

Commission
According to the Danish Act on Trade Commission, the principal may revoke the commission arrangement at any time, and the commission agent may refuse it at any time. When the agent's commission arrangement applies for a definite period of time or the commission agent must be regarded as having been guaranteed that he or she may conclude a specific business, or the notice period has been agreed, the commission agent is entitled to compensation for the loss he or she may incur by the early revocation of his or her commission arrangement. The commission agent may also claim compensation if he or she refuses the commission arrangement because of the principal's breach of agreement, or if the commission arrangement ceases to exist as a result of the principal's bankruptcy. The principal is also entitled to compensation if the commission agent has assumed the commission arrangement for a definite period of time or has undertaken to conclude a specific business, or the notice period has been agreed, and the commission agent refuses his or her commission arrangement prior to expiry or otherwise is in breach of agreement, or if the commission arrangement ceases to exist as a result of the principal's bankruptcy.

Distribution agreements and other agreements:
Notice periods of distribution agreements are, in contrast to those applying to commercial and commission agency agreements, not governed by any specific body of rules. These notice periods will often be governed by the parties' distribution agreements. Case law shows a series of incidents in which it was found that a supplier could not terminate a distribution agreement for convenience without observing the agreed notice period or, if the parties had not agreed on a notice period, with a reasonable notice. A reasonable notice depends on the specific circumstances of the case, including whether the contract is continuous. The notice period will usually not exceed six months. If the agreement has been entered into for a definite period of time, the agreement will lapse upon expiry of the period. There is a presumption that agreements for definite periods of time cannot be terminated for convenience unless otherwise agreed, or there has been a breach. According to the general rules and principles of contract and tort, it is a condition for being able to terminate an agreement for convenience – without observing the agreed notice period – that the party to whom the breach must be notified is in material breach of his or her obligations under the agreement.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Commercial agents
Pursuant to the Danish Commercial Agents Act, commercial agents are entitled to compensation for generated goodwill at the expiry of the agreement. This generally applies in all circumstances when the principal has terminated the agreement, whatever the reason for such termination. The exception to this rule is when the termination is due to the commercial agent's material breach. If the agent has terminated the agreement, compensation is conditional upon the termination being due to circumstances caused by the principal or being due to the age or infirmity of the agent, for which reason the agent cannot reasonably be demanded to continue his or her activities. The compensation according to law cannot exceed an amount corresponding to one year's commission payment, calculated on the basis of the agent's average annual commission for the past five years. If the distribution relationship has lasted for a shorter period than five years, the amount is calculated on the basis of the average remuneration in that period. Case law shows that the courts base their calculation of compensation on the commercial agent's commission income for the past 12 months prior to expiry of the agency agreement.

If the contract has expired prematurely for no legitimate ground, or if other actions give rise to liability, the injured party may claim damages.

Commission
See question 9.

Distributors
Each party to a distribution agreement may be ordered to pay damages if he or she has inflicted a loss on his or her contracting party as a result of breach. Case law includes instances of damages having been paid because a distribution relationship was ended at a notice shorter than what had been agreed on. Damages are based on estimates. Case law does not unambiguously state whether a distributor may claim compensation for the group of clients or the goodwill he or she has generated during the distribution agreement. The clear presumption of case law is that a distributor does not have a claim for compensation. However, in a few instances, the distributor has been awarded compensation as a result of the distributor's significant performance in the market for which he or she has not yet been compensated and because the termination for convenience has taken place without reasonable cause and without regard to the interests of the contracting party. Presumably, exceptional circumstances are required for a distributor to become eligible for compensation.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Yes.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

No. Danish law recognises contractual freedom and it would, therefore, be possible to enforce a confidentiality agreement.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Non-competition clauses may have a restrictive effect on competition, and the competition rules may therefore affect both the possibility of entering into non-competition clauses and the duration of such non-competition clauses, both during the term of the agreement and afterwards.

Generally, agreements about non-competition clauses may be entered into by parties from various levels in the distribution chain if their individual market shares do not exceed 30 per cent, the agreement does not include special restrictions and the non-competition clause only applies during the term of the agreement, lasting no more than five years.

Non-competition clauses with a duration exceeding five years are not covered by block exemption and, therefore, are subject to specific assessment.

It is generally deemed anti-competitive to agree on non-competition clauses that also apply after the termination of the agreement, and such clauses are, therefore, subject to critical assessment. Relevant competition rules may entail the restriction on the possibility of enforcing the non-competition clause.

Furthermore, the rules of the Danish Contracts Act may affect the enforceability of the non-competition clauses. According to circumstances, the assessment of non-competition clauses necessitates distinguishing between agreements with commercial agents, distributors and selective distributors.

Selective distributors
Selective distribution will generally be deemed anti-competitive, if the supplier, directly or indirectly, prevents the authorised distributors from purchasing products for resale from certain competing suppliers. Such restriction may be enforced only if an individual assessment finds that the restriction is found not to unduly restrict competition.

Commercial agents
Non-competition clauses are binding during the period of the contractual relation. A non-competition clause may be derogated from under section 38 of the Danish Contracts Act, under which provision a non-competition clause may not go beyond what is necessary to avoid competition or unreasonably restrict the access of the person under an obligation to employment. According to the Danish Commercial Agents Act, a non-competition clause is binding on the agent after the termination of the agreement only if it has been made in writing, applies to the geographical area or the group

of clients which the agent has been assigned, and it concerns the product types covered by the agency agreement. Moreover, the maximum period for such competition clause is two years from the termination of the agency contract.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Commercial agency

The function of a commercial agent is primarily to facilitate purchase and sale on behalf of the principal, unless the commercial agent has been granted special power of attorney to enter into agreements on behalf of the principal. This means that the principal and the third party are the parties to the agreement, and, consequently, that the principal will be setting the price.

Commission

As the commission agent acts on account of the principal, the principal may dictate that the goods must not be sold at a price either higher or lower than a specified price. However, if the principal has set a price, the commission agent ought to achieve a more advantageous price pursuant to the Danish Act on Trade Commission.

Distributor

Contrary to a commercial agent, a distributor enters into agreements in his or her own name and for his or her own account and at his or her own risk. A supplier setting binding resale prices either in the form of fixed prices or minimum prices acts contrary to both EU and Danish competition law. This applies notwithstanding the display of such binding prices. Likewise, a supplier must not express that certain minimum profits are to be observed. Such conduct is considered detrimental to competition as it has an adverse effect on the price competition in the distributive trades. Recommended resale prices and maximum prices are allowed as long as they are not enforced in such a way that, in actual fact, they constitute binding minimum prices. Contraventions are punished by fines.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

See question 14. Incentives and solicitations with the object of preventing distributors derogating from the recommended resale prices are prohibited. The prohibition applies irrespective of the form of such incentives or solicitations; whether they be in the form of rewards for distributors meeting the price requirement or sanctions, such as discontinuation of supplies, for those failing to do so. Consequently, it is not allowed for suppliers to advertise that they will not deal with distributors who do not follow their pricing policy.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Yes.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

It is in contravention of Danish competition law to offer business partners different terms and conditions for services of equal value, thus placing some business partners in a weak competitive position. It is, in fact, a prohibition against discrimination that may find expression in handling identical situations differently, or in handling different situations identically without any objective justification for this discrimination.

A single business enterprise's independent behaviour leading to discrimination is, as a rule, not covered by the Danish Competition Act's prohibition against anti-competitive agreements. However, such behaviour may be covered by the prohibition against abuse of a dominant position if the business enterprise holds such a dominant position.

As a general rule, the forms of discounts and bonuses based on costs (that is, a discount based on the seller's cost saving) are not regarded as having a detrimental effect on the price or on competition, whereas discounts based on sales and demand may have an adverse effect on competition.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

As a general rule, agreements about market sharing between suppliers and distributors are not allowed under the Danish Competition Act. This means that agreements about sharing customers or defining geographical sales areas are generally also prohibited by law.

The exception to this rule is exclusive distribution agreements, which are covered by the Block Exemption Regulation for vertical agreements, provided the supplier's and the distributor's market shares do not exceed 30 per cent of the relevant market on which the goods and services are to be sold or purchased. It may be agreed that the sole distributor is cut off from active sales efforts outside its geographical area. Active sales efforts are regarded as sales generated from the sole distributor's direct approach to individual customers or groups of customers. Such an approach may be in the form of advertising that the sole distributor aims specifically at a defined group of customers or a defined area.

However, as a general rule the sole distributor cannot be cut off from passive sales efforts outside its own area as these efforts are not covered by the block exemption. Passive sales efforts are regarded as sales generated by a customers unsolicited query and the sole distributor's general marketing, such as online advertising. This advertising must be reasonable in order to reach the sole distributor's own groups of customers and customer areas, even though it may also reach groups of customers and customer areas outside the sole distributor's own geographical area.

If the supplier cuts off the distributor from passive sales efforts aimed at the customers it has reserved for itself, or the supplier has given exclusive right to others, the relationship is not covered by the block exemption. Any restriction of passives sales will, as a general rule, be in contravention with the prohibition against anti-competitive agreements. Accordingly the agreement must be specifically assessed to ascertain whether it satisfies the conditions for individual exemption. If not, the agreement will be void and the Danish Competition and Consumer Authority may order that the agreement terminate.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Selective sales systems are allowed when the exclusion of particular customers can be justified by rational sales and efficiency reasons, and when adequate consideration concerning effective competition in the market is taken into account. We may deduct from the case law of the European Court of Justice that four conditions must be fulfilled in order for selective distribution to be in accordance with the competition rules of EU law. First of all, the types of product in question must render it necessary, for example because of their high quality or advanced engineering; secondly, the selection of customers must be based on objective criteria; thirdly, the system must improve competition, thereby offsetting the competition law disadvantages that could arise when implementing a selective sales system; fourthly, criteria exceeding necessary measures are not allowed. Danish competition law adopts a similar position.

To the extent that a selective sales system is subject to the prohibition, it may be exempt under the block exemption for vertical agreements. In addition, it is a requirement that the selective system does not aim to constrain active or passive sales to end-users, or aim to constrain sales between competing distributors at the same or different levels in the distribution chain.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

In addition to the prohibition against anti-competitive agreements, the prohibition against abuse of dominance constrains the relationship between suppliers and their distributors. If a supplier holds a dominant position on one or more relevant markets, this may restrict the supplier's ability to set its prices, enter into agreements containing terms of exclusivity, etc.

There are two administrative organs in Denmark: the Danish Competition Council, which is always the first instance, and the Danish Competition Appeals Tribunal, which is the board of appeal of the Competition Council. The Danish Competition and Consumer Authority carries out the secretariat functions of the Competition Council.

The two administrative organs work parallel to and interact with the criminal system in that the Competition Authority refers a case to the police (the Public Prosecutor for Special Economic Crime) if it assesses that sanctions must be imposed against an alleged violation. The police may also be notified of criminal violations by third parties. As for criminal cases, such cases are decided by the courts. In addition, the courts act as boards of appeal in respect of decisions made by the Competition Appeals Tribunal (CAT).

The Danish Competition Act is not subject to private prosecution. Natural and legal persons may, however, bring private damage claims before the courts, if they have suffered a loss as a consequence of a violation of the competition rules. The competition authorities cannot consider the issue of damages.

The Danish competition authorities enforce the Danish Competition Act in accordance with case law from the EU courts and the European Commission.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

If the distributor or the agent is the owner or the licensee of the intellectual property rights, he or she may, in certain circumstances, be entitled to oppose parallel import of the relevant products.

As a general rule, the rights are exhausted when the products are released for free circulation by the rights holder or with the consent of the rights holder, that is, the rights holder thus forfeits his or her power to control the further course and use of the products once they have been sold and marketed to another country within the EEA territory according to law. It follows from case law of the European Court of Justice that the exhaustion is deemed to be regional within the EEA territory. This means exhaustion of rights will not take place in the event of a product being marketed or sold outside the EEA territory. A provision contained in a distribution agreement concluded between an EU member state and third country stating that re-imports into the EU are not allowed may, however, be in violation of the EU competition rules if it affects the trade between EU member states.

The nature of the incident generating the exhaustion of rights differs depending on which intellectual property rights may be involved, and the exhaustion is, furthermore, not necessarily complete, but in relation to the distributor-agent relationship, the parallel import issue arises in practice, particularly in relation to trademark rights subject to almost complete exhaustion, that is, the products may be resold, leased, lent, used commercially, etc without first obtaining the consent of the trademark owner once they have been lawfully released for free circulation within the EEA territory.

Provided the trademark owner has reasonable ground for opposing such marketing of the products, especially if the condition of the products has changed or deteriorated after they were marketed, the exhaustion-of-rights doctrine will not apply. The trademark owner may thus prevent sale of substandard or deteriorated products which might harm the trademark's reputation. Moreover, the trademark owner could prevent any marketing measures of the parallel importer that suggest that there is a commercial relationship between the parallel importer and the trademark owner, indicating, for instance, that the parallel importer belongs to the trademark owner's network of distributors.

As a general rule, the trademark owner may also oppose any repacking, replacement and the like of trademarks, unless such repacking is deemed necessary for the marketing of the parallel imported products, and the interests of the trademark owner are otherwise protected.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

All advertising must be pursuant to the rules of the Danish Marketing Practices Act. Furthermore, the sale of certain products, such as tobacco, alcohol, pharmaceuticals and food, is subject to sector-specific regulation. The advertising must be loyal and in accordance with good marketing practice in consideration of consumers, other traders and the public interest.

A distributor may market itself as an authorised distributor for a certain supplier only if the supplier has authorised the distributor to do so. Advertising costs may be divided freely under the distribution agreement concluded with the distributor, and the agreement may also determine the extent of the distributor's marketing measures.

High advertising costs imposed on an agent may result in the agent being regarded as not acting as an actual commercial agent. This means that the agent is, in actual fact, regarded as a distributor and, therefore, must comply with the restrictions of the Danish Competition Act.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

In Danish law, intellectual property rights are protected by primarily:

- the Danish Consolidated Act on Copyright (Consolidated Act No. 1144 of 23 October 2014);
- the Danish Consolidated Patents Act (Consolidated Act No. 108 of 24 January 2012);
- the Danish Consolidated Utility Models Act (Consolidated Act No. 106 of 24 January 2012);
- the Danish Designs Act (Consolidated Act of 24 January 2012); and
- the Danish Tradesmarks Act (Consolidated Act No. 109 of 24 January 2012).

Moreover, the Danish Marketing Practices Act protects against illegal product imitation and use of distinctive marks.

If a work meets the conditions of the Danish Copyright Act, the work is automatically protected against illegal infringement as from the date of its creation. Patents, utility models, designs or trademarks are normally protected by the registration of such by application to the Danish Patent and Trademark Office.

Apart from the protection of rights holders provided by IPR and marketing practices legislation, the rights holder may also protect his or her rights by means of the distribution agreement, in which the distributor's use of the rights holder's intellectual property may be regulated.

Technology-transfer agreements are very common, for instance in connection with R&D contracts.

24 What consumer protection laws are relevant to a supplier or distributor?

Under Danish law, consumer protection rules are provided in consumer paragraphs of the Danish Sale of Goods Act (Consolidated Act No. 140 of 17 February 2014) concerning price, place of delivery, delay, lack of conformity as well as remedies for lack of conformity. The Act must not be derogated from to the detriment of the consumer. Subject to the Act, a consumer may rely upon mandatory provisions of the legislation concerning lack of conformity in a country within the EEA, if it is agreed that the legislation in a country outside this area applies.

The Danish Act on Certain Consumer Contracts (Act No. 1457 of 17 December 2013) applies to agreements entered into between consumers and commercial enterprises.

The E-Commerce Act (Act No. 227 of 22 April 2002) applies in parallel with the Danish Consumer Contracts Act and contains a minimum requirement with respect to services in the information society and e-commerce.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Both producers and distributors are, according to the Danish Product Safety Act, under an obligation to notify the Danish Safety Technology Authority about products considered dangerous when they become aware of such circumstances as well as about which precautionary measures are taken in order to avoid risks. Producers and distributors must then cooperate with the Danish Safety Technology Authority on precautionary measures to be taken with respect to the warning of consumers and recall.

It is important that the producer labels its products so they may be identified in case of a product recall. The label must contain the reference number, name and address of the producer, etc. Labelling may be omitted if the producer is able to ensure an efficient recall without labelling the product.

The agreement may specify which party is to bear the costs incurred for product recalls. It cannot be ruled out, however, that such an agreement may be set aside in whole or in part according to the general rules of Danish law if it is deemed to be disproportionately unfair to the party which, under the agreement, must bear the costs.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

As a general rule, freedom of contract exists and the supplier may, in principle, exclude all warranties for one particular distributor. However, consumers have a various powers under the Danish Sale of Goods Act and the Danish Act on Certain Consumer Contracts and other Acts that may not be derogated from. These powers include a two-year claims deadline and the right of cancellation in purchases made through distance selling.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The Danish Act on Processing of Personal Data (Act 2000-05-31 No. 429) governs the processing of personal data. The Act distinguishes between ordinary non-sensitive data, sensitive data and data on other private matters. Different rules and conditions on the processing of data apply, depending on the category of the data. As a general rule, personal data must be processed for a legitimate purpose. A company may not disclose data concerning a consumer (which are not general customer information) to a third company for the purpose of marketing or use such data on behalf of a third company for this purpose, unless the consumer has given his explicit consent.

The consumer always owns the data collected about him. The distributor becomes the data controller, if the consumer has given his data to him. That means that the distributor – within the scope of the Danish Act on Processing of Personal Data – may determine what the data may be used for, that is, that the distributor carries the immediate responsibility for the processing of the data, just as the distributor has authority over the data. A third party may obtain 'ownership' of the data as a data controller, but may as well obtain access to the data as a data processor, thereby processing the data on behalf of the data controller.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

It depends whether the parties have agreed on such things. Subject to agreement between the parties, the supplier may reject people managing the distributor's undertaking or terminate the agreement, if he is not satisfied with the management. In Danish law, section 36 of the Danish Contracts Act (Consolidated Act 1996-08-26 No. 781 on contracts and other juristic acts pertaining to property), under which unfair contract terms or clauses may be set aside if it would be at variance with the principles of good faith to enforce them. If a supplier rejects a manager or terminates the agreement on the grounds of unreasonable criteria, it will thus depend on a reasonableness test under section 36 of the Danish Contracts Act whether the clause may be enforced.

If the parties have not agreed on a right for the supplier to reject the managers of the distributor's undertaking or that the agreement may be terminated if he is not satisfied with the management, the supplier has no right to do so.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

As a general rule, and if the relationship constitutes a distribution relationship, the supplier and the distributor are two independent parties, each responsible for their own employees.

If, in fact, the relationship constitutes an employment relationship, in which the distributor or the agent performs the work according to the employer's instructions, and at his expense, the distributor or the agent is considered an employee. In that case, employment law protection provisions as well as applicable collective agreements apply.

Circumstances in favour of the agent or the distributor being considered an employee are mainly that the employer may determine general or specific instructions for performing the work, including supervision and control; that the employer fixes the working hours; that the employer pays the costs related to the performance of the work and that remuneration is fixed according to the rules typically applying to employment relationships (monthly salary, hourly salary, etc).

30 Is the payment of commission to a commercial agent regulated?

Yes. Sections 8 to 15 of the Danish Commercial Agents Act govern the claim for commission of commercial agents. Sections 8 to 10 contain the gap-filling rule on commission payments and the non-mandatory provisions on which performance entitles the agent to commission. Sections 11 to 15 lay down, among other things, when the right to commission is earned, when the commission must be paid, and how the agent may ensure that he or she receives the commission amount that he or she is entitled to. Sections 11 to 15 are non-mandatory.

31 What good faith and fair dealing requirements apply to distribution relationships?

In Danish law, a duty of loyalty applies to all parties to a contract. The duty of loyalty is a duty – under general principles of the law of contract and tort – to show mutual trust and confidence as well as consideration in a contractual relationship. Consequently, each party is responsible for paying due regard to the other party's interests, including protecting him or her against undue losses. Furthermore, section 36 of the Danish Contracts Act applies, under which the courts may amend or, in whole or in part, set aside an agreement if it would be at unreasonable or at variance with the principles of good faith to enforce it.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Under section 36 of the Danish Contracts Act, agreements or terms may be set aside or amended in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce them. In this respect, powers of discretion have been conferred on the courts. The courts are reluctant to amend agreements of commercial relationships.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

The rules on commission and termination of the agency under the Danish Commercial Agents Act, which may not be derogated from to the detriment of the commercial agent, may not be derogated from by a choice of

law agreement to the detriment of the agent either if the relationship would otherwise have been governed by the Danish Commercial Agents Act.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

As a general rule, Danish courts recognise international jurisdiction agreements. Denmark is a party to the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, but due to the Danish opt-out, Denmark is not a party to the Jurisdiction Regulation. However, Denmark entered into a parallel agreement with the European Community in 2005 as of which year the rules apply between Denmark and the other EU member states.

Jurisdiction agreements relating only to internal affairs between two persons from the same country, but without a certain attachment to another country, will hardly be recognised as the jurisdiction agreement cannot be characterised as being international.

By agreement, the parties may also opt for settlement by arbitration instead of settlement through the courts. The parties may choose between ad hoc arbitration proceedings or institutional arbitration proceedings. The Danish Arbitration Act is based on the UNCITRAL Model Law. The parties may choose that the arbitration proceedings take place in Denmark or abroad. In consumer contracts, an arbitration agreement is not binding on the consumer if it was entered into before the dispute arose. Institutional arbitration proceedings may take place at the Danish Institute of Arbitration, which has developed its own set of rules for arbitration proceedings conducted at the Institute.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Disputes arising between the parties to distribution and agency agreements may be settled before the ordinary Danish courts. Proceedings are instigated before the district courts or the Maritime and Commercial High Court (provided that they have jurisdiction); the appeal court being the Danish High Court.

The remedies depend on the nature of the case. Generally, prohibitory injunctions, damages, fines and specific performance are all possible outcomes.

There are no restrictions on foreign undertakings making use of the courts, just as the procedure for foreign parties is the same as for national parties. Foreign parties must not be treated differently from national parties; they can expect fair treatment.

Update and trends

From 25 July 2014 to 31 October 2014 all citizens and organisations were able to contribute to the public consultation on the evaluation of the Commercial Agents Directive (86/653/EEC). The objective of the consultation was to evaluate the Directive to determine whether regulatory costs and burdens could be reduced and whether the Directive could be simplified. The summary results of the consultation has at the time of writing not yet been published. (http://ec.europa.eu/internal_market/consultations/2014/commercial-agents-directive/index_en.htm.)

The Danish Administration of Justice Act governs Danish court procedures. Following the claim of the opposing party, the court may convene the parties or third parties to testify before the court, just as the court may order either of the parties to produce exhibits following an application from an opposing party. Prejudicial effect is a consequence of not complying with the court's order without a lawful excuse.

It may be said in favour of the Danish court system that the process is relatively speedy compared to that of other jurisdictions, and that the courts are recognised and enjoy a high level of credibility among the general public.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

An agreement on mediation or arbitration will be enforced in Denmark. No legal restrictions on the terms of an arbitration agreement exist except for applicable ordinary contract law provisions and principles, but the parties may consider what is practically feasible to carry out by agreement on arbitration.

The advantage of arbitration proceedings under Danish rules is first and foremost that the process is similar to what most foreign players are used to as Denmark's Arbitration Act is based on the UNCITRAL Model Law and Denmark has acceded to several international conventions, including the New York Convention of 10 June 1958 on Recognition and Enforcement of Foreign Arbitral Awards and the Geneva Convention of 21 April 1961 on International Commercial Arbitration.

Furthermore, the Danish Institute of Arbitration is a recognised institute as it has, among other things, a speedy process compared to other institutes.

BECH-BRUUN

Sidsel Marie Kristensen **smk@bechbruun.com**

Langelinie Allé 35
2100 Copenhagen
Denmark
Tel: +45 72 27 35 01
www.bechbruun.com

Værkmestergade 2
8000 Aarhus C
Denmark

Dominican Republic

Georges Santoni Recio and Mónica Villafaña Aquino

Russin, Vecchi & Heredia Bonetti

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. Since 1995 a foreign supplier may either establish its own Dominican entity or even register itself with local authorities to import and distribute its products.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes. There are no limits on foreign participation in local importer companies.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Under the Dominican Companies Law No. 479-08, the three types of business entities best suited for such purpose are: the *sociedad anónima* (SA), the *sociedad anónima simplificada* (SAS) and the *sociedad de responsailidad limitada* (SRL). All are limited liability companies. Also, the sole proprietorship business entity, the *empresa individual de responsabilidad limitada* (EIRL) can be used.

Companies are formed via the enactment of the by-laws in a first shareholders' meeting, the appointment of the first manager(s), payment of 1 per cent of the designated social capital (100,000 Dominican pesos minimum requirement for SRLs, 3 million pesos for SASs and 30 million pesos for SAs), filing for registration and issuance of the Mercantile Registry granted by the Chamber of Commerce and Production of the company's domicile and finally filing at the Dominican Tax Department for the taxpayer ID number).

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

No. There are no restrictions or limitations on foreign businesses operating in the Dominican Republic, save for a few, very limited, exceptions generally related to national defence or 'strategic' industries.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

The same taxes apply for all businesses operating in the Dominican Republic, regardless of their nationality or the nationalities of their shareholders or members. The principal taxes that would apply to distribution activities are: the corporate/personal income tax and capital gains tax at 27 per cent of all Dominican-source income in 2015 and dropping by 1 per cent yearly until it reaches 25 per cent, the value added tax (ITBIS) at 18 per cent for most products, the luxury tax at varying rates and the dividend tax (10 per cent withholdings).

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

There are various means of selling foreign goods or services in the Dominican Republic. Dominican law does not require that foreign suppliers have an agent or distributor in the Dominican Republic. Such suppliers can either: (i) make direct sales to Dominican purchasers; (ii) establish a subsidiary, branch, or sales office; or (iii) sell through Dominican agents or distributors. As a result, most forms of distribution structures are available for foreign suppliers doing business locally. Under the Dominican freedom of contract principle, the parties are free to choose the distribution structure they see fit.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Dominican Law No. 173 of 6 April 1966, as amended (Law 173), deals with suppliers-distributors, agents, etc, selling goods or services in the Dominican Republic, and it includes all natural or juridical persons engaged in the 'promotion or negotiation of the importation, distribution, sale or lease of products or services, or any type of trade or exploitation of foreign merchandise or products and the services related thereto [...] whether acting as agent, representative, importer, commission merchant, franchisee, or under any other designation'. Under this broad statutory language, both agents and distributors would be construed as subject to Law 173.

There are no special governmental agencies or authorities that regulate the appointment, use and termination of commercial intermediaries. Nonetheless, a very important aspect of Law 173 is that the local concessionaire must have registered the name of the foreign firm it represents and the terms of its agreement with the Foreign Exchange Department of the Central Bank. Non-registration generally bars a claim under Law 173. Since agents and distributors sometimes fail to register their agreements with the Foreign Exchange Department of the Central Bank, it is very important for foreign suppliers to submit a formal request to the Central Bank to determine whether the requisite registration was made before considering the termination or non-renewal of local concessionaires.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

After an agent or distributor is appointed and duly registered before the Dominican Central Bank under the protection of Law 173, the foreign supplier may have very little flexibility in terminating the agent or distributor, even in the face of marginal performance. Also, the refusal of non-renewal is limited by Law 173. In any case, in order to terminate or refuse to renew a distribution relationship the foreign supplier must prove 'just cause', which is defined by Law 173 as a 'breach of one of the essential obligations of the contract'.

The protection under Law 173 consists of the imposition of substantial sanctions for termination made without 'just cause'. Law 173 makes no

distinctions between agents or distributors. They are referred to as concessionaires, and include any type of distribution or representation relationship in the Dominican Republic.

The burden of proving 'just cause' falls to the foreign supplier. The local agent or distributor is only required to prove that termination or non-renewal took place. Contractual provisions whereby the principal is allowed to terminate the agreement without cause, such as upon a minimum notice, are ineffective because of the public order nature of Law 173. In addition, pursuant to article 2 of Law 173, non-renewal of the distribution agreement is deemed equivalent to termination.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Article 3 of Law 173 establishes the indemnity formula for terminations or failures to renew without just cause.

> *ARTICLE 3. Every concessionaire shall have the right to sue the licensor in case of destitution, substitution or termination of the concession contract existing between them, or due to refusal to renew said contract, unilaterally or without just cause on the part of the Licensor, for the complete and just indemnification of the damages and losses caused by such reason, which amount shall be fixed based on the following factors:*
>
> *a All losses sustained by the concessionaire due to the personal efforts he has put in for the exclusive benefit of the business he is deprived of, including expenses for payment of compensations established by the labour laws.*
>
> *b The present value of the investment in the acquisition or lease of the premises and its fitness, of the equipment, installations, furniture and fixtures, in case these were only used for the business he is deprived of.*
>
> *c (Amended by Law No. 263 dated 31 December 1971) The value of the promotions of the services offered as per the commercial prestige of the agent, of the merchandise and products, parts, spare parts, accessories and fixtures that he has in stock and from whose sale, lease or exploitation he shall cease to benefit from; this value shall be determined by the acquisition and transportation cost to his warehouse or office, plus taxes, duties, inland freight charges and any other charges caused by the delivery of the merchandise to his warehouse or office; and*
>
> *d (Amended by Law No. 622 dated 28 December 1971) The amount of the gross profits obtained by the concessionaire from the sale of the merchandise, products or services during the last five years, or if the commercial relationship has been for less than five years, five times the average annual gross profits obtained during the last years, irrespective of what they amount to. In case the concessionaire had represented the Licensor for more than five years, the latter shall pay, in addition, the amount resulting from multiplying the number of years in excess of five years by one tenth the average of the gross profits obtained during the last five years of representation.*

As mentioned, Law 173 is a 'public order' law whose provisions may not be superseded by private agreements among the parties. Nevertheless, one important exception refers to distribution agreements signed with US companies.

With the promulgation of the Dominican Republic–Central American Free Trade Agreement with the United States (DR-CAFTA) on 1 March 2007, Law 173 is no longer of mandatory application to US companies. Only if the parties expressly choose for the distribution agreement to be governed by Law 173 will such law be applied, otherwise the agreement will be governed by its own terms and by general contract law, which means that term and termination provisions would be valid and enforceable.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Yes.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

No. That would fall under the freedom of contract principle.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Yes. In practice it is common to see non-compete provisions in distribution agreements, especially if the distribution is exclusive. Generally, parties can agree to non-compete clauses as they wish, provided such non-compete restrictions allow the distributor a freedom of enterprise, and do not completely limit their ability to do business in general.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

For non-regulated sectors, resale prices can be agreed to in the contract and the supplier may control pricing as a result of a mutually agreed provision. Specific sectors, such as telecommunications services, fuels, insurance and others, are limited by local laws regardless of contractual limitations or prohibitions.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Yes.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Yes.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

No.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Yes, a supplier may restrict geographic areas or categories of customers, exclusive territories are permitted and a supplier may reserve certain customers to itself.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Yes. A supplier may restrict its distributor's ability to deal with particular customers.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Dominican Antitrust Law No. 42-08 establishes restrictions for competitors to collude or agree among themselves to fix prices or restrict competition in any other way. As a result, unless the local distributor and supplier are competitors in the Dominican market, such antitrust rules would not apply.

Law No. 42-08 created an antitrust agency, the National Commission for the Defence of Competition (Pro-Competencia) to regulate and oversee free competition. Private parties can file claims with Pro-Competencia, which may initiate investigations that eventually result in fines. Fines range from 30 to 3,000 times the minimum wage in cases of antitrust violations.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

No. Dominican courts have decided that parallel imports by a third party are generally allowed, so long as the origin of the products is licit. Courts have decided that it shall be responsibility of the supplier to prevent third parties from been able to buy their products and import the same to an already assigned territory.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

There are no restrictions on advertisement or marketing. The parties may agree that the distributor shall be responsible for all or part of the advertisement and marketing costs.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Suppliers may register trademarks, trade names, patents, copyrights and trade secrets in the Dominican Republic. The principal registration entity is the National Office of Industrial Property (ONAPI). Trademark rights are considered territorial in the Dominican Republic, therefore ownership of trademarks abroad does not necessarily entail local protection, and therefore registration via ONAPI is advisable to safeguard such rights. The supplier being the registered owner of the trademark, it will be able to restrict its use as it deems fit. Technology-transfer agreements are common.

24 What consumer protection laws are relevant to a supplier or distributor?

Law No. 358-05 (the Consumer Protection Law) is considered a public order statute. The Law creates and establishes Pro-Consumidor, a governmental agency for the protection of consumers with the ability to order product recalls, establish fines and destroy harmful products.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

The Consumer Protection Law establishes the mandatory recall of any products that are deemed to be harmful to consumers. The cost and sanctions associated with a product recall will be the responsibility of the local supplier (in this case the local distributor), nonetheless the Consumer Protection Law has a long reach and in recalls based on harm to the public health, it may reach the manufacturer.

The supplier and distributor may determine in the agreement the party responsible for carrying out and absorbing the cost of a recall.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

A supplier may limit the warranty provided to its distributor in an agreement between the parties. Nonetheless pursuant to the Consumer Protection Law, the local distributor must grant the end-user a warranty for the same length as provided in the country of origin of the products.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The supplier and distributor may exchange information about customers and end-users, provided such data is not protected by the law. Data protection is limited by Dominican Law No. 172-13. Any information regarding racial or ethnic origin, religious, political and sexual preferences, union affiliation and health information is protected and cannot be revealed or shared without the consent of the owner of such data.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Yes, a supplier may contractually reserve the right to approve or reject the individuals who manage the distribution partner's business, although in a Law 173 covered contract, the courts may determine that such is not sufficient just cause for termination or non-renewal.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

It would be very difficult for an agent or distributor to be considered an employee. A court would have to determine that the agency or distributorship agreement is a sham and all the elements of a labour relationship are present, such as subordination, attendance requirements, payment of a salary, etc.

The best protection is for the supplier to enter into an agreement that clearly establishes the role and responsibilities of its agent or distributor.

30 Is the payment of commission to a commercial agent regulated?

No.

31 What good faith and fair dealing requirements apply to distribution relationships?

There is a statutory presumption in the Dominican Civil Code that all agreements are presumed to be entered into and carried out in good faith.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

In principle there are no other restrictions or limitations on provisions in distribution contracts regarding their enforceability. We are not aware of any mandatory provisions. If a contract is entered into in the Dominican Republic or is to be performed in the Dominican Republic, absent any mention to the contrary, Dominican law will be presumed to apply.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

For contracts governed by Law 173 being a public order statute, Law 173 will apply. For contracts not governed by Law 173 (ie, signed after DR-CAFTA with a US concessionaire), the parties' contractual choice of country law is valid.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Dominican law would apply to an agreement with local concessionaires notwithstanding a choice of law clause in their agreement because of the 'public order' nature of Law 173. Similarly, a choice of forum provision in an agreement would be rendered equally ineffective. The Dominican Supreme Court has interpreted Law 173 as precluding application of foreign law and jurisdiction. Hence, the choice of foreign law and submission to foreign courts or an arbitration panel will not prevent a Dominican court from applying Law 173. Nevertheless, it may be convenient for a foreign supplier to nonetheless include foreign law as governing so as to strengthen its position in the event that its agent or distributor should attempt to seek

enforcement of a Dominican Republic judgment in a foreign court. The imposition of Dominican Republic law, substantially altering mutually agreed-upon obligations of the parties in a situation where the parties previously have chosen a foreign law as governing, may be construed as repugnant to the public policy of the foreign court before which enforcement of the judgment is sought. Arbitration and other forms of alternative dispute resolution are not precluded under Law 173, but there is no guarantee that a Dominican court would respect such a choice.

However, a recent decision by a Dominican court of appeals found that Law 173 does not preclude the parties from choosing a non-Dominican arbitration forum. Specifically, it declared as valid a clause in a distribution agreement where the parties chose the International Chamber of Commerce (ICC) as a dispute resolution forum. The ruling indicated that, notwithstanding Law 173 'public order', the election of an arbitration forum its valid, so long as the merits of the dispute are resolved on the basis of Law 173 (see Ruling No. 633-2010; File No. 026-03-10-00100; 8 October 2010; Second Chamber of the Civil ands Commercial Courts of Appeals of the National District).

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Dominican courts are available to resolve any disputes. Foreign entities, in general, are fairly treated. Although litigants may require disclosure of documents or testimony from an adverse party in specific cases upon the order of the court, there is no 'discovery' analogous to that which exists in other jurisdictions.

Update and trends

There are no proposals that we are aware of to eliminate or reduce the impact of Law 173, however, after the carveout of Law 173 by the DR-CAFTA agreement and legislative and court decisions in other countries in the region limiting the effect of local distribution protection statutes, it may be that in the not-too-distant future Law 173 will be eliminated or its provisions reduced.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Mediation or arbitration clauses in non-Law 173 contracts would be enforceable in the Dominican Republic. Choice of arbitration tribunal, location, language, etc, can be chosen freely by the parties. Arbitration offers advantages in cases where a fast decision is important, since Dominican courts tend to be somewhat slow and proceduralistic in rendering decisions.

For distribution contracts governed by Law 173, in principle Dominican courts are mandatory, nonetheless, as indicated above, there has been a recent appellate court decision that validated a foreign arbitral choice of forum.

RUSSIN, VECCHI
& HEREDIA BONETTI

Georges Santoni Recio **gsantoni@rvhb.com**
Mónica Villafaña Aquino **mvillafana@rvhb.com**

2 El Recodo Street
Monte Mirador Building, 3rd floor
Bella Vista
Santo Domingo
Dominican Republic

Tel: +1 809 535 9511
Fax: +1 809 535 6649
www.rvhb.com

Finland

Patrick Lindgren
Advocare Law Office

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

As Finland is an EU member state there are, in principle, no obstacles to foreign investment from within the European Economic Area (EEA) in an import and distribution entity. Save for the branch of a foreign entity, any entity organised under Finnish law is regarded as a domestic entity.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

There are no quota requirements for foreign participation.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The private limited liability company is by far best suited. It can be formed by one person, whether physical or juridical. Mainly, all that is needed is to adopt the by-laws containing, at a minimum, the company name, domicile and field of operations, sign the memorandum of association which rarely fills more than one sheet of paper, and file the notification with the Companies' Registry: the Trade Registry. However, a person must be careful not to encroach upon any else's trade name or trademark, and be able to bring forth evidence to the effect that the subscribed amount of shares have been fully paid in advance to a bank account within the EU, this being, additionally, confirmed by a chartered accountant as well as all the directors to be registered.

In principle, the Companies Act (624/2006), and as to the incorporation procedure the Trade Registry Act (129/1979) and Ordinance (2008/1979) govern them.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

In general, the foreigner-specific restrictions in respect of operating are limited to foreigners from outside the EEA and concern mainly the fields of banking, financing and insurance. In general, there are no restrictions in respect of title to shares or business assets. However, a business operating in the narrow business sectors perceived as putting at risk an important national interest, such as in the business of banned dual-use goods export, would be well advised, under the Monitoring Act (1612/1992), to seek formal permission from the Ministry of Employment and Economy. This notwithstanding, running of a branch of a foreign entity from outside the EEA requires the consent of the Companies Registry. Normally, consent is readily granted. If the foreign business runs a Finnish subsidiary, at least one of the directors, including the managing director (eg, CEO, president), must be a resident of the EEA, unless the Companies Registry grants an exemption. The auditor should be a resident authorised or approved public accountant. In the event that there is no person within the EEA entitled to sign in the name of the subsidiary or the branch, there must be (in Finland) a registered agent for service of process.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes. However, see question 4.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

According to the main rule, foreign businesses are taxed on income sourced in Finland, only. On the formation of an importer owned by the foreign supplier, no tax is levied, just a modest handling fee.

Should the foreign business have a permanent establishment (PE) in Finland, it will be liable to tax on all income attributable to the PE. Moreover, dependent on its domicile and the kind and origin of the products imported, the foreign supplier may be subject to customs duties as well. In addition, for its imports the supplier may be subject to car purchase tax and excise duties levied on, for example, tobacco, alcoholic beverages, soft drinks and liquid fuels.

Given that foreign businesses are taxed only on income sourced in Finland, and that the foreign business will be liable to tax on all income attributable to the PE, sale revenue, interest, royalties and capital gains are included, but costs, expenses and losses attributable to the business are deductible. If a PE's business operation results in loss, such loss will be deductible during the subsequent 10 tax years, applying the same loss carry-forward rules that are applied in respect of Finnish business entities. However, these rules will not apply should more than half the ownership of the foreign company change hands.

Dividends are generally totally tax-exempt both domestically and under either the EU Parents-Subsidiary Directive subject to the 10 per cent minimum shareholding requirement, or tax-exempt to a quarter subject to double tax treaty between Finland and the country from which the dividends are distributed. The corporate tax rate is 20 per cent. Since there are currently no thin capitalisation restrictions, a business can be financed from abroad, however, subject to some rather intricate rules on the deductability of interests paid in excess of €0.5 million.

Generally, the tax treaties provide for tax on dividends and royalties varying between 5 and 15 per cent to be withheld at source. However, where the EU Parents-Subsidiary Directive is applicable, no withholding tax is levied on profit distribution, such as dividends, to a parent company holding, directly, at least 10 per cent of equity of the profit distributing company. But where the Directive is not applicable, the withholding tax at source on dividends is 15 per cent. However, for other non-resident corporate bodies, generally, the rate of withholding is 20 per cent on profit distribution, interest (where not completely tax-exempt) and royalties. For physical persons, the rate is 35 per cent on income from employment, pensions and distributions by employee investment funds, unless otherwise agreed in the tax treaty concluded with the recipient's country of residence. Most other income of non-residents derived from Finland than above indicated, is taxed on an assessment basis.

From the viewpoint of the foreign business electing to use as its vehicle the limited liability company, it is notable that Finland has concluded 116 double tax treaties for avoidance of double taxation and tax evasion, some of which are multilateral and which take prevalence over domestic tax law. The most frequent method for eliminating double taxation is the ordinary credit method. Where there is no double tax treaty with the domicile state of the foreign taxpayer, the country's tax rights will be determined by domestic tax laws.

Non-Finnish residents are taxed in Finland on income sourced in the country, subject to any applicable treaties for avoidance of double taxation.

Under certain conditions and subject to the approval of an application, salary earners with special expertise may – for a maximum period of four years – be entitled to participate in a regime permitting the employer to withhold, in lieu of income and municipality tax, 35 per cent of salary earned. Otherwise, alien employees will be liable for progressive tax on their salary or wages should they stay in Finland for longer than six months, regardless of citizenship. If the stay lasts no longer than six months, the Finnish employer will collect 35 per cent tax at source on the pay, as well as withholding social security payments unless the pay is effectuated by and encumbers a foreign company. Royalties paid to holders of intellectual property rights who are not Finnish residents are subject to a 28 per cent tax at source. The tax rate is 30 per cent for capital income, and 32 per cent where capital income exceeds €40,000.

In general, goods and services supplied in Finland in the course of business are subject to VAT. The general rate of VAT is currently 24 per cent, although the rate for food and restaurant and catering services is 14 per cent and the rate for categories such as books, subscribed newspapers, cultural events, medicines, fitness services, passenger transport and accommodation is 10 per cent.

Real estate tax is assessed on the taxable value of the property, whether land or buildings.

Transfer of title to shares of a private limited liability company is generally subject to a transfer tax of 1.6 per cent of the price agreed. On transfer of real estate, the tax rate is 4 per cent.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

For both newcomers and established suppliers the commercial agency provides a means of penetrating and exploiting the market as well as where launching a selection of new products. For supply of heavy capital equipment, such as industrial machinery, the agent, whether the commercial or the undisclosed commission agent (commissionaire) and with or without a consignment stock, comes in handy. However, frequently, best suited for products requiring local storage or modification are the variety of open or closed distributorship arrangements there are available, such as the dealer, the value added reseller or the selective distributor, the latter mode being favoured by high-tech as well as luxury products manufacturers.

Apart from the business format franchise contract the product distribution franchise contract is a recognised mode of distribution of, in particular, daily consumer products whether or not the franchisee also carries products of other suppliers than those of the franchisor, the trademark is established, the system feature of the franchisor is weak or strong, or the services, such as training and continued assistance, are good or poor. The same or similar applies to a variety of trademark licensing arrangements. An optional manufacturing licence contract may warrant the local distributor the ability to manufacture the quantities demanded should the supplier no longer be able to meet the demand. In particular, in the latter case, the manufacturer or supplier may wish to participate, by means of shareholding, in the business of its distributor.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

The fairly narrow concept of commercial agency is regulated by the Act on Commercial Representatives and Salesmen (417/1992, the Commercial Agents Act). Such an agent, in the statute denoted as a commercial representative, is defined as an entrepreneur who, in a representation contract concluded with another, the principal, has undertaken continuously to promote the sale or purchase of goods on behalf of the principal by obtaining offers for the principal or by concluding sales or purchase contracts in the name of the principal. Thereby, outside the purview of the Act fall all other types of agents, such as the concealed agent and consignment or commission agent, etc, as well as any kind of agency for the supply of services.

The relationship between a supplier and its distributors of goods or services is not regulated by any particular statute, but by a number of more or less general statutes, such as the Contracts Act (228/1929), the Sale of Goods Act (355/1987) and the Unfair Business Practices Act (1061/78).

The Competition and Consumer Authority (FCCA) is the government agency exerting certain power in respect of competition, but is generally regarded as lacking the means to effectively have an impact on consumer issues.

There is a host of self-regulatory constraints and guides that govern the distribution relationship, such as those published under the auspices of the ICC. One most prominent is the translation into Finnish of the Consolidated ICC Code of Advertising and Marketing Communication Practice 2011. In addition, there are a number of guidelines as to advertising and marketing. Moreover, there are the Council of Ethics in Advertising and the Board of Business Practice, both sub-agencies of the Finnish Central Chamber of Commerce and specialised in B2B sales and marketing issues. In particular, for convincing courts and arbitral tribunals on ethical advertising and fair business practice, the opinions of these two bodies are held in high esteem.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

No, freedom of contract prevails.

Apart from where the contract is made for a certain duration, the prevailing opinion is that a party to a distribution relationship cannot be forced to be bound, perpetually, and accordingly, unless the parties contractually agree otherwise, both parties are deemed to be allowed to terminate the contract without any specific cause. The aforementioned notwithstanding, there ought to be a certain space of time within which the opposite party may adapt him or herself smoothly to the change of circumstances, and therefore, the length of the period of notice may vary depending on a number of reasons.

Any clause to the effect that the contract term may be renewed provides for accommodating to the changed circumstances.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Save where the relationship is qualified as that of commercial agency, there is no mandatory compensation or indemnification due to the distributor, commission agent or suchlike self-employed intermediary solely for the reason that the contract was terminated without cause. However, where essential properties of the relationship are similar to those of the commercial agent, case law suggests the courts may be inclined to make use, analogously, of the provisions of the Commercial Agents Act harmonised to article 17, paragraph 2 of the EU Directive 86/653/EEC (Council Directive of 18 December 1986 on the coordination of the Member States relating to self-employed commercial agents). (Implications of such analogous application can be found in Supreme Court case KKO 1987:42.) Where the relationship is terminated without taking heed of the need for providing for a period of notice enabling the opposite party to accommodate him or herself to the changed circumstances, the intermediary should be able to count with being compensated for the loss caused. Of course, the same is true where the termination can be demonstrated as being abusive.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Based on the principle of freedom of contract, yes. However, the general rule of the Contracts Act admitting the competent court to adjust a contract provision found unconscionable has been applied in court practice on a number of occasions. The main thrust of the latter is that should the court deem a contract term unfair or the application of such term leading to an unfair result, the term may be adjusted or set aside (section 36 of the Contracts Act as amended by law 956/1982). In particular, should the distributor or agent run the risk of going out of business because of a contract provision prohibiting him or her at the peril of payment of damages from transferring the ownership of his or her business, for a lengthier period of time and with no regard being had to the change of circumstances, the court may determine such provision be considered grossly unfair, unreasonable or otherwise unconscionable.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

No, there are none. But in respect of confidentiality provisions, the general rule of the Contracts Act admitting the competent court to adjust a contract provision found unconscionable may be applied.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Restrictions are, generally, enforceable subject to being in compliance with the applicable competition laws, which according to the main rule provide that a competition prohibition as to competing goods or services must not during the contract term last for longer than five years, however, after termination merely for one year, except where by derogation permitted pursuant to the applicable competition rules (article 5, paragraph 2 and 3 of Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices). It has to be remembered, however, that the above notwithstanding, the members of a selective distribution system must not be, whether directly or indirectly, imposed any obligation causing such members not to sell any brands of competing suppliers.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

No, the supplier is not even permitted to set maximum prices not to be exceeded by the distributor since such practice interferes with the distributor's freedom to set his or her own prices. However, by means of price recommendations the suppler may influence resale pricing provided such recommendations do not amount to resale price maintenance or price fixing, which is strictly prohibited under domestic and EU law, whether directly or indirectly, such as by means of determining the distributor's sales margin or maximum reductions to be granted to customers.

Resale price maintenance in vertical agreements is a hard-core restriction considered by the antitrust authorities as unlawful and not exemptable. Since, in most cases, the commercial agent is integrated in the principal's sales network and also otherwise a genuine agent, the agent remains outside the scope of the competition rules concerning price maintenance.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Resale price recommendations and suggestions are permitted, but establishing a minimum advertised price policy may, depending on its contents, be branded as anti-competitive. This, however, would not foreclose advertising recommended prices. Nevertheless, any defensive boycott in order to punish violations of agreements that restrain competition are prohibited types of discrimination. The same is true of any predatory boycotts.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

There are no restrictions on including a most-favoured customer clause in the contract.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Collective non-discrimination is prohibited. Accordingly, there should be no obstacle to applying different prices to different types of customers, in different locations, granting different rates of discount to individual customers, etc.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

The supplier may make the distributor refrain from actively selling to certain geographic areas or categories of customers, but not from selling passively. However, in the event of a selective distribution system the rule expressly authorising the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system is applicable (article 4(b)(iii) of Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices).

Exclusive territories are permitted, in principle, and most customary.

A supplier may reserve certain customers to itself, as discussed above.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Unless refusal to deal amounts to abuse of a dominant position or is deemed to be unfair business practice, such refusal to deal is part of the freedom of contract.

Apart from making the distributor refrain from active sales in certain geographical areas or to certain categories of customers, within the frame of a selective distribution system the supplier may restrict its distributor's ability to deal with unauthorised distributors outside the territory of the system (ie, non-members of the system).

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Although single branding is frequently implemented by means of a non-competition clause, it also can occur otherwise and be objectionable without any period of grace of five years or one year (see question 13). This is the case should, for example, competitors be foreclosed from entering the market. Tying arrangements may affect both the markets for those manufacturing the relevant products and the price of the products.

Suppliers and their distribution partners must comply with the domestic Competition Act (948/2011) section 5 and articles 101 and 102 TFEU. The competent agency to enforce such laws is the Finnish Competition and Consumer Authority (FCCA).

Private parties can bring actions under antitrust or competition laws. Liability in damages under section 20 of the Competition Act is due to anyone who has suffered damage or loss because of infringement of section 5 or 7 of the Competition Act, or article 101 or 102 TFEU.

The following remedies are available: damages for economical loss, whether direct or indirect, including but not limited to expenses, price difference, and lost profit. Any losses because of price discrimination, of excessive pricing due to a cartel or of the refusal by a party in a dominant position to supply are deemed as direct losses to be compensated.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

No, save for selective distribution (article 1(e) of Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices).

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

The main provisions are contained in the Unfair Business Practice Act requiring truthfulness in connection with all sales and marketing, including

advertising, and in the Consumer Protection Act (38/1978) regulating sale and marketing to consumers.

There is no statutory limit with regard to whether a supplier may pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Safeguarding of intellectual property rights (IPRs) is implemented mainly by means of registration and contractually. Any one individual having made an invention susceptible to industrial application, or his or her successor in title, is entitled, on application, to a patent. Exclusive rights for a trademark may be acquired, even without registration, after the mark has become established. A trade symbol is considered established if it has become generally known in the appropriate business or consumer circles in Finland as a symbol specific to the goods or services of its proprietor. Any artistic or literary work, independently originated by a human being, and of original character, expressed in any manner or form, qualifies for copyright. In respect of software and databases, sheer originality is enough. The requirement fulfilled, copyright arises by virtue of itself. Only copyright, know-how and trade secrets can be registered.

The supplier is encouraged to safeguard its IPRs by means of provisions to the effect that the distributor is under a duty to inform the supplier of infringement of its IPRs, to assist it in defence of its rights and not to reveal, either during the currency of the contract or after its termination or expiration, the supplier's trade or commercial secrets or other confidential information, such as know-how and technical data, nor to use such secrets or confidential information for purposes other than those of the contract.

Technology-transfer agreements are common.

24 What consumer protection laws are relevant to a supplier or distributor?

A number of laws and decrees supplement the Consumer Protection Act (38/1978), such as the Act on Provision of Information Society Services (458/2002) and the Communications Market Act (393/2003), both aiming to ensure reasonably priced communication services for consumers. In addition, there is the Act on the Safety of the Consumer (920/2011), the Act on the Safety of Toys (1154/2011) and the ancillary government decree, plus the Decree on certain chemical requirements concerning toys (1352/2013). Moreover, there are the Government Decrees on the Data to be provided on Consumer Goods and Services (613/2004), on Price Information on Consumer Products and Services (553/2013), and concerning unfair business-to-consumer commercial practices (601/2008, implementing the EU Unfair Commercial Practices Directive 2005/29/EC), the Food Act (23/2006), the Accommodation and Nutrition Agency Act (308/2006), the Package Tour Agency Act (939/2008), the Act on the Provision of Services (implementing Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 1166/2009), the Insurance Contracts Act (543/1994), the Debt Collection Licence Act (517/1999) as well as a host of provisions concerning investment guidance. Generally applicable supplemental statutes are the Interest Act (633/1982), the Debt Collection Act (513/1999) and the Criminal Code (1889/39), the latter of which includes chapters on business offences and on offences endangering health and safety (consumer credit offence (chapter 30, section 3 of the Criminal Code), charter trip company violation and charter trip company offence (chapter 30, section 3a of the Criminal Code), health offence (chapter 44, section 1 of the Criminal Code)).

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Any consumer product found perilous to the health or property and the peril is unavoidable by any other means can, by the local regional state administrative agency being supervised by the Safety and Chemicals Agency, or by the Safety and Chemicals Agency itself, be ordered, inter alia, to be recalled at the expense of the distributor. The same applies to consumer products lacking the CE marking denoting conformity with the relevant EU requirements (chapter 6 of the Act on the Safety of the Consumer (920/2011)).

Freedom of contract provides that there are no restrictions on the agreement delineating which party shall be responsbile for carrying out and absorbing the cost of a recall.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

The principles of freedom of contract and pacta sunt servanda provide that there is no obstacle to such agreement inter partes, albeit not in relation to any third party. In addition, parties must take heed of the provisions permitting courts, at the request of the opposite party, to 'rewrite' the contract. See question 11.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Yes. The Personal Data Protection Act puts the Finnish distributor under a number of obligations to ensure that all personal data is processed in accordance with the standards and requirements specified therein. For the purpose of the Personal Data Act 'personal data' means any information on a private individual and any information on his or her personal characteristics or personal circumstances, where these are identifiable as concerning him or her or the members of his or her family or household, and 'processing' means collection, recording, organising, use, transfer, disclosure, storage, manipulation, combination, protection, deletion or erasure of personal data, as well as other measures directed at personal data (sections 3 and 8 of Personal Data Act (523/1999)).

The title to data protected under Personal Data Protection Act is not regulated statutorily. It, therefore, must be deemed as being the property of the one who has collected it, his or her successor or assignee.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Such contractual provision is, in principle, enforceable. Apart from the risk of illegitimate use of such provision, it may, however, in practice, ensue in making the distributor the subordinate of the supplier to such a degree that he or she may be regarded as being an employee of the supplier.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

To be considered an employee, and be at least in part submitted to labour law, the distributor or agent is to be considered as acting under the direction and supervision of the supplier and, simultaneously, lacking the responsibility for financial risk. Small income may alone constitute a factor putting the distributor or agent in a position equal to that of an employee. You may get close to the conclusion that the distributor or agent is submitted to work under the direction of the supplier where involvement, in person, is required, or where the supplier is entitled, at its discretion or very frequently, to issue new instructions to the distributor or agent, the latter being required to adhere to such instructions and the supplier allowed to monitor this adherence, or where the supplier is permitted to amend the contract at its discretion. Accordingly, importance is placed on the consciousness, intent of the parties as well.

If the distributor or agent is found to be a de facto employee and not an entrepreneur, the result may be claims against the supplier for vacation benefits and for such protection against dismissal, termination or whatever severance that an employee is considered to deserve under the Employment Contracts Act (55/2001); and for social security purposes, claims from authorities considering the supplier liable for undeclared social security premiums. Although of course rather rare, such qualification as an employee for the purpose of the benefits extended under labour law may become constituted because of careless or negligent contract drafting, or because the arrangement in reality is allowed to degenerate into a state in which the distributor or agent is acting under the supplier's direction and supervision and not as an independent entrepreneur putting capital at risk. This may be the case where supplier-owned outlets are

converted into franchises. One method of diminishing the risk of confusion that is advocated by some experts may be to see to it that the distributor or agent is a limited liability company instead of a sole proprietor.

Should the above criteria for the distributor or agent to be considered an employee exist, and should the distributor or agent, simultaneously, have failed to take out and maintain an insurance policy for at least the minimum statutory pension scheme in his or her trade, for the purpose of the pension insurance premiums, he or she may be regarded as an employee, and consequently, the supplier may become liable for such insurance premiums, including any in arrears as well as default interest.

Again, in the event that the above criteria for a distributor or agent to be considered an employee exist, and the distributor or agent fails to pay the advance taxes or the final taxes assessed, the risk exists that the tax authorities will consider the distributor or agent an employee, and accordingly debit the taxes in arrears with the latter. Under these circumstances, also the question of the supplier's vicarious liability arises whereby the supplier may be held liable for the acts of the distributor or agent.

Whenever there is doubt as to whether the distributor or agent is to be regarded as an independent entrepreneur, it is advisable to seek a ruling from the tax authorities.

A supplier can protect itself against responsibility for potential violations of labour and employment laws by its distribution partners by means of not depriving the self-employed intermediary of its independence, as discussed above. And by means of contractual stipulations to the effect that the distribution partners indemnify and hold the supplier not liable for any consequences of being deemed an employee, such as making good any amounts it may have to pay to such employee as well as to any third parties for the benefit of the employee of the distributor.

30 Is the payment of commission to a commercial agent regulated?

The payment of commission is provided for under the Commercial Agents Act (Act on Commercial Representatives and Salesmen, sections 10 to 15). In the event that the parties have failed to agree on the payment of commission, still the commercial agent is entitled to commission on any transaction concluded during the period of validity of the agency contract where the transaction has been concluded as a result of his or her action or with a third party whom the agent has previously acquired as a client for the principal for transactions of the same kind or, if the agent has been entrusted with a specific geographical area or group of clients, the transaction has been concluded with a third party belonging to that area or group of clients. Moreover, the agent is entitled to commission on any transaction concluded after the termination of the agency contract if the transaction has been concluded in the manner referred to above and the offer, whether to purchase or to sell, reached the principal or the agent prior to the termination of the agency contract or if the transaction can be deemed mainly attributable to the contribution of the agent during the period of validity of the agency contract and the transaction was concluded within a reasonable period after the termination of the contract. Any contracting to the effect that the right to commission is to arise later than at the time when the third party has fulfilled his or her performance obligation, or should have done so if the principal had fulfilled his or her performance obligation in accordance with the transaction, does not bind the agent. Unless the agent consents thereto, the agent's right to commission is not affected should the principal agree with the third party on cancelling the transaction or amending its terms. In the absence of any agreement on the amount of the commission payable, the commission shall be determined on the basis of the remuneration customarily paid for the execution of the same or corresponding activities at the location of the agent's operating. If, therefore, the amount of the commission cannot be determined, the agent is entitled to a commission that is reasonable under the circumstances. The payment shall be effected by the end of the calendar month during which the commission accrued.

31 What good faith and fair dealing requirements apply to distribution relationships?

The requirement that the contract must be negotiated and executed in good faith is emphasised in Finnish jurisprudence. The concept of good faith is also underlying the Contracts Act, which is the basis of each and every distributorship founded on Finnish law. Accordingly, the principle of culpa in contrahendo (obligations in negotiation) is also emphasised. The carrying force is loyalty between the parties: each party ought to deal loyally, paying attention to the advantage of the other party as well. Therefore, when interpreting a contract weight is primarily given to such issues as:

- in a like situation, how do parties normally act;
- what is to be assumed from the parties;
- what does prudence require in the particular branch;
- what purposes does the contract serve;
- what ends did the parties have in mind (any disloyal intentions); and
- at what stage did the parties know what?

For the commercial transactions between the supplier and the distributor the Sale of Goods Act is founded on the concept of good faith as well as fair dealing. The same is true as to the CISG, which is the assumed applicable set of rules for the sale of goods in trade outside of the purview of the Nordic countries. Insofar as the element of representation is concerned, the analogous application of the Commercial Agency Act requires that regard be had to the duty of both the agent and the principal, among others, to act in good faith towards one another (Act on Commercial Representatives and Salesmen, sections 5, 8 and 9).

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No. There is no requirement that the agreements as such should be registered with or approved by any authorities to be deemed valid or for whatever purpose. However, where either party to a licence of an IPR desires that the licence be recorded by the relevant registry, such non-mandatory recording is possible. Recording makes the licence effective against third parties, such as creditors.

In addition, a security interest by means of a pledge can generally be instituted by the recorded owner of the IPR. This is true for registered trademarks as well as patents, utility models, registered designs, layout designs and plant varieties. However, unregistered trademarks, trade names and copyrights cannot be used as security. A valid pledge of a right to a registered trademark requires a writ of pledge and entry into the register of trademarks. Execution can be levied on a trademark only if the pledge is entered into the register. Although as to the pledge of a patent right there are no formal requirements inter partes for being regarded as binding in relation to third parties, the pledge needs to be entered into the register of patents. In these respects, one should note that there are some slight differences compared with other pledgeable IPRs.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

No, there are no other restrictions on provisions in distribution contracts or limitations on their enforceability. There are no mandatory provisions, save for the above-mentioned good faith, fair dealing and loyalty between the parties.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

No. Under article 3 of the Rome I Regulation (EC 593/2008), the parties to the contract may subject a distribution contract to the law of a foreign country, or may elect a foreign law to be applicable to a certain separable part of the contract. Nevertheless, regarding choice of a foreign law, whether or not accompanied by the choice of a foreign tribunal, be aware that such choice does not prejudice the application of domestic mandatory rules from which no derogation can be made, such as the rules of the law on consumer protection, product liability, labour and employment, personal data law, law of tenancy, law on restraints of competition, procedural rules as to IPRs or tax law.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Yes, there are restrictions, although they do not seem to affect agency or distributorship contracts. The restrictions seem to be limited to matters outside the scope of the EC Regulation 2015/2012 and the rules conferring special jurisdiction to consumers under section 4 of that EC Regulation

as well as exclusive jurisdiction in certain matters under section 6 of the Regulation. Since prorogation of jurisdiction is provided for under article 25 of Regulation 2015/2012 to the effect that if the parties, regardless of their domicile, have agreed in the form prescribed that a court or the courts of a member state are to have jurisdiction to settle any disputes that have arisen or that may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Similarly as a prorogation agreement is recognised, so is the so-called derogation agreement, which is an agreement to the effect that a certain court is (or certain courts are) to be regarded as foreclosed (ie, excluded) jurisdiction.

Parties can contractually agree to arbitration of their disputes instead of resorting to the courts. Arbitrations can be seated abroad provided that the seat of the arbitration is a signatory to the New York Convention.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

The courts available to suppliers and distribution partners to resolve their disputes on contract performance and commercial transactions are in the first instance the ordinary district courts. In civil cases the proceedings start with the pretrial phase of the procedure, after which the case is adjourned to the main hearing. Alternatively, the case may be resolved already in the course of the partly written and partly oral pretrial procedure. Apart from the claims and merits of the case, the complexity and length of the procedure depend to a great deal on one hand on the quality and quantity of evidence to be presented and on the other hand on that each party is heard regarding the claim, its grounds and whatever evidence there is.

Should the judgment or decision rendered, within about a year or two, be contrary to expectations, non-satisfaction and the intention to appeal is to be notified within a week and generally the appeal is to be accomplished within no more than 30 days. The appeal procedure consists of written preparation and one or more hearings. The courts of appeal have to arrange an oral hearing if the evidence of the case has to be evaluated once more, or when a party so requests unless the appeal is, for example, clearly without merit.

The third and final instance is the Supreme Court, which has its seat in Helsinki. Its main task is to establish precedents, thus giving guidelines to the lower courts on the application of the law. The Supreme Court may grant a leave to appeal in cases in which a precedent is necessary for the correct application of the law, a serious error has been committed in the proceedings before a lower court or another special reason exists in law. Normally, the cases are decided on the basis of solely written material; the Supreme Court may, however, also conduct oral hearings and inspections.

Finally, the Market Court is the competent court as regards disputes on, inter alia, competition between firms and improper marketing. Redress is sought with the Supreme Court.

Foreign businesses are encouraged to use the local courts. A standing joke goes that foreign businesses can expect equally unfair treatment as anyone else.

The statute says that anyone who wishes to present evidence in advance for a case that is not yet pending shall apply for permission for this from a court of first instance. If his or her rights may depend on the admission of the evidence and there is a danger that the evidence will be lost or that it will be difficult to present it later, and the presentation of the evidence is not for the purpose of obtaining information on an offence, permission shall be granted. If the rights of another person depend on the presentation of the evidence, he or she may, if necessary, be invited to appear in court for the hearing. His or her costs shall be covered by the applicant. In such cases no one may be required to appear as a witness or an expert witness in a court other than the court of first instance in the district of which he or she resides or is staying (chapter 17, section 10 of the Code of Judicial Procedure (AAD/1734)).

Once the case is pending, pretrial disclosure of documents (discovery) is implemented by the request of either party that the opposite party states whether he or she has in his or her possession written evidence or an object that may be relevant in the case, always provided such document or object be sufficiently identified by the requesting party (chapter 5, section 20, paragraph 2 of the Code of Judicial Procedure (AAD/1734)). When it can be assumed that a document is of significance as evidence in a case, the person in possession of the document can be ordered on pain of a fine to present it in court (chapter 17, sections 10 to 17 of the Code of Judicial Procedure (AAD/1734)).

One advantage of a foreign business resolving a dispute in the Finnish courts is the direct enforceability against a Finland-domiciled party, or one with property in this country. Another is that the court fees and dispatch costs are fairly low. In addition, as Swedish is formally a domestic language equal with Finnish, one more advantage is that should you wish to have your case tried in Swedish, completely, you are entitled to expect your case to be equally thoroughly tried as if it were in the Finnish language. Certain matters, such as applications for injunctive relief, are often timely rendered and effectively handled by able judges and service-minded court clerks. On the other hand, a serious drawback is the fact that since there is no statutory ceiling in respect of the prevailing party's attorneys' fees to be compensated by the defeated party, the 'risk of litigation' tends to grow unforeseeably and frequently out of control.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Yes, such an agreement is enforceable, although whatever decisions mediation may bring forth are, in contrast to arbitral awards rendered in a New York Convention country, not enforceable. The award, however, needs to be recognised. This is dependent on whether the arbitration agreement on which the award has been founded fulfils the formal requirements, and it must not be contrary to Finnish public policy. The party against whom enforcement of an arbitral award is sought shall, in general, 'be heard'. Accordingly, should the party against whom enforcement is sought be able

ADVOCARE Law Office

Patrick Lindgren **patrick.lindgren@advocare.fi**

Erottajankatu 11 A (4th floor)
00130 Helsinki
Finland

Tel: +358 10 666 5680
Fax: +358 9 685 2244
www.advocare.fi

to demonstrate that one or more of the aforementioned obstacles exists, the award is not to be enforced.

An arbitration agreement concluded under Finnish law needs to be made in writing. This requirement is fulfilled if the agreement is contained in a document signed by the parties or in an exchange of letters between the parties. The written form requirement is also regarded as fulfilled where the parties, by exchanging e-mails, have agreed that a dispute shall be decided by one or more arbitrators. Any stipulations concerning the arbitration tribunal, the location of the arbitration or the language of the arbitration are matters that may affect the assessment to be conducted whether the rule of the Contracts Act admitting the competent dispute resolving body, be it a court or an arbitration tribunal, to adjust a contract provision found unconscionable should be applicable. See question 11.

The main advantage for a foreign business resolving a dispute with a business partner by arbitration in Finland is avoiding the quagmire of what at worst may evolve from any ordinary court, the fact the hearings are not public, the finality of the award and last but not least the frequent ambitiousness and dedication of the arbitrator resulting in elaborated and well-founded awards, which in turn lead to continued demand for the fairly well paid assignment of acting as arbitrator. The disadvantages are the expenses for both counsel and compensating the arbitrator or arbitrators for their work and expenses, and for the defeated party, the lack of any way of seeking redress.

France

Jean-Philippe Arroyo and Anne Bellargent
JP Karsenty & Associés

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign supplier may establish its own entity to import and distribute its products in France as long as it respects the applicable administrative formalities (registration, reporting, etc) that are, for the most part, supported by the business formalities centre (CFE) of the Chamber of Commerce and Industry. For instance, every entity must obtain a SIRET number from the French Trade and Companies Register before starting any commercial activity.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Subject to general rules regarding foreign investment in or ownership of a domestic company (see question 4), there are no specific rules regarding ownership of a French company by a foreign supplier, the French company being the importer of its products.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

There are two types of businesses that are best suited for an importer owned by a foreign supplier.

First, it can be a 'branch' (or 'agency'), which is considered to be a permanent establishment without having its own legal identity, as it is legally attached to the parent.

A branch is subject to the Commercial Code, articles L141-18, L142-2 and L142-3, the Monetary and Financial Code, article L131-71, and the Insurance Code, article L112-2, L112-2-1 and L112-4.

Alternatively, it can take the form of a 'subsidiary', which is a French company whose parent provides at least 50 per cent of capital. The subsidiary is different from the branch since it does not constitute a separate legal entity, but simple offshored services of a company.

The subsidiary generally takes the form of a limited liability company (SA, SAS or SARL). SARL and SAS are the least expensive forms of companies in their implementation, and their statutes are almost standardised.

A subsidiary is subject to articles L122-3, L225-23, L225-71, L225-109, L225-177, L225-216, L233-1, L247-1, L710-1 and L720-4 of the Commercial Code and the Law of 22 March 2012 on the simplification of the law and the alleviation of administrative procedures.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

As a principle, foreign investment is free in France in accordance with EU rules on free movement of capital.

However, foreign investment in France can be subject to statistical or administrative declaration or prior authorisation. These different regimes are governed by the Monetary and Financial Code.

For instance, a statistical declaration needs to be filed with the Banque de France when foreign investors acquire at least 10 per cent of the capital or voting rights of a French company for an amount exceeding €15 million.

Moreover, an administrative declaration is necessary with the Ministry of the Economy if a foreign entity creates a company in France or takes over some participation in a domestic business when the transaction exceeds €1.5 million and, in general, for purchase operations (no minimum amount) of all or part of a business and direct (or indirect) participation in the capital of a French law firm granting more than one-third of the capital or voting rights (unless the investor already owns more than 50 per cent of the French company).

Prior authorisation is only necessary in specific cases regarding sensitive activities (eg, security and weapons).

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

See questions 2 and 4.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Two main taxes are due by businesses that operate or own interests in French businesses:

- value added tax (VAT) is an indirect tax which in principle covers all goods and services consumed or used in France; and
- corporation tax is due on the company's profits only if said company operates in France.

Thus, a subsidiary is subject to corporation tax, VAT and payment of taxes including business tax.

The branch has the fiscal personality and is subject to all business taxes as a French company. Thus, it is also subject to the filing of the annual income statement.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Several economic operators or distribution structures are available to the supplier for ensuring the distribution of its products or services:

- subordinate distributors, who are placed under the authority of the supplier, and are, on several levels, integrated into the supplier's entity;
- intermediary distributors, who are acting as authorised representatives of the supplier, and who can therefore negotiate on behalf of the supplier. Several agents are also entitled to create a legal relationship between the supplier and its customers; and
- reseller-distributors, who buy the goods from the supplier on their own behalf in order to resell them to customers.

When a supplier has to deal with several distributors, it can choose to set up a network of either distribution (selective or exclusive) or franchising.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

A specific regime is applicable to commercial agents according to the Commercial Code (article L134-1 et seq), such regulation having been implemented following Council Directive 86/653/EEC dated 18 December

1986, protecting commercial agents both during the performance of the contract and once the contract has been terminated.

Various legislation is applicable to the relationship between a supplier and a distributor, and is essentially provided in the Commercial Code. For several years now, the distribution sector has been more and more regulated, and again recently with Law No. 2014-344 of 17 March 2014 on Consumer Protection (the Hamon Law), which sets up several rules for the relationships between suppliers and distributors, and gives strong powers to the governmental agencies (mainly the General Directorate for Competition Policy, Consumer Affairs and Repression of Fraud (DGCCRF)) in order to enforce the regulations.

Moreover, Commission Regulation (EU) No. 330/2010 of 20 April 2010 concerns all vertical agreements and provides exemptions for certain types of vertical agreements that improve economic efficiency.

In addition to such legal sources, several sectors have decided to set up codes of good practice.

Furthermore, the French Competition Authority, an independent authority that is specialised in the analysis and regulation of competition on the markets, has very broad powers to impose injunctions or to condemn a company on the ground of a violation of competition rules (cartel activity, abuse of a dominant position, examination of mergers, etc).

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

For commercial agents, except in the event of serious misconduct on the agent's part, the supplier has to respect a notice period (between one and three months) for the termination of a contract of indeterminate duration, following article L134-11 of the Commercial Code.

As regards distribution relationships, case law generally rules that the supplier is not required to give a cause for the termination or non-renewal of a distribution contract.

However, in case of selective distribution contracts, the termination of the contract is more difficult if the dealer still respects all the selective criteria.

Subject to the respect of a sufficient period notice, indeterminate duration contracts can be terminated at any time by either the supplier or the distributor.

Moreover, distribution contracts can include a termination clause, by which the parties provide that in case of a contractual failure by one of the parties, the contract shall be terminated without any notice. In this case, the supplier has to indicate to the distributor the precise failure justifying the termination.

However, the supplier cannot use such a clause to terminate the contract because of the opening of collective insolvency proceedings against the distributor.

In any case, article L442-6-I-5° of the Commercial Code provides that any party that terminates a commercial relationship has to respect a written formal notice taking into consideration the length of such a commercial relationship. This very important mandatory provision applies irrespective of the terms of the contract, and there has been extensive case law applying that provision.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Commercial agents have a legal right to an indemnity in the event of a termination by the supplier either of a contract of indeterminate duration or of a fixed-term contract during its performance. This principle also applies to when the supplier decides not to renew the fixed-term contract (article L134-12 of the Commercial Code). Pursuant to article L134-16 of the Commercial Code, any clause or agreement providing the contrary shall be disregarded.

The indemnity compensates for the loss of all commission that the agent should have obtained through the activity developed in the common interest of the parties during the term of the contract.

However, such an indemnity is not due if:

- the termination of the contract results from serious misconduct on the part of the commercial agent;
- the agent has decided to terminate the contract; or
- the agent has not claimed for such an indemnity within one year after the end of the contract (article L134-12 paragraph 2 of the Commercial Code).

Distributors do not have such a legal right, but can claim, on the ground of article L442-6-I-5° of the Commercial Code, compensation if the notice period is considered insufficient by a court. They can also claim compensation for the damages suffered in case of abusive termination of the contract.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

French courts shall enforce a distribution contract provision prohibiting the transfer of the distribution rights, all or part of the ownership of the distributor, or the distributor's business to a third party.

It is frequent to find in distribution contracts a provision forbidding the assignment of the contract by the distributor, notably into franchising agreements where the 'intuitu personae' prevails, or a provision that subordinates the assignment of the contract to an approval, generally reserved to the only supplier.

In case of an assignment of the distributor's business, case law considers that it does not give rise to the automatic assignment of the distribution contract.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

To be valid, a confidentiality clause should normally be limited by a term.

The exclusions from the confidential information's scope should also be specified in the clause. In particular, these provisions should specify that information which is outside the public domain is considered confidential. However, if the information has been brought to the attention of the public or has to be revealed in the course of a judicial procedure, it should no longer be considered confidential.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

During the term of the relationship, commercial agents cannot, without the prior approval of the principal, represent a competing company, pursuant to article L134-3 of the Commercial Code. However, case law has a very restrictive view of competing products.

Commercial agent contracts can also provide a post-contractual non-compete clause, but article L134-14 of the Commercial Code provides that it has to be written, and that it should be limited as regards the geographic area as well as the kind of goods or services of the agent. Moreover, such a provision shall only be valid for a maximum period of two years following the cessation of the contract.

Such restrictions are also commonly used in distribution agreements, and Commission Regulation (EU) No. 330/2010 of 20 April 2010 provides that a non-competition obligation for an indeterminate length or for more than five years shall not be valid. In franchising agreements, such a restriction is admitted if it is necessary for maintaining the network's common identity.

Post-contractual clauses shall also not be valid unless four conditions are satisfied:

- the prohibition concerns competing products or services;
- the prohibition is geographically limited to the place where the distributor had its business during the contract;
- the prohibition is necessary to the protection of the supplier's know-how; and
- the prohibition is limited to one year following the expiry of the contract.

French courts also apply general principles regarding post-contractual non-compete clauses: they should be limited in time, in their geographical scope, regarding the activity, proportionate and necessary to protect legitimate interests of the supplier.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

The supplier may not restrict the freedom of its distribution partners to set resale prices by imposing, directly or indirectly, a minimum resale price (Commission Regulation (EU) No. 330/2010 and article L442-5 of the Commercial Code).

In this case, French courts will consider the contract as void and the supplier can be fined up to €15,000.

However, the supplier has the option of imposing a maximum sale price or of suggesting recommended resale prices provided that these prices do not amount to a fixed or minimum sale price as a result of pressures or incentives.

If a commercial agent meets the criteria to be qualified as such listed in the Commission Guidelines of Regulation 330/2010, the supplier can fix the resale prices of its products since the agent is not considered by competition law as a separate economic entity from the supplier.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

In addition to imposing a maximum resale price (see question 14), the supplier can advise resale prices or disseminate information relating to the resale price provided that it does not restrict the distributor's ability to determine its sale price by exerting pressure on or incentivising the distributor.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Article L442-6-II-d of the Commercial Code declares void the clauses allowing 'automatic benefit from more favourable conditions granted to competitors by the other party'. It can also be considered as illicit on the ground of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and of the equivalent provisions in the French Commercial Code (article L420-1 and L420-2).

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Price discriminations can be justified by the importance of the quantities sold (which can lead to productivity gains) or services rendered by customers for instance. If customers can be differentiated, the seller can also charge different prices for each customer and each category of customers.

Moreover, categorical terms of sales can be established (ie, different terms and conditions depending on categories of buyers of products) as well as specific terms applicable to a particular customer.

However, those documents are strictly regulated by the Code of Commerce, the provisions of which are enforced by governmental agencies. More particularly, a contractual document shall be signed every year by suppliers and distributors in order to set out the prices and the various discounts and rebates applicable to the distributor.

Nevertheless, in some cases, these discriminations may have anti-competitive effects: articles 101 and 102 TFEU prohibit agreements or abusive practices that 'apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' (article 101(1)(d)) but also the imposition, directly or indirectly, of 'unfair purchase or selling prices or other unfair trading conditions' (article 102(a)).

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

First, it is important to distinguish between the restrictions outside the European Economic Area, and within the European Economic Area.

As regards the latter, exclusive territories are permitted provided Commission Regulation (EU) No. 330/2010 is respected, which forbids any provision containing direct or indirect restrictions of the territory into which, or for the customers to whom, the distributor may sell the goods or services, except notably if such a restriction aims at restricting active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor, when such a restriction does not limit the sales by the distributor's customers.

This regulation also forbids any restriction of active or passive sales to end users by members of a selective distribution system, without prejudice to the possibility of prohibiting such a member from operating out of an unauthorised place.

The EU guidelines on vertical restraints define active sales as an active approach of the customers, whereas passive sales refer to the response of the distributor to unsolicited requests from customers through the internet.

Moreover, such guidelines consider that sales made by a distributor through the internet are passive sales. Therefore, in principle, every distributor shall be allowed to use the internet to sell products, and the European regulations forbid several limitations of the possibility for the distributor to access numerous customers.

Such rules do not apply to restrictions concerning sales outside the EEA.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

In principle, according to Commission Regulation (EU) No. 330/2010, it is not possible to limit the clientele, unless it is a prohibition of active sales towards the supplier's reserved clientele or allocated to another distributor.

In a selective distribution network, such a regulation forbids agreements that restrict active or passive sales to end-users or cross-supplies between the members of such a network.

However, it is possible to forbid agreed selective distributors from reselling goods or services to unauthorised distributors.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Inspired by consumer law, article L442-6-I-2° of the Commercial Code (introduced by the Law on the modernisation of the economy of 4 August 2008 (LME)) provides for liability incurred by the person submitting or attempting to submit a business partner to obligations creating a significant imbalance in the rights and obligations of the parties. Although case law mostly concerns large-scale distribution, the scope of this prohibition is not limited to the retail sector.

Furthermore, these relationships are governed by the law of restrictive practices, which prohibits a range of unfair behaviours such as sudden termination of commercial relationships, obtaining benefits without consideration or abusive delisting.

The said relationships can also reveal an abuse of a dominant position (article 102 TFEU or article L420-2 of the Commercial Code) and are therefore monitored.

In case of infringement of articles of the Commercial Code, relating to transparency and restrictive practices, the Ministry of Economy through the DGCCRF has seen its powers strengthened by the Hamon Law. Regarding infringement of antitrust laws, the DGCCRF acts against anti-competitive practices at the request of plaintiffs or on its own initiative when competition is distorted in a market.

Regarding private enforcement, the EU Directive of 11 June 2013 provides that people, whether direct or indirect buyers, who have suffered harm caused by an infringement of the competition rules have the right to obtain compensation for that damage. Directive 2014/104/EU of 26 November 2014 has provided a set of rules to be implemented in the member states in order to have more effective private enforcement of antitrust rules in Europe.

Private parties can bring actions before courts regarding disputes arising from anti-competitive practices if they can prove a fault (characterised by the violation of article L420-1 (cartels) and L420-2 (abuse of dominant

position) of the Commercial Code) and that the injury is direct, sure and current.

In this context, the concept of a class action has recently been introduced to France with the Hamon Law, which allows approved consumer associations to bring a class action (article L423-1 of the Consumer Code), especially in case of infringement of antitrust rules.

Consequently, the Commercial Code now provides that when a procedure starts before the DGCCRF, the European Commission or a national competition authority of another member state of the EU, it interrupts the statute of limitation of the civil action until there is a final decision. Thus, the associations can bring a follow-on civil action once this decision is final.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Within exclusive distribution, a distributor can fight against any sale by the supplier to a distributor located in its exclusive territory. On the other hand, it may not prevent any passive sales made by other distributors. Consequently, parallel imports are hard to fight in exclusive distribution networks within the EEA.

The fight against parallel imports is easier in selective distribution networks, if such a distribution scheme is applied throughout the EEA. Selective distribution agreements frequently provide an obligation for the agreed distributors not to sell the products to unauthorised distributors.

The supplier can control its network to identify the agreed distributors who are selling its products to unauthorised resellers in violation of their contractual obligations.

After having demonstrated the legality of the network, several actions are possible for the supplier to prevent parallel importation:

- a tort action based on unfair competition or infringement; or
- a tort action based on article L442-6-I-6° of the Commercial Code, which prohibits any direct or indirect participation in the violation of parallel distribution.

The supplier may also initiate summary proceedings to obtain provisory interdiction of parallel sales.

As there is a principle of legality of parallel importations under both European and French regulations, the reseller has to demonstrate that it has regularly bought the products, without any necessity to also demonstrate the illicit importation of its own seller.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

As mentioned above, within the European Economic Area, it is possible for a supplier to limit active sales by a distributor to a territory that has been exclusively allocated to another distributor or which the supplier has reserved to itself.

However, the supplier has to allow passive sales to such territories. Therefore, general advertising or promotion made by an exclusive distributor to reach customers in its own territory and which also reaches customers in other distributors' exclusive territories should be allowed.

Regarding the internet, which is considered as a passive way of selling, Commission Regulation (EU) No. 330/2010 authorises a supplier to restrict the use of the internet by distributors to the extent that promotion on the internet would lead to active selling into another distributor's exclusive territory.

Furthermore, in principle, a supplier can contractually pass part of its costs of advertising on to its distributors.

Lastly, distribution contracts usually include provisions on the use of the supplier's IP rights (more particularly trademarks) by distributors in their marketing activities.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

To protect their intellectual property in France, suppliers should apply and register their intellectual properties with the National Industrial Property Institute (INPI).

The duration of protection varies accordingly: 20 years for a patent, 10 years (renewable indefinitely) for trademarks and 25 years for designs and models.

A supplier may also request that legal protections granted in other countries be extended to France and Europe, notably through Community Trademarks.

Distribution contracts usually include provisions prohibiting the distributor from registering the supplier's trademarks and distinctive signs and from including them within their commercial or company names.

Distributors are also usually requested to inform the supplier of any infringement of its IP rights that they become aware of.

Know-how is mainly protected through confidentiality clauses, although there have recently been several attempts to establish a legal regime applicable to the protection of business secrets.

Technology-transfer agreements are quite common and regulated by Commission Regulation (EU) No. 316/2014 of 21 March 2014 as regards their possible anti-competitive aspects.

24 What consumer protection laws are relevant to a supplier or distributor?

Almost all consumer protection laws included in the French Consumer Code are relevant to a supplier or a distributor, as consumer law is directly linked to distribution law.

Consumer protection laws aim at controlling the offer made by the supplier or distributor to the customer (pre-contractual information on the seller and the product or service, terms and conditions of sale, prices, promotions, legal and commercial warranties regarding the product or service, etc).

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Suppliers have to put on the market products responding to a general obligation of security. Moreover, they have to give useful information to the consumers for them to evaluate the inherent risks of a product and to take adequate measures to avoid such risks.

Distributors are also supposed to sell products responding to the general safety obligation, ensure the security of the distributed products, and be able to give any necessary documents to ensure the traceability of the products.

When a supplier or a distributor notes that a product is dangerous, it has to inform without any delay its commercial partners and the competent authorities (national or European) and collaborate with such authorities.

The recall of distributed products is an administrative measure monitored by governmental agencies including the DGCCRF. Several summary measures are possible pursuant to the Consumption Code if the manufacturer, supplier or distributor does not voluntarily take any measures to recall defective products.

Decrees can be issued to take summary measures to suspend the manufacture, importation or market of a product, and to order the withdrawal or recall of the products.

Regarding the recall process, French law considers that the manufacturer is responsible for defective products (in accordance with article 1386-1 of the Civil Code, which transposed Council Directive 85/374/EC of 25 July 1985 concerning liability for defective products) except when the manufacturer cannot be identified; then the supplier or the distributor could be responsible for such products.

The contract can provide that the distributor will be able to call on the guarantee of the supplier in case of defective products and their recalls. Even if the contract does not contain a specific provision on the matter, the distributor should be able to do so.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

In its relationships with its distribution partners, a supplier can limit the warranties it provides in relation to the products, or even exclude such warranty if both the supplier and the distributor are from the same specialty (regarding the legal hidden defects warranty).

However, such a notion of professionals from the same specialty is assessed very closely and restrictively by case law. It implies that both professionals have a comparable knowledge of the products because they have identical, similar or complementary businesses.

In its relationships with downstream customers, the distributor has an obligation regarding the warranty of hidden defects. The condemned

distributor can turn against its supplier to obtain reparation of its loss if the defect existed prior to the product's purchase by the distributor.

Under French law, the clause erasing or reducing the right of compensation to the consumer in case of a failure of the seller to fulfil its obligations is abusive.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The distributor being independent, it should be responsible for the treatment of the data collected from its customers and consequently responsbile for adhering to the data protection legislation, the primary legislation being the Law on Data Protection of 6 January 1978. For instance, this law contains provisions on data transfer outside the EU and how the conditions differ on whether the recipient country offers a sufficient level of protection or not.

In any case, in accordance with data protection rules, data subjects should be informed of the entities that collect their personal data and to whom their data is transferred, as well as the purpose of the data processing.

Case law has considered that the sale of personal data files not submitted to the CNIL (the French Data Protection Authority) is void. Thus, even if a file containing personal data is supposedly legal, failure to complete the formalities with the CNIL results in its exclusion from trade.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Many distribution agreements are entered into in consideration of the person of both the supplier and the distributor, or only of the distributor, and contain a specific clause giving an intuitu personae character to the contract, which is an obstacle to the assignment of the contract without the agreement of the assigned party, sometimes in case of change in the management of the distributor.

Such intuitu personae is very important with regard to franchising agreements.

If the distribution contract does not contain any provision including intuitu personae, case law considers that the contract is maintained despite the change of management.

In any case, unless the supplier is an equity partner of the distributor, it cannot decide to dismiss the individuals managing the distributor entity.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

As a principle, the distributor is legally independent from the supplier and a supplier that would interfere into the management of the distributor's company, for instance by laying off the distributor's employees or establishing the accounting and taxation documents of the distributor, should be considered as de facto manager, which would entail some liability, especially in case of insolvency proceedings.

Moreover, the distributor has to decide its resale prices independently, and a supplier that would impose resale prices or limit the pricing freedom of the distributor would be subject to a criminal penalty, but also to the application of labour and employment laws in its relationship with the distributor.

To avoid such responsibility, the supplier has to ensure that the distributor runs its business independently, and remains free to determine its resale prices.

It is frequent to find in distribution contracts provisions stating the independence of the distributor and its right to determine its own resale pricing policy. However, the judge shall assess the relationship between the supplier and the distributor in concreto, and any practice from the supplier showing a severe interference into the distributor business shall be sanctioned regardless of the contract's provisions.

30 Is the payment of commission to a commercial agent regulated?

The payment of commission to a commercial agent is regulated by provisions of the Commercial Code.

Article 134-5 of the Commercial Code provides that 'the commission is based on the number or value of business passed by the commercial agent.'

In accordance with article L134-9 of the Commercial Code, the agent is entitled to a commission when the principal or the client has performed the transaction. Moreover, the commission is acquired once the principal should have performed the transaction and will be acquired at the latest when the client pays the price. The agent is also entitled to a commission for all the business transactions completed thanks to him or her; that is, for every contract completed during the duration of the contract and even after its termination for a reasonable period of time.

Lastly, even if the commission rate is usually determined by the parties, the agency contract may not have any specific provisions on the matter. In this case, the agent is entitled to remuneration in conformity with established customs in the branch covered by the agency contract. Where there are no established customs, the remuneration should be reasonable given all the elements regarding the activity.

31 What good faith and fair dealing requirements apply to distribution relationships?

Any agreement must be performed in good faith (article 1134 of the Civil Code). This means that a party to a contract must not unnecessarily aggravate the situation of the other party. The good faith requirement includes a duty of loyalty, which applies to distribution relationships.

In recent years, French courts have extended the good faith requirement to cover the pre-contractual period and contract termination.

Furthermore, the Hamon Law has introduced an article L141-8 in the Commercial Code regarding renegotiation clauses in case of change of economic circumstances in the case of food and agricultural raw materials, recognising the unforeseeability in these contracts.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

Generally speaking, there is no requirement to register distribution agreements or intellectual property licence agreements, or obtain approval from any government agency.

However, the DGCCRF only controls concentration transactions between companies, whether they consist of mergers, acquisitions or the creation of joint ventures, when they have a national and not a European control dimension.

Within this framework, the DGCCRF can analyse distribution agreements and intellectual property licence agreements.

Moreover, some provisions regarding the disclosure of information prior to the signing of distribution contracts and more particularly in relation to franchising contracts require the franchisor or supplier to inform the distributor of the registration of IP rights and of IP licences relating to the rights.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

There are no mandatory provisions on distribution contracts, and the parties are free to determine the content of their distribution agreement, subject to respect of the contract's general rules (parties' ability, integrity of their consent, determination of the contract's object and lawfulness of the cause), and subject to antitrust laws and mandatory laws applicable to distributor relationships (see questions 8, 9, 10, and 13 to 22).

Regarding consent, French law (article L330-3 of the Commercial Code) obliges the supplier to disclose some information to the distributor prior to entering into a contract including the following obligations (mainly in franchising agreements):

- an obligation of exclusivity or quasi-exclusivity from the distributor to the benefit of the supplier; and
- the provision by the supplier of a commercial name or a trademark to the distributor.

Update and trends

The Hamon Law, which mainly aims to regulate the relationships between professionals and consumers, recently brought important changes to the relationships between suppliers and distributors.

As discussed above, this law introduced the concept of class actions, ensuring better protection of consumers, who can act if they have suffered damage to their economic interests, notably for anti-competitive practices.

Concerning B2B relations, the supplier's general terms and conditions have become the 'single basis of commercial negotiation' (article L441-6 of the Commercial Code) and must be submitted within an established time frame.

The law also seeks further abuses such as the gap between the agreed price and the price charged or paid and exchanges during the course of the contract.

Moreover, the sanctions have now been strengthened, and the law has reinforced the control and sanctioning powers of the governmental agencies.

Pursuant to the Hamon Law, it is therefore necessary for any economic operator in the context of B2B relationships to identify new requirements and new risks and achieve compliance quickly, to avoid heavy administrative sanctions.

Nevertheless, several provisions are inherent to a category of distribution agreements. For instance, an exclusive distribution agreement cannot be conceived without a territorial distribution exclusivity given to the distributor.

Moreover, both parties have to be careful to avoid any provision restricting competition in the distribution contract.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

The law applicable to contractual obligations is determined by French private international law rules and by Community Regulation 593/2008 of 17 June 2008 (Rome I) and the Rome Convention of 19 June 1980, as well as by the Hague Convention of 14 March 1978 for commercial agents.

Those instruments acknowledge that the parties to a contract have the freedom to choose the law applicable to the contract, irrespective of whether the chosen law is that of a member state of the European Union or of a third-party state.

However, such a freedom can be limited by the application of overriding mandatory rules.

Regarding commercial agents, the ECJ has ruled that the local law of the court on the compensation of agents in case of termination of the contract could apply irrespective of the law chosen by the parties (ECJ, 9 November 2000, C-381/98; ECJ, 17 October, 2013, C-184/12).

Moreover, even if case law is currently unclear in France, article L442-6-I-5° of the Commercial Code concerning the sudden termination of commercial relationships might also be considered an overriding mandatory law.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Generally, the parties may choose that a certain court will be competent (principle of autonomy of the parties). In international matters, the provisions extending the jurisdiction in favour of foreign courts are generally lawful subject to compliance with certain rules laid down in the relevant international conventions and in the cases where the jurisdiction of the French courts is of public policy.

Article 25 of the Brussels I bis Regulation No. 1215/2012 of 12 December 2012 (replacing the Brussels I Regulation as of 10 January 2015) provides for conditions of the validity of the jurisdiction clause regardless of the domicile of the parties: the clause must be in writing and specify the court of a member state.

Thus, the parties may designate any court, regardless of whether there is a connection with the contract.

However, a French decree has listed the courts exclusively competent to rule over cases regarding the application of article L442-6-I-5°.

Moreover, as the legal actions brought on this legal ground are considered to be tort actions and not contract actions, there is some case law ruling that the jurisdiction clauses should not apply to these actions.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Suppliers and distribution partners (whether French or foreign) may address their disputes to different courts such as the commercial and civil courts and expect fair treatment. For domestic disputes, section 48 of the Civil Procedure Code (CPC) authorises clauses derogating from the territorial jurisdiction of the courts when they are entered into between commercial parties.

Moreover, a contractual clause may provide that suppliers and distribution partners will address their future disputes before an arbitration tribunal or try to mediate or conciliate before initiating civil proceedings.

Regarding disclosure of elements of proof, article 145 CPC is intended to allow a subject of law to obtain evidence that it may need to support a potential and future trial. Furthermore, a litigant may ask a bailiff to issue a summons to notify the opposing party for disclosure of certain documents, after several unsuccessful reminders. A summons without effect can be relayed by an injunction issued by the president of the court.

J.P. KARSENTY & ASSOCIÉS
Avocats à la Cour de Paris

Jean-Philippe Arroyo **jpharroyo@jpkarsenty.com**
Anne Bellargent **abellargent@jpkarsenty.com**

30, rue d'Astorg
75008 Paris
France

Tel: +33 1 47 63 74 75
Fax: +33 1 46 22 33 27
www.jpkarsenty.com

In cases involving antitrust and distribution mandatory rules, only some specialised courts and judges have jurisdiction over those cases: this is a clear advantage of litigating before such courts.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Contracts between commercial entities can provide that if a dispute arises, it shall be resolved by arbitration or mediation and not by a court.

This arbitration or mediation clause is generally considered to be valid. However, it has to respect certain formalities (provided by the CPC): for instance, this provision must be in writing and appoint the arbitrators or the terms of their designation. Furthermore, the decision shall be in writing and must contain a concise statement of the respective claims of the parties and their legal means. It must be justified in law or in equity.

Resolving a dispute in France by arbitration has the advantage of rapidity and confidentiality (as opposed to court decisions). Usually, the main disadvantage is the cost of arbitration.

Germany

Martin Rothermel and Benedikt Rohrßen
Taylor Wessing

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. Specific restrictions may apply, however, if (foreign or domestic) investors do business in the defence, pharmaceutical or financial sectors.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes. There is no specific investment legislation and no minimum percentage of German shareholders required.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The types of business entities suited best are:
- limited liability company (GmbH and UG);
- stock corporation (AG); and
- limited partnership (KG).

The criteria for choice of entity used are liability, taxation, financing, personal involvement and control, and flexibility. For larger companies, GmbH or AG are typically best suited. Their shareholders' liability is limited to the respective share capital.

The minimum share capital varies between €50,000 (AG), €25,000 (GmbH) and €1 (for the GmbH-subtype, UG). The transfer of shares in a GmbH or UG typically has to be approved by the other shareholders and notarised, while shares in an AG are freely transferable. However, the GmbH is a more flexible and procedurally less demanding form of entity than the AG.

GmbH, UG, and AG are formed by one or more founding shareholders, adopting the articles of association and appointing its managing directors plus, in the case of an AG, a supervisory board (of at least three members), in a notarial deed. They exist upon registration at the commercial register. Alternatively, a supplier may purchase an existing, inactive shelf company and, as an advantage, start operating immediately.

Partnerships are often preferred for tax reasons, especially the KG, which – for reasons of limiting liability – is often combined with a corporation as general partner ('GmbH & Co KG' or 'AG & Co KG'). They require at least two partners.

The governing laws are as follows:
- the Limited Liability Companies Act (GmbHG) for the GmbH and UG;
- the Stock Corporation Act (AktG) for the AG; and
- the German Civil Code (BGB) and the German Commercial Code (HGB) for partnerships.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Generally, no: foreign businesses operate under the same rules as domestic businesses. By way of exception, the Federal Ministry for Economy and Technology can restrict or prohibit acquisitions of or participations in domestic business entities by individuals or business entities seated outside the EU, Iceland, Liechtenstein, Norway or Switzerland (EEA). Preconditions to this:
- the foreign investor acquires 25 per cent or more of voting rights in a German company; or
- the acquisition endangers national public order or security (sections 55 to 59 of the Foreign Trade and Payments Ordinance (AWV)). This may especially be the case if the domestic business entity acquired pertains to infrastructure sectors (telecommunications, power supply, trains, airports or hospitals).

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes. See question 4.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

A foreign supplier especially has to consider:
- whether the importer itself shall pay income tax, or the supplier as owner, or both; and
- whether the supplier might be subject to double taxation (both in Germany and at its state of origin) and whether it can be avoided.

To foreign businesses and individuals that operate in Germany, two levels of taxation apply:
- the trade tax applies to all businesses and individuals in Germany and is paid on the taxable earnings. As local tax, its rate differs from municipality to municipality; and
- the income tax depends on the business entity:

Corporations are subject to corporate income tax (15 per cent flat rate). Their shareholders are subject to a tax on capital gain and dividends. The average overall tax burden for corporations in Germany is 30 per cent (corporate income tax and trade tax).

A partnership itself is not subject to income tax, but its partners are subject to either corporate (if business entities) or personal (if individuals) income tax.

Individuals pay personal income tax. The tax rate increases with the income (to a maximum of 45 per cent at an income of €250,000), but trade tax payments can be set off against it. Special tax rates apply for dividends and capital gains.

For dividends, capital gains, interest payments and licence fees, withholding tax may apply. It amounts to 25 per cent of the capital gain distributed to the owning business (plus a further 'solidarity surcharge' of 5.5 per cent, added to the tax amount). These taxes may be refunded in case of double taxation if a respective treaty with the country of origin of the owning business exists.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Any conceivable distribution structure is available. Apart from manufacturing under a private label, trademark licensing, and joint ventures, the following distribution structures are typically used:

- in-house sales force, allowing direct influence on employees and an easy margin calculation, but generally entails high labour cost (including social security);
- self-employed commercial agents, who solicit customers and can (but do not have to) have the authority to conclude a contract on the supplier's behalf. The supplier sells directly to end customers and bears the distribution risk, but may also control the margins. Contrary to employees, the agent's remuneration ('commission') can be exclusively profit-oriented (ie, remunerated only in case of successfully soliciting customers), and in relation to the turnover. Commercial agents have to provide detailed market reports. If the commercial agent acts in the EU, protective agency law applies, including the indemnity claim (questions 8 to 10);
- distributors, who buy and sell the product on their own behalf. Consequently, they bear distribution risks, and, in return, gain profit from the difference between purchase and resale price, while suppliers' margins are rather low. The distributor is obliged to market and distribute the supplier's products, and to safeguard the supplier's interests. Distributors are less protected than commercial agents (exceptions: question 8);
- commission agents, who are midway between commercial agents and distributors. They sell products in their own name but for the supplier's account. The supplier bears the sales risk, even if the commission agents have products in a consignment stock to which the supplier retains title. The supplier can influence the commission agent without observing the strict antitrust law which applies to distributorship agreements; and
- franchisees, who buy and sell products on their own behalf. The franchisee acquires licences of intellectual property rights (trademarks and know-how) from the supplier (franchisor) for using and distributing the products or services. The franchisee is entitled and obliged to design its shop according to the franchisor's concept and corporate design, and use the management- and system-specific know-how. In return, the franchisee pays royalties. The franchisor has, in the beginning, to disclose the key risks and issues for running the franchise, and subsequently often provides assistance on know-how and business.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Employment contracts with the in-house sales force are governed by sections 611 to 630 BGB, and several laws on employees' protection.

Agency contracts are governed by sections 84 to 92c HGB. The commercial agent is, next to the employee, strongly protected, for example, by mandatory rules on:

- minimum notice periods (question 9);
- commission payments (question 30); and
- goodwill indemnity (question 10).

Distributorship contracts are – as in most EU member states – not explicitly governed by statutory law. However, there is extensive case law, for example, whether the supplier has to take back products unsold at termination of contract. Agency law applies by analogy if the distributor is:

- integrated into the supplier's sales organisation; and
- obliged (due to agreement or factually) to forward customer data during or at termination of contract.

Further, distributorship contracts have to conform to antitrust law. Generally, the antitrust law of any affected market applies (article 6(3a) of the Rome II Regulation).

Franchise contracts are not explicitly governed by statutory law. They combine elements of licensing, sales, and management of another's affairs. Generally, agency law applies by analogy (see German Federal Court of Justice (BGH), decision of 17 July 2002).

Certain industry self-regulatory constraints exist, for example, in the automotive industry, where members of the European Automobile Manufacturers Association have agreed to a code of good practice.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

The supplier's right to terminate without cause is restricted. No restriction applies to a decision not to renew the distribution relationship when the contract term expires, unless antitrust law in rare cases demands continued delivery.

Agency agreements can be terminated without cause if contractually agreed. However, mandatory notice periods have to be observed, staggered pursuant to the contractual term: from one month in the first year to six months after five years (section 89(1) HGB). The notice periods cannot be shortened, and, in case of extension, the supplier's notice period must not be shorter than the agent's (section 89(2) HGB). A cause is only required if the agreement is terminated without a notice period (section 89a HGB). It is given if the terminating party cannot reasonably be expected to continue the relationship until ordinary termination (considering all circumstances of the single case and weighing the interests of both parties).

Distributor agreements with an indefinite term can be terminated (sections 314, 573, 620(2) and 723 BGB); the notice period depends, however, on the single case, considering also the distributor's investments. For example, one-year periods have been accepted in automotive distribution (BGH, decision of 21 February 1995, *Citroën*). In rare cases, antitrust law may demand a renewal of the relationship.

Franchise agreements can be terminated according to agency law (mutatis mutandis). However, longer periods can apply in specific cases, for example, if the franchisee made considerable investments due to the supplier's product.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

The commercial agent is entitled to indemnity if the agent has brought new customers or has significantly increased the business volume with existing customers, which results in benefits for the principal, and if such payment of indemnity is equitable under the given circumstances (section 89b HGB). Indemnity is calculated on basis of the commission earned during the last 12 months of activity, earned with new customers, and existing customers towards whom the agent has substantially increased the sales. Indemnity is capped to a maximum of the past five years' average annual commission (section 89b(5) HGB). The claim cannot be waived before termination, but is excluded if the agent has not notified the principal within one year following termination. Indemnity is not payable if:

- the agent terminated the contract (unless justified by circumstances attributable to the principal or because of the agent's age or illness);
- the principle has terminated the contract because of default attributable to the agent (which would justify immediate termination for cause); or
- the agent, with the principal's agreement, assigns and transfers its rights and duties under the agency contract to another person.

Indemnity cannot be contracted out, unless the agent acts outside the EEA (section 92c HGB).

The distributor can claim indemnity only by analogue application of agency law (question 8). The distributor's indemnity can amount to the distributor's average annual net margin.

The franchisee can likely claim indemnity based on analogue application of agency law, but this has not yet been ruled out (BGH, decision of 23 July 1997, *Benetton*). No indemnity, however, can be claimed where the franchise concerns anonymous bulk business and customers continue to be regular customers only de facto (BGH, decision of 5 February 2015).

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

A provision that prohibits the transfer of distribution rights will be enforced (section 399 BGB). Distribution rights are not assignable without the

supplier's consent if the supplier has a reasonable interest in the distributor's or agent's personal performance (sections 613 and 664 BGB).

A transfer of ownership ('change of control') cannot be hindered. However, the distributor can agree not to transfer ownership, and, in case of breach, the supplier is entitled to damages, including, if possible, re-transfer of ownership (section 137 BGB). In addition, the parties could agree on a termination right in case of change of control.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Limitations exist, especially as regards the draft of standard business terms. Within such, confidentiality provisions shall clarify the scope of confidentiality (what, who, how long). Contractual penalties may only apply if the receiving party culpably broke confidentiality; the amount of penalty has to be reasonable (sections 310, 307 and 343 BGB and 348 HGB).

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Non-compete obligations towards distributors and franchisees are enforceable if they conform to antitrust law. Generally, agreements that aim at or result in restraints of competition are prohibited by antitrust law, namely by the German Act Against Restraints of Competition (GWB) and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Unless agreements contain hard-core restrictions, a safe harbour is provided by the De Minimis Notice of 30 August 2014 and the Vertical Block Exemption Regulation No. 330/2010 (VBER). Agreements between non-competitors are safe if each party's market share does not exceed 15 per cent on any relevant market affected.

If one party's market share exceeds 15 per cent, but none exceeds 30 per cent, a non-compete obligation during the contractual term is valid if limited up to five years at most. Where products are sold on premises owned by the supplier or leased by the supplier from third parties not connected with the buyer, the five-year maximum does not apply. However, the non-compete obligation cannot exceed the term for which the buyer is occupying the premises. After the contractual term, a non-compete obligation where one party's market share exceeds 15 per cent, but none exceeds 30 per cent, is valid if it is necessary to protect know-how transferred to the distributor, and if limited to competing products, the concrete distributor's premises, and a one-year term.

If one party's market share exceeds 30 per cent, any restriction of competition, including non-compete obligations, can only benefit from the individual exemption under the strict criteria of article 101(3) TFEU ('efficiency defence').

Non-compete obligations towards agents are enforceable. Antitrust law generally does not apply, provided that the principal bears the commercial and financial risks related to selling and purchasing the products or services (Guidelines on Vertical Restraints of 10 May 2010, paragraphs 12 et seq, 18 and 49). Special limits apply only to post-contractual non-compete obligations if concluded before termination. They must be limited to a two-year-maximum, to the agent's territory or customers, and to the contractual products or services. Further, they must be done in writing and delivered to the agent. The principal has to pay an indemnity for the non-compete obligation's term (section 90a HGB).

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Generally, a supplier may not fix a resale price or price level at which its distributors or franchisees resell (except for suppliers that manufacture newspapers, magazines and books, section 30 GWB). An agreement or behaviour that aims at establishing such resale price maintenance is treated as a hard-core restriction and therefore generally void (see Guidelines on Vertical Restraints of 10 May 2010, paragraphs 48, 223). By way of exception, the supplier can plead the efficiency defence (eg, when introducing a new product or a coordinated short-term, low-price campaign). However, resale prices can be influenced by recommending resale prices or setting maximum resale prices (question 15). As regards enforcement, see question 20.

Suppliers can control the price at which they sell the products or services via agents because the antitrust law restrictions do not apply (question 13).

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Recommending resale prices or setting maximum resale prices is exempt from antitrust law if the parties' market shares do not exceed 30 per cent (beyond, there is only room for the efficiency defence), and only if it does not result in a minimum or fixed sale price because of pressure or incentives from one party (article 101(1) TFEU and article 4(a) VBER).

Establishing a minimum advertised price policy is exempt if it works as mere recommendation. If, however, it results in minimum resale prices or a fixed or minimum price level, it can only be exempt under the efficiency defence.

By contrast, a supplier shall not announce it will not deal with distributors or franchisees that do not follow its pricing policy because it will be treated as fixing the selling prices (question 14).

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

A most-favoured nation or most-favoured customer clause is enforceable if agreed between non-competitors and if none of the parties' market shares exceeds 30 per cent (beyond, there is only room for the efficiency defence).

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Generally, a seller can charge different prices to different customers because of freedom of contract. However, a seller:

- may have to charge the same prices if it holds a dominant or similarly strong market position (sections 19 and 20 GWB and article 102 TFEU); and
- may generally not charge different prices on grounds of race or ethnic origin. The same goes on grounds of sex, religion, disability, age or sexual orientation if the respective sales contract is typically concluded with or without low importance of the buyer's person, especially in 'bulk business'. An exception exists if different treatment is based on objective grounds, especially where it serves to avoid threats, prevent damage, etc (sections 19 and 20 of the Anti-Discrimination Act (AGG)).

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Generally, a supplier may not restrict the territories in which or the customers to whom its distribution partner sells (article 101(1)b TFEU). Exempt are, however, restrictions of:

- active sales into the exclusive territory or an exclusive customer group reserved to the supplier or another distribution partner;
- sales to end-users if the distribution partner operates at wholesale level;
- sales from members of a selective distribution system to unauthorised distributors in the system's territory; and
- selling components, supplied for incorporation, to customers who would use them to manufacture the same kinds of products (article 4(b) VBER).

Active sales means actively approaching individual customers (eg, by direct, unsolicited mail, e-mail, visits) or a customer group in a specific

territory through promotions specifically targeted at that group. Passive sales means responding to unsolicited requests from individual customers, including general advertising which reaches customers in other exclusive territories or customer groups if done reasonably. This also applies to the internet: sales via webshops may not be excluded. A supplier may only, however, require its distribution partner to fulfil certain quality standards, especially in selective distribution (Guidelines on Vertical Restraints of 10 May 2010, paragraphs 51 and 54).

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

A supplier may refuse to deal with customers because of freedom of contract, unless restrictions by antitrust or anti-discrimination law apply (question 17).

A supplier may restrict its distributor's ability to deal with particular customers only if an exemption from antitrust law is given (question 18).

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Generally, agreements that aim at or result in restraints of competition are prohibited by antitrust law (question 13). Certain hard-core restrictions are generally prohibited, regardless of the parties' market shares, for example, price fixing (question 14), or restricting the geographic areas or categories of customers (question 18). Other hard-core restrictions especially apply to selective distribution (eg, no restriction of cross-supplies between distributors within a selective distribution system).

Except for hard-core restrictions, a safe harbour is provided by the De Minimis Notice and VBER (question 13). If, however, one of the parties' market share exceeds 30 per cent, an agreement or concerted practice that restrains competition can only benefit from the efficiency defence of article 101(3) TFEU.

Antitrust law is mainly enforced by the authorities (the European Commission and the German Federal Cartel Office), especially through fines. However, it can also be enforced by private action, aiming to remove the infringement of antitrust law or achieve damages (section 33 et seq GWB).

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

A distributor or agent cannot directly prevent parallel imports. Instead, they can only demand from their supplier to use its rights, if existent, to prevent parallel imports.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

When advertising and marketing products, they generally have to observe the Unfair Competition Act (UWG), avoid misleading advertising, adhere to the Ordinance obliging sellers to mark goods with prices (PAngV), and further provisions that regulate market behaviour in the interest of market participants (eg, labelling of textiles or food products). The parties are free to agree on the cost of advertising.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

A supplier may safeguard its IP by registering its patents, trademarks, utility models, and designs in the territory where the products shall be distributed now or in the future. Thus, the supplier can exert the respective rights in case of infringement.

Technology-transfer agreements are common and governed by the Technology Transfer Block Exemption Regulation No. 316/2014.

24 What consumer protection laws are relevant to a supplier or distributor?

Above all, consumer protection laws apply at the end of the distribution chain: between the seller and the buying consumer. Statutory law grants a two-year warranty that products are free from defects at the passing of risk. In case of a defect, the buyer is entitled to claim subsequent performance (remedy of the defect or delivery of a defect-free product), alternatively price reduction or withdrawal (all regardless of fault), and damages, provided that the seller has acted with fault (sections 437, 280 et seq BGB). Although fault is generally assumed by law, the seller can exculpate itself, especially if the seller has not manufactured the product. These consumer rights cannot be contracted out by the supplier (sections 474 and 475 BGB).

Each seller within the distribution chain is entitled to have recourse against its own supplier if the product has already been defective at the respective delivery (sections 478 and 479 BGB). In order to maintain these rights, however, the buyer (unless a consumer) has to check at the time of delivery whether the product is defective, and inform the seller accordingly (sections 377 and 378 HGB).

In addition, special information duties towards consumers exist in:

- over-the-phone sales (section 312a(1) BGB);
- over-the-counter sales, except everyday sales (section 312a(2)2 BGB, article 246(2) EGBGB);
- e-commerce (section 312j BGB); and
- direct distribution off-premises and distance contracts (section 312d BGB).

Statutory law also limits the fees that the consumer shall pay for means of payment or consumer hotlines, etc (section 312a(3–5) BGB). Finally, the consumer has a right of withdrawal regarding distance and off-premises contracts (sections 312g and 355 BGB).

These consumer rights are similar throughout the EU because they are influenced by the EU Directives 1999/44/EC on the sale of consumer goods and 2011/83/EU on consumer rights.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Statutory law does not set any requirements. According to case law, a manufacturer must keep its products under surveillance and, when detecting risks for legally protected goods (such as health), adopt the necessary preventive measures. The extent and time of such measures depends on the single case, especially the product at risk and the extent of possible damage (BGH, decision of 16 December 2008).

The distribution agreement can delineate which party is responsible for a recall and its costs. Individual agreements are not subject to specific limits. Standard business terms, however, are subject to a strict review in court: they can be unenforceable if they are incompatible with essential statutory principles, if they limit essential contractual rights and duties, or if they are surprising or ambiguous (section 310(1), 307, 305c BGB). Therefore, such terms should consider who would typically be responsible for recall and costs, depending on the product (ready-made, or not, etc).

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

A supplier may limit the warranty rights granted by statutory law (question 24) towards its distribution partners.

There are a few limits to individual agreements: they must not contradict statutory prohibitions (section 134 BGB) and public policy (section 138 BGB), and must not limit or exclude liability for wilful intent, fraudulently concealing defects, where a guarantee has been given, or according to product liability law (sections 202, 276, 444, 639 BGB). If the product has been found to be defective by the consumer, and the defect already existed when the supplier delivered it to its distribution partner, a limitation of warranty can only be enforced if the supplier provides another compensation of equal value (section 478(4) BGB).

In standard business terms, however, one may hardly deviate from statutory law – even in B2B contracts (sections 310(1) and 307 BGB). One may only:

- modify the rules of subsequent performance (time, place, number of attempts);
- exclude liability for slightly negligent breaches of non-cardinal duties; and
- limit liability for slightly negligent breaches of cardinal duties to the typical damages foreseeable at conclusion of the contract.

The same goes for warranties provided to each downstream customer, unless the customer is a consumer because a consumer's statutory rights cannot be contracted out (question 24).

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The exchange of information about customers is restricted by the Federal Data Protection Act (BDSG), which implements the EU Directive 95/46/EC. The collection, processing and use of information on customers are only allowed if permitted by law or by the customer (section 4 BDSG). Details on commercial collection and data storage for the purpose of transfer are laid down in section 29 BDSG.

The owner of customer information, if contained in a database, is the person who produced the database – provided that its assembly, verification or presentation required a substantial qualitative or quantitative investment (section 87a et seq of the German Copyright Act).

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

A supplier may generally approve or reject managers because and if the agent or distributor has to render the services in person (question 11). However, the distribution partner is free to employ assistants, unless the parties have agreed on a respective 'veto right' for the supplier.

A supplier may terminate the relationship with notice (if of indefinite term, or agreed), or without notice, but for cause (question 9). Termination for cause, however, requires a more concrete cause than 'missing satisfaction' with the management (unless individually agreed). What might suffice is if culpable mismanagement has resulted in a strong decrease in turnover.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

An agent would be treated as a supplier's employee if the agent does not act independently. An agent acts independently if the agent – according to the overall picture of contractual rules and factual activity – freely organises his or her activities and working time (section 84(1)2 HGB). This goes mutatis mutandis for other types of distribution partners.

Treatment as an employee in particular has the following consequences:

- employee protection, for example, limited right of termination under the Dismissal Protection Act;
- continued payment of salary during public holidays, illness and holidays;
- minimum wage under the Minimum Wage Act of 11 August 2014;
- obligation to pay contributions to social security;
- income tax on salary;
- adherence to worker participation and collective bargaining agreements if applicable; and
- exclusive competence of labour courts if the employee has, during the last six months of activity, earned an average amount which does not exceed €1,000 per month.

A supplier generally does not need to protect against responsibility for potential violations of labour and employment laws because the supplier is not required to respond to such violations unless it has contributed to them. However, the supplier can advise the distribution partner in the distribution agreement of the partner's sole responsibility.

30 Is the payment of commission to a commercial agent regulated?

Yes, the agent is entitled to:

- 'del credere commission' if the agent assumes liability for fulfilment of contracts procured by the agent (section 86b HGB);
- an advance on commission once the principal has performed its obligations (section 87a paragraph 1 HGB);
- accounting within maximum periods of three months (section 87c(1) HGB);
- commission irrespective of delivery and payment, unless the principal is not responsible for non-delivery (section 87a(3) HGB); and
- request information, statements of account, an excerpt from the books, and inspection by an auditor (section 87c HGB).

These rules are mandatory and cannot be contracted out. Further details on the payment of commission (if not agreed otherwise) are set out in section 86b et seq HGB.

31 What good faith and fair dealing requirements apply to distribution relationships?

The parties to distribution relationships have to safeguard each other's interests (sections 86, 86a and 90 HGB and section 242 BGB).

The agent is especially obliged to:

- check customers' creditworthiness;
- inform the supplier immediately about any business procured;
- keep confidential any information obtained during his or her activity; and
- abstain from acting for the supplier's competitors.

Similar obligations, except non-competition, apply also to distributors, commission agents and franchisees.

The supplier is obliged to assist and take care of its distribution partner, subject, however, to the supplier's economic freedom.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

No (for mandatory provisions, see questions 7–10, and 30). The respective statutory law (question 8) will apply, even if the contract remains silent.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Generally the parties are free to choose the applicable law (article 3 of the Rome I Regulation). If, however, all elements relevant for the choice of law are located in another country than that of the chosen law, the choice of law shall not prejudice the provisions that cannot be derogated from by agreement (article 3(3) and (4) of the Rome I Regulation).

Moreover, overriding mandatory provisions of the forum's law cannot be avoided by choosing another law. Similarly, the courts may also give effect to overriding mandatory provisions of the country where the contractual obligations have to be performed (see article 9 of the Rome I Regulation). Overriding mandatory rules are, for example, provisions of agency law. If, therefore, the agent acts within the EU, the agent's claim for goodwill indemnity (based on the EU Directive on self-employed commercial agents of 1986) cannot be contracted out – even if the parties choose a foreign law (see European Court of Justice, decision of 9 November 2000, *Ingmar*, concerning, however, the former Rome Convention on Law Applicable to Contractual Obligations of 1980). Arguments against applying the same principles under the Rome I Regulation exist, but there is currently no case law that favours such interpretation.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Generally, the parties are free to choose a court, especially if:

- the other party resides in another EU member state, and the parties have chosen the court of an EU member state (article 25 of the Brussels Ia Regulation);
- the other party resides in Iceland, Switzerland or Norway, and the parties have chosen the courts of one of these states or Germany (article 23 of the Lugano II Convention); or
- both parties are merchants, legal persons under public law, or special assets under public law, or the other party resides outside Germany (section 38 of the Code of Civil Procedure (ZPO)).

The parties may instead choose arbitration (section 1029 et seq ZPO, article 1(2)d of the Brussels Ia Regulation and article 1(2)d of the Lugano II Convention).

However, the choice of court proceedings or arbitration cannot avoid overriding mandatory provisions (question 34), as ruled by the Higher Regional Court in Munich (decision of 17 May 2006) and confirmed by the BGH (decision of 5 September 2012).

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Suppliers and distribution partners are free to use any means of dispute resolution, especially out-of-court negotiation, mediation, arbitration or litigation. Restrictions exist only insofar as overriding mandatory provisions cannot be avoided by means of dispute resolution (question 35). Suppliers and distribution partners can expect fair treatment in German courts since the judges are well-trained, have been determined beforehand, and the parties are entitled to due process of law (articles 101 and 103 of the German Constitution). The advantages of resolving disputes in Germany are, inter alia, that court rulings are quite foreseeable and that court proceedings are fairly quick (8.2 months on average for proceedings in the district courts according to the latest statistics).

Update and trends

The European Commission is currently evaluating whether the Commercial Agents Directive of 1986 remains fit for purpose. Public consultation finished on 31 October 2014 (see http://ec.europa.eu/internal_market/qualifications/other_directives/commercial_agents/index_en.htm).

As a trend, the number of private actions that aim at enforcing antitrust law is rising, and so are the amounts of damages awarded. This trend will be further invigorated by the EU Directive on antitrust damages actions which was signed into law on 26 November 2014.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Yes, an agreement to mediate or arbitrate disputes will be enforced in Germany (section 1029 et seq and section 278a ZPO). Arbitration may be disadvantageous if only small sums are concerned (the costs for German courts are typically lower than the costs for arbitration if the amount in dispute is less than €5 million). Typical advantages of arbitration are, however, that proceedings are confidential, lead to a final decision without the opportunity to appeal, and the award is enforceable in far more countries than court judgments (because of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards).

TaylorWessing

Martin Rothermel **m.rothermel@taylorwessing.com**
Benedikt Rohrßen **b.rohrssen@taylorwessing.com**

Isartorplatz 8
80331 Munich
Germany

Tel: +49 89 210 38 176
Fax: +49 89 210 38 300
www.taylorwessing.com

India

Srijoy Das, Siddharth Seshan and Anup Kumar
Archer & Angel

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign supplier may establish its own business entity, subject to compliance with Indian exchange control laws, namely, the Foreign Exchange Management Act 1999 (FEMA) and accompanying regulations. A good reference point is the consolidated Foreign Direct Investment Policy (the FDI Policy) issued by the Department of Industrial Policy and Promotion (DIPP), Ministry of Finance, government of India.

The FDI Policy provides a detailed prescription on the types of business entities that may be established by a foreign supplier, entry routes for foreign investments and other conditions, cap on foreign investments, if any, and certain other sector-specific conditions that may have to be followed by a foreign investor.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

The foreign supplier may consider entering into a joint venture with a local partner and own a partial equity stake in the importer of its products, subject to the FDI Policy. This is a fairly common arrangement since the foreign supplier stands to benefit from the expertise, marketing skills and business acumen of the local company with respect to the Indian market.

The amount of equity stake (including warrants convertible into equity shares) that the foreign supplier may hold in its importer will depend on the business sector in which the supplier is operating. The FDI Policy has prescribed certain sectoral caps on the amount of foreign investments that may be made in the share capital of a local company.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

It is typical to form a private limited company. Such a company would be formed under procedures laid down by the Companies Act, which would also govern the functioning of the company. The company would need a charter and by-laws.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Although there are no restrictions on foreign businesses operating in India, FEMA requires foreign businesses to have a place of business in India before they can commence business operations. Foreign businesses may establish incorporated business entities such as a private limited or a public limited company, or unincorporated business entities such as a liaison office, branch office, project office, limited liability partnership (LLP) or a partnership firm. The choice of an appropriate business entity would depend on the nature and scope of business activities proposed to be undertaken by the foreign business in India.

Foreign investments in domestic business entities engaged in certain businesses are prohibited. These include lottery, gambling and betting, real estate business, construction of farm houses, manufacturing of cigars and cigarettes or of tobacco, or tobacco substitutes, atomic energy and railway transport (excluding mass rapid transport systems).

Foreign investments in domestic businesses operating in most business sectors, other than prohibited businesses, is allowed up to 100 per cent of the share capital of such domestic businesses, subject to FDI related performance conditions, if any, and the prescribed foreign investment entry routes. The FDI policy also provides for certain sector-specific conditions, subject to which the domestic business entity with FDI must carry on its business operations.

Foreign investments in certain business sectors is limited up to the sectoral cap prescribed under the FDI Policy.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Please see questions 2 and 4.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Various taxes may be applicable, including income tax (for local businesses which earn profits), service tax (for services provided), sales tax (for sale of goods) and customs duty (for import of products). Withholding tax may apply for payments made by an Indian entity to a foreign supplier.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The most common structure used by a foreign supplier is a simple distribution arrangement for the entire country or a region. Franchising is used for concepts or systems being licensed, and is gaining popularity. Trademark licensing is mostly used when the intention is to produce goods in India for sale using the supplier's trademark only.

Joint ventures are most commonly used when foreign and Indian parties combine to use the foreign partner's technology to manufacture goods in India, either for domestic sales or exports.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

There are no government agencies that regulate the relationship between a supplier and its distributor or agent. The parties are free to contractually agree to any terms and conditions within the parameters of the Contract Act 1872 (the Contract Act). It is important to examine the provisions of the Sale of Goods Act 1930, which provides for certain implied conditions and warranties for sale and purchase of goods. Some of these conditions, however, may be contractually waived by the parties.

Some of the other aspects of the relationship, including payment of royalties by the distributor to the foreign supplier, would be subject to the provisions of FEMA. The Competition Act 2002 (the Competition Act) must be examined while structuring the relationship between the foreign supplier and its distributor or agent. The Competition Act regulates transactions that may have an adverse effect on competition, such as abuse of a dominant position, agreements on resale price maintenance, exclusive tie-in agreements, transactions that limit production, supply, markets, technical development, etc.

There are limited industry self-regulatory bodies that may affect the distribution or agency relationship, such as the pharmaceutical industry, where various associations of wholesalers and retail sellers of drugs, such as the All India Organisation of Chemist and Druggists, directly or indirectly determine the sale price of drugs and also control the supply of drugs in a concerted manner.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

There are no legal or statutory restrictions on a supplier's right to terminate a distribution relationship 'without cause'. A contract would typically spell out the circumstances under which the contract may be terminated by either party, which includes breach of representations and covenants, failure to achieve a minimum sales target, failure to perform a contract where time is of the essence, infringement of a trademark, insolvency, etc. In addition, the Contract Act provides for repudiation of contract under certain circumstances, notwithstanding anything to the contrary provided in the contract itself.

It is important to ensure that a contract of agency is not created between the supplier and its distributor, as there are specific issues with respect to termination of agency where the agent has an interest in the subject matter of the agency.

There are no legal or statutory restrictions on the supplier's right to refuse renewal of the distributor relationship, unless the contract provides otherwise.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

There is no statutory requirement that requires a party terminating the contract, with or without cause, to pay any compensation or indemnify the non-terminating party, unless such termination itself is unlawful under the terms of the contract resulting in a loss to the non-terminating party. If so, compensation or indemnity payable to the non-terminating party would depend on the contractual terms. In the absence of any understanding, courts are free to determine the quantum of compensation payable by the terminating party to the non-terminating party.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Such restrictive covenants are generally enforceable. However, restricting the transfer of ownership of the distributor or agent, or their respective businesses to a third party pursuant to the expiry or early termination of the contract may not be enforceable. The courts are likely to arrive at a determination that such restrictive covenants operate in restraint of trade and are void.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality provisions are generally enforceable, both during the term of the contract and pursuant to its expiry or early termination. Confidentiality covenants must be reasonable in time and scope, and should not be used by the supplier merely to restrict its distributor from dealing with the supplier's competitors on the ground that any such dealing by the distributor may result in a breach of confidentiality covenants.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

In-term and post-termination covenants not to compete are likely to be difficult to enforce. The Contract Act states that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. The Act provides an exception only in relation to a sale of a business along with the goodwill, where the agreement imposes a restriction on the seller to not carry on a similar business within specified local limits so long as the buyer carries on the business. That said, limited in-term non-compete covenants have been upheld in certain cases where the specific facts and circumstances warranted enforcement. Courts have confirmed that reasonable restrictive covenants cannot jeopardise the livelihood of the distributor, and any post-term covenant beyond six months to a year is likely to be unenforceable.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

A supplier may control the prices at which its distribution partner resells its products, subject to the condition that such a provision in the distribution contract does not cause or is not likely to cause an appreciable adverse effect on competition (AAEC) in India. The Competition Act has referred to this practice as 'resale price maintenance'.

Although the Competition Act does not define AAEC or provide any formulae to determine when an agreement causes or is likely to cause an AAEC, the Competition Act specifies the following factors for determining the presence of an AAEC, namely: '(a) creation of barriers to new entrants in the market, (b) driving existing competitors out of the market, (c) foreclosure of competition by hindering entry into the market, (d) accrual of benefits to consumers, (e) improvements in production or distribution of goods, or provision of services, and (e) promotion of technical, scientific and economic development by means of production or distribution of goods, or provision of services'.

The Competition Commission of India (CCI) is required to consider these factors to determine the anti-competitive effect as well pro-competitive justification of the contract, and determine whether the contract has an AAEC under the Competition Act.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

The supplier is free to suggest resale prices and establish a minimum advertised price policy, and refuse to deal with customers who do not follow its pricing policy, subject to the condition that such practices or terms included in the contract with its distributor do not cause or are not likely to cause an AAEC.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Yes.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

There are no statutory or legal restrictions affecting a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased or otherwise. However, any predatory pricing by a dominant seller in a given product and geographic market will be in violation of the Competition Act.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

The Competition Act considers exclusive distribution agreements void if they cause or are likely to cause an AAEC in India. Similarly, an agreement restricting the customers to whom the distribution partner may resell the products is void, if it causes or is likely to cause an AAEC in India.

The Competition Act sets out two exceptions to the general prohibition against anti-competitive agreements, namely: (i) reasonable restrictions as may be necessary for protecting intellectual property rights conferred by Indian laws, and (ii) those exclusively for export of goods or services.

The Competition Act does not define or make any distinction between active sales efforts and passive sales for the purpose of determining market restrictions.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

There are no statutory restrictions on a supplier's ability to refuse to deal with particular customers. However, including such restrictive covenants in the supplier's contract with the distributor would render such contracts void if they cause or are likely to cause an AAEC in India.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

The Competition Act also regulates 'tie-in arrangements' between a supplier and its distribution partner. A tie-in arrangement requires a purchaser of goods, as a condition of such purchase, to purchase some other goods from the supplier. Any tie-in arrangement between a supplier and its distribution partner will be void if it causes or is likely to cause an AAEC in India.

The Competition Act prohibits abuse of dominance by any business entity, including a supplier, that enjoys a position of strength or dominance in the relevant product or service market. Certain practices by a dominant entity, including predatory pricing and denial of market access are prohibited.

The CCI, on its own motion or based on information received from any person, including the consumer or distributor, or on a reference made to it by the central or state government, or any statutory authority, may initiate an inquiry into any alleged violation of the Competition Act.

If a complaint is made against the activity of a supplier as being anti-competitive, the CCI will consider each case on its merits. There is an appeal to a Competition Appellate Authority Tribunal and thereafter to the Supreme Court of India in relation to any decision made by the CCI.

Competition Act also provides for private enforcement. Non-parties to a contract, including consumers can approach the CCI and obtain declaratory orders and injunctions. However, compensation claims have to be brought before the Competition Appellate Authority Tribunal.

In case of a conviction under the Competition Act, CCI is empowered to pass any or all of the following orders: (a) direct the concerned undertaking(s) to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position (b) impose a penalty, which may be up to 10 per cent of the average turnover for the three preceding financial years of the concerned undertaking(s), (c) direct that the agreement shall stand modified to the extent and manner as may be specified by the CCI, and (d) pass such other orders as it may deem fit.

The CCI is empowered to issue interim orders, temporarily restraining a party from carrying on an anti-competitive act, where it is satisfied that such an anti-competitive act has been committed or is about to be committed.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

The Patents Act 1970 allows parallel imports in relation to patents and the Trademarks Act 1999 provides for the principle of international exhaustion of rights, and suggests that parallel imports are allowed as long as the goods are genuine and have not been materially altered or impaired. However, there are certain exceptions, most notably, in the case of parallel imports of design rights that are prohibited under section 22(1)(b) of the Design Act and in the case of goods bearing a false trademark or a false trade description. The distributor or agent may cite these exceptions in a genuine case to prevent parallel imports of the supplier's products in its designated territory.

The interpretation of parallel imports is ambiguous in India and is a subject that has been highly debated in various judicial forums without definite conclusions regarding its legality. Generally, the right holders put forth arguments based on the principle of national exhaustion of trademark rights thereby placing counterfeits and parallel imports on the same pedestal. However, importers argue on the ground of international exhaustion so that the right holder has no control over genuine goods once they have been released in any market worldwide.

As far as a product that is protected under the Patents Act or the Trademarks Act is concerned, if imported into India by way of parallel import, no action can be taken to restrain such import unless it can be proved that the product is counterfeit or fake and/or materially altered or impaired.

As far as a product design, which is protected under the Designs Act, is concerned, parallel imports of even genuine goods is presently prohibited. However, to enforce this exception, the product design should have registration in India as per the Designs Act.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

There is no uniform law or any statutory body regulating the advertising industry. Therefore, a supplier or distributor must comply with local and industry-specific laws, which may restrict or prescribe the manner in which an advertisement should be published. These include the Food Safety and Standards Act 2006, which prescribes that an advertisement relating to standard, quality, quantity or the usefulness of any food product should not be misleading or deceiving. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003 prohibits any direct and indirect advertisement of tobacco products. There are other industry-specific laws and an examination of these laws is important to determine whether there is any restriction on the supplier's or distributor's ability to advertise and market the products it sells.

Apart from this, the Advertising Standards Council of India (ASCI), a non-statutory and self-regulatory body, has issued a Code for Self-Regulation in Advertising (the ASCI Code), which applies to persons involved in the commissioning, creation, placement or publishing of advertisements. The ASCI Code does not have any statutory force and is merely considered good practice but has been adopted by various advertising industry bodies.

A supplier may pass on any or all costs incurred by it in advertising the contract products to its distributor. In a similar vein, the supplier may also share the costs incurred by its distributor in advertising the contractual products. The parties may also mutually agree on other matters, for instance, the manner in which the distributor may advertise the contract products, the requirement for the distributor to obtain the prior approval of the supplier for using the supplier's brand or advertisement materials, etc.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

It is advisable for a supplier to register intellectual property it seeks to protect under the applicable intellectual property laws, whether trademarks, patents, industrial designs or copyright. Although India has provisions to enforce rights of a right holder by way of common law in cases where there is no registration of intellectual property in India, it is advisable to seek protection under statutory laws and secure registration. Registration of an intellectual property in India acts as a prima facie proof of ownership in favour of the registered proprietor. However, each dispute is judged taking all factors into account such as adoption and prior use.

It is further recommended that any licensing activity or permitted usage of the intellectual property in India be specified by way of an agreement with sufficient clauses to protect the rights holder and avoid misuse and exhaustion of intellectual property rights. In licensing, it has to be further ensured that goodwill generated out of use of the intellectual property is attributed to the licensor and not the licensee.

Periodic checks and monitoring of the physical and online market should be undertaken to identify potential infringers and take timely action. Monitoring of the Trademarks Register should also be undertaken to identify infringers who may attempt to register similar or deceptively similar marks.

India does not have any specific laws in respect of trade secrets and know-how, and therefore the protection of trade secrets and know-how is purely contractual and depends on the restrictive convents such as confidentiality and non-compete (subject to reasonable restrictions during the term of contract) provisions in the contract.

24 What consumer protection laws are relevant to a supplier or distributor?

In general, the following consumer protection laws may be relevant to a supplier or distributor:

- the Consumer Protection Act 1986 and accompanying rules;
- the Legal Metrology Act 2009 and accompanying rules;
- the Food Safety and Standards Act 2006 and accompanying rules; and
- the Competition Act 2002 and accompanying rules.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

There are no statutory requirements regarding recall of distributed products. The parties are free to mutually agree and delineate their responsibilities and liabilities, if any, in the distribution agreement with respect to recall of products. Courts have held that a manufacturer should not sell products that suffer from any major defect, and if so, the product in question must be promptly withdrawn from the market or from the consumers once the manufacturer comes to know of the defect.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Under the Sale of Goods Act 1930, there are implied warranties or conditions as to the quality or fitness for any particular purpose for which the goods are sold in the following cases:

- where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition to its fitness for any particular purpose;
- where the goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality provided that, if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed; and
- where a particular purpose may be annexed to the goods by the usage of trade.

Unless there is a contract to the contrary, the buyer has the right to initiate a product liability claim under the circumstances described above. Therefore, the supplier may contractually agree with its distribution partner to vary or extinguish the implied warranties and conditions provided under the Sale of Goods Act. Similarly, the supplier and its distribution partner may include suitable disclaimers in the contract with its downstream customers for varying or excluding the implied warranties and conditions.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (the Rules) impose strict conditions on the collection, transfer and disclosure of 'sensitive personal data or information'. The Rules prescribe the manner in which sensitive personal data or information may be collected, transferred or disclosed by a business entity (the 'data controller'). These conditions include (i) publication of a privacy policy on the website of the data controller; (ii) obtaining prior consent of the provider of information (the 'data subject'); (iii) collection and use of information for a lawful purpose connected with a function or activity of the data controller; and (iv) retention, disclosure and transfer, subject to obtaining prior consent of the data subject or where such disclosure is required for the data controller to comply with a legal obligation. It is also important to note that any body corporate handling 'sensitive personal data or information' is obligated to implement and maintain certain reasonable security practices and procedures prescribed under the Rules.

It is fairly common to include covenants in the distribution contract requiring the distribution partner to comply with the Rules, including obtaining the prior consent of the data subject for disclosure of such information to the supplier. The supplier, however, is also required to maintain the same level of data protection as its distribution partner if it is the recipient of sensitive personal data or information.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Since there are no statutory or legal restrictions to the contrary, the supplier may do so, provided the distribution contract confers a right upon the supplier to take such action. Certain objective parameters should be agreed that must be triggered by the management of the distribution partner before the supplier can exercise its right to terminate the relationship.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Under certain circumstances, it is conceivable that a distributor or an agent, being a natural person, may be treated as an employee of the supplier. This could also lead to a presumption, from a taxation perspective, about the existence of the supplier's permanent establishment in India. The courts may infer an employer–employee relationship based on some factors, which include supervision and control, organisation and integration.

If a court re-characterises the principal-to-principal relationship into one of employment, the supplier will be obliged to provide all the statutory employment-related benefits to the distributor and/or its agent, including minimum wages, gratuity, bonus, maternity benefits and workmen's compensation (applicable only to workmen), earned leave, overtime benefits, past dues, etc.

The supplier may also safeguard itself from potential violations of employment and labour laws by its distribution partners, by including suitable covenants in the distribution contract requiring the distribution partners to comply with these requirements, apart from obtaining indemnity in this regard.

30 Is the payment of commission to a commercial agent regulated?

Local laws do not regulate payment of commission by a supplier to its commercial agent, except in defence procurement deals that are subject to the regulations notified by the Ministry of Defence, government of India.

31 What good faith and fair dealing requirements apply to distribution relationships?

Being a common law jurisdiction, there is no statutory law available that implies a duty of good faith or fair dealing requirements with respect to distribution relationships. An important exception in this regard is a Supreme Court judgment that has recognised and upheld the validity of a clause in a contract that requires the contracting parties to negotiate in good faith within the time period specified in the contract. However, the jurisprudence on this subject is still evolving.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

It is not mandatory to register distribution agreements or intellectual property licence agreements. However, it is possible for a trademark licence agreement to be registered with the Trademark Office if certain conditions are fulfilled. Registration is advantageous for enforcement of rights.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

While non-solicitation covenants are usually enforceable, care must be taken to ensure that it is drafted concisely to avoid being hit by the Contract Act, which prohibits the imposition of any hindrances to the exercise of a lawful profession, trade or business.

Similarly, a limitation of liability clause is generally valid and enforceable, subject to the condition that limitations on liability arising by reason of death or personal injury, fraud or gross negligence are not enforceable. The limitation of liability clause must be reasonable and not amount to a penalty to be enforceable. The ability of a party to claim damages for breach of contract is limited to the actual damages or losses suffered by that party arising from the breach.

The Contract Act recognises the freedom of parties to contract freely and does not mandatorily require any provision to be included in the contract. Apart from certain implied conditions and warranties under the Goods Act, local law will not deem any provisions to be included in the contract even if absent.

Any provision where a party is absolutely restricted from instituting legal proceedings to enforce its legal rights is void. A contract will also be void if (i) it is uncertain; (ii) both parties to the contract have misunderstood a matter of fact essential to the contract; and (iii) the consideration or object of the contract is of such nature that, if permitted, it would defeat the provisions of any local law or is fraudulent, or involves or implies injury to the person or property of another, or is opposed to public policy.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Indian law will respect the parties' choice of governing law, subject to the following exceptions: courts can invalidate a choice of law clause if they perceive it as being opposed to Indian 'public policy'. This is especially the case if the court concludes that a foreign law has been designated as the law governing the contract to avoid application of certain mandatory provisions of local law.

Indian parties, whether natural or legal persons, contracting among themselves cannot designate a foreign law as the law governing the contract. In all such cases local law will be the law governing the contract.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

While there are no restrictions on the parties' contractual choice of courts or choice of arbitration tribunals to resolve disputes, this choice must be carefully weighed based on (i) the manner of enforcement of foreign judgments by local courts, and (ii) the 2012 ruling of the Supreme Court of India, in the case of *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (the *BALCO* ruling), which has substantially changed the jurisprudence on arbitration in India.

The *BALCO* ruling effectively undid the earlier line of precedents that enabled local courts to exercise effective supervisory jurisdiction over certain foreign-seated arbitrations, subject to the condition that the parties had not included a term in the contract expressly ousting the jurisdiction of local courts. This had an adverse impact on the efficiency, certainty and finality of India-related arbitrations, notwithstanding the fact that such arbitrations were seated outside India. The *BALCO* ruling has laid down the following important principles:

- Part I (dealing with domestic arbitration) of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) would have no application to an international commercial arbitration held outside India. Therefore, foreign awards passed in such arbitrations would be subject to the jurisdiction of the local courts when the same is sought to be enforced locally in accordance with the provisions contained in Part II of the Arbitration Act dealing with enforcement of foreign arbitration awards. Part I of the Arbitration Act is applicable only when the seat of arbitration is in India, irrespective of the kind of arbitration;
- power of the local courts to set aside an arbitration award under section 34 of Part I of the Arbitration Act does not apply to arbitrations seated outside India. Such power applies only to arbitrations seated in India. Therefore, a foreign arbitration award cannot be challenged by the local party under section 34 of Part I of the Arbitration Act, as was the case earlier;
- local courts do not have the power to grant interim measures when the seat of arbitration is outside India, but there is no such bar if the arbitration is seated in India;
- pendency of the arbitration proceedings outside India would not provide a cause of action for filing a civil suit in India where the main hope is for an injunction; and
- the *BALCO* ruling applies to all arbitration agreements executed on or after 6 September 2012. Parties with arbitration agreements executed before 6 September 2012 are still subject to the pre-*BALCO* regime.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Parties, including foreign businesses, are free to approach local courts (depending on jurisdiction) to resolve disputes, unless arbitration is the agreed form of dispute resolution. Foreign businesses approaching courts receive the same treatment as any Indian party, and are not advantaged or disadvantaged in any way as compared to their Indian counterparts. Indian court procedures are very lengthy and parties must follow set procedures for evidence, cross-examination and arguments before a case is decided.

Archer & Angel

Srijoy Das **sdas@archerangel.com**
Siddharth Seshan **sseshan@archerangel.com**
Anup Kumar **akumar@archerangel.com**

#5B, 5th Floor, Commercial Towers
Hotel J W Marriott
Aerocity
New Delhi 110037
India

Tel: +91 11 4195 4195
Fax: +91 11 4195 4196
www.archerangel.com

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

These agreements are certainly enforceable. The Arbitration Act states that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. It also requires that the arbitration agreement must be in writing.

Parties are free to determine the number of arbitrators constituting the arbitration tribunal, subject to the condition that it is not an even number. The parties are also free to agree upon the language or languages to be used in the arbitration proceedings.

Arbitration, as an alternate dispute resolution mechanism, is strongly recommended for resolving disputes between foreign businesses and their domestic partners. Local courts suffer from a huge backlog of cases, and delays are endemic with timelines of 10 years or more in obtaining a final judgment not uncommon. Foreign businesses, therefore, are advised to opt for institutional arbitration over local courts to resolve disputes.

Italy

Marco De Leo
RASS – Studio Legale Rinaldi e Associati

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes, a foreign supplier is free to establish its own entity in Italy to import and distribute its products with no restrictions.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes, in Italy a foreign supplier can be a partial owner with a local company of the importer of its products and there are no foreign investment laws that impose any restrictions.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Usually, the forms of business entity that are best suited for an importer owned by a foreign supplier are those of a company limited by shares (SpA) or a limited liability company (Srl). They are incorporated by notarial deed and governed by Italian law.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

No, the Italian jurisdiction does not restrict foreign businesses from operating or limit investment in or ownership of domestic business entities, since in Italy there are no foreign investment laws imposing restrictions on non-nationals in respect of the ownership or control of a business or of an entity.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes, the foreign supplier can own an equity interest in the local entity that distributes its products.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Taxes due for the formation of a company acting as importer owned by a foreign supplier are the stamp duty for the deed of incorporation. Taxes applicable to foreign businesses (VAT, direct taxes, withholding tax, etc) are those provided by the Italian system for resident businesses in accordance with local laws and bilateral treaties to avoid double taxation.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

In Italy the most common kinds of distribution arrangements are distribution agreements, franchise agreements, agency agreements and trademark licence agreements.

The choice of distribution structure depends mainly on the organisation of the supplier's network. For a discussion of the characteristics of the different distribution structures and agreements please see question 8.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

In Italy, the agreement and the relationship between a supplier and its distributor, agent or other kind of representative are regulated by the Italian Civil Code, EU directives, the Antitrust Law (see the chapter called 'Regulation of the distribution relationship') and some special laws (as regards franchise, Law No. 129 of 6 May 2004).

What follows is a summary of the different kinds of distribution agreements and applicable laws and regulations.

Agency agreement

In the agency agreement, the commercial agent as a self-employed commercial intermediary, undertakes the continuing obligation to negotiate the sale of purchase of goods, or even concluded such transactions in the name and on behalf of a principal in exchange for a commission.

In Italy, the agency relationship is governed by the Italian Civil Code (which implemented EC Directive 86/653) but also by the economic collective agreements signed by the union representatives of enterprises on one side and of the agents on the other side. If the principal is a foreigner, the economic collective agreements will be not applicable, unless the parties expressly agree on their application in the agency agreement.

The commercial agent operating in Italy has to be registered by the principal at a government agency, named 'Enasarco'. The principal has to pay to Enasarco a kind of social contribution in the form of a percentage of the commission and other sums paid to the agent and set aside termination indemnity accrued year by year. If the principal is not an Italian entity or does not have a seat or a branch in Italy, it is not obliged to register with Enasarco, but has the option to do so.

Distribution agreement

A distribution agreement is an agreement on a continued basis by which the supplier sells the products to the distributor, which undertakes to purchase the supplier's products and to resell them in a specific territory.

Italian laws do not specifically regulate 'distribution' agreements. However, according to general principles, when a contract is not expressly contemplated by law it can be regulated by the rules applicable to the most similar contract type. In this respect, distribution agreements normally have features connected to certain types of contracts expressly governed by the Italian Civil Code, namely: the sale contract, by which the vendor sells and transfers to the buyer the ownership of a good against a price; and the long-lasting contract, by which one party undertakes, against a consideration, to carry out a periodical and continuous supply to the other party of the quantity of goods corresponding, in principle, to the need of such other party.

Franchise agreement

A franchise is an arrangement mixing distribution and licensing of IP rights, particularly suited to the retail commerce of products or services, basically to end customers in a point of sale.

According to the special law on franchising No. 129 of 6 May 2004 enacted in Italy, franchising is an agreement between two legally and economically independent parties, whereby one party (franchisor) grants to another party (franchisee), against consideration, a set of industrial or

intellectual property rights related to trademarks, trade names, shop signs, utility models, industrial designs, copyright, know-how, patents, technical and commercial consulting and assistance, under which the franchisee joins a system (network) constituted by a number of franchisees operating in the territory, for the purpose of distributing specific goods and services.

Commission sales agreement
The commission sales agreement is an arrangement by which one party (commission agent) undertakes to purchase or sell goods in its own name but on behalf of the other party, the supplier. It is regulated by the Italian Civil Code pursuant to article 1731 et seq.

Commission sales agreements are normally connected to a 'mandate', and the commission agent has no power to represent the supplier.

Commission sales agreements are onerous and therefore the agent is entitled to a commission, usually consisting of a percentage of the value of the deal and sales procured.

Finders
Finders perform intermediation activities to facilitate the conclusion of sales on an occasional basis.

The main (and only) difference with respect to the commercial agent is the occasional basis of the procurement and the fact that finders do not have any contractual obligation to promote the sales and execution of agreements.

Basically, there is a risk that the agreement with finders may be construed as an agency agreement, regardless of the nomen juris given by the parties. In this case, the 'principal' could be charged with payment of the mandatory indemnities upon termination provided for by the Italian Civil Code, as well as payment of the unpaid contributions (such request could also be raised directly by Enasarco, as a result of inspections and audits).

Brokers
Commercial agents (typical) or finders (atypical) are the two only types of independent sales representative recognised by Italian laws and Italian courts.

The figure of the 'broker' is not recognised, other than with respect to insurance or financial transactions, and a brokerage agreement under Italian laws and by Italian courts will very likely be construed as an agency agreement.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Distribution agreement
Distribution agreements executed for a definite term may be terminated before the expiration date only according to the cases of early termination provided for by the agreement itself or in case of material breach by one party (not remedied).

Distribution agreements executed for an indefinite term, as a general principle of Italian law, can be terminated without cause giving a reasonable notice period. Usually, the distribution agreement provides that the distribution may be terminated upon either party serving on the other written notice giving a certain notice period. If the distribution agreement does not contain any termination provision, the general rule is that a 'reasonable' notice period has to be given to the other party having regard to the 'nature of the supply' (ie, the structure and the kind of products) and duration of the relationship.

Agency agreement
An agency agreement executed for a definite term can be terminated before the expiration date only according to the cases of termination provided for by the agreement or in case of material breach by one party (not remedied) or for 'just cause'.

With reference to the agency agreement for an indefinite period of time, pursuant to article 1750 of the Italian Civil Code, either party may terminate it by notice. The period of notice shall be one month for the first year of the agreement, two months for the second year commenced, three months for the third year commenced, four months for the fourth year commenced, five months for the fifth year commenced and six months for the sixth year commenced and subsequent years. The parties may not agree on shorter periods of notice. Economic collective agreements usually provide for a longer notice period in favour of agents.

Franchise agreement
The cases of termination of a franchise agreement are similar to those of a distribution agreement (which are basically applicable to all commercial agreements). A franchisor may terminate the franchise relationship in the case of default or non-performance of the franchisee's obligations. In general, termination is granted if the breach of the agreement can be considered a serious breach, such as a default in payment of fees and royalties, violation of any exclusivity rights on the product or non-compliance with the franchisors' standards.

Non-renewal
Basically, the decision not to renew the distribution agreement when the contract term expires is lawful and does not entail any kind of liability. If the agreement provides for tacit or automatic renewal, a termination notice should be sent to the other party within the term stated in the agreement.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Agency agreement
According to article 1751 of the Italian Civil Code (which cannot be derogated 'in peius' by the parties, ie, to the detriment of the agent), upon termination of the agency agreement, the principal must pay an indemnity to the agent, if he or she 'has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers'.

The Italian Civil Code does not indicate how to quantify such indemnity but provides that: 'The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent'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 economic collective agreements provide in detail the amount of the termination indemnity, which is formed by three elements: (i) the termination indemnity, which is due to the agent even if he or she has not increased the volume of customers or the turnover and even if the relationship has been terminated; (ii) the clientele indemnity; and (iii) the success indemnity, which is due to the agent if the latter acquired new customers or significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. In any event, the aggregate amount of the aforesaid three figures may not exceed the maximum amount that could be due pursuant to article 1751 of the Italian Civil Code.

Distribution agreement
With reference to the distribution agreement at present, there is no provision under Italian law that entitles a distributor to any indemnity upon the expiration or in case of lawful termination of the distribution agreement. Also, the general attitude of Italian jurisprudence on this matter is that no termination indemnity, either for goodwill or for clientele, is due to the distributor.

Franchise agreement
With reference to the franchise agreement, the franchisee does not have the right to claim any indemnity from the franchisor after termination, unless the parties have expressly agreed otherwise.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Yes, the Italian jurisdiction can enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, since, as a general rule, article 1406 of the Italian Civil Code provides that

each party can assign an agreement to a third person only if the other party consents thereto.

With reference to the transfer of all or part of the ownership of the distributor or agent the two most common provisions are (i) the pre-emption right, which is a right to acquire certain property matching the offer made by a prospective buyer, or (ii) a 'change of control' clause, which generally allows one party to terminate the agreement when there has been a change in the control of the other party.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

No, there are no limitations in Italy concerning the confidentiality provisions provided for by distribution agreements.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Distribution agreement

In accordance with Regulation (EC) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, together with the Commission Guidelines on Vertical Restraints (2010/C 130/01) restrictions are allowed and enforceable save for the following:

- restricting the buyer from purchasing, or otherwise dealing with, competing products of the purchased products, directly or indirectly (eg, this will include the situation where the buyer is obliged to buy more than 80 per cent of its total purchases of the product from the supplier), for more than five years, or when their duration is indefinite; non-compete obligations that are tacitly renewable beyond a period of five years are also not covered (however, when renewal beyond five years requires the explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period, such clause is covered by the Regulation); or
- restricting the buyer from competing after the termination of the agreement, except where the restriction is limited to one year, is necessary for the protection of know-how and is limited to the same premises and land from which the buyer has operated during the agreement.

Agency agreement

With reference to the agency agreement the undertaking for the agent not to compete with the principal during the term is provided for by the law (unless expressly derogated in writing by the parties); after termination of the agreement, the undertaking not to compete, if any, must be limited to the territory, customers and products relevant to the contract and cannot exceed two years after termination. According to article 1751-bis of the Italian Civil Code and the economic collective agreements, a relevant and autonomous non-competition indemnity is to be paid to the agent.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Article 4 of Regulation (EC) No. 330 of 20 April 2010 contains a list of the 'hard-core restrictions', which are basically restraints on the buyer's ability to determine its sale price and certain types of (re)sale restrictions. They are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to consumers. The consequence of including such hard-core restrictions in an agreement is that the whole vertical agreement will be null and void.

The restrictions set forth by Regulation (EC) No. 330 of 20 April 2010 shall apply to distribution agreements prohibiting the supplier from imposing a minimum resale price.

In accordance with article 4(a), a supplier can influence resale pricing only by imposing a maximum sale price or by recommending a sale price, provided that the maximum or recommended price does not amount to a fixed price as a result of pressure from, or incentives offered by, any of the parties.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

As explained in question 14, in accordance with Regulation (EC) No. 330/2010 of 20 April 2010, article 4(a), the supplier can impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

Within the above limits, a supplier can establish a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy since there are no restrictions under the Antitrust Law.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

In principle, the supplier may grant to the distributor a 'best price' right with respect to the prices applied by the supplier to other distributors. On the contrary, as mentioned above, a supplier cannot control the prices at which its distribution partners resell the products.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

There are no restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, etc. The seller is free to decide, according to its market strategy, the price it charges to its direct customer based on the characteristics of the market or the customer (eg, based on volumes, turnover, etc).

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

A supplier can restrict the geographic areas or categories of customers to which a distribution partner may actively resell and promote products, and can reserve certain customers or territories to itself or to other distributors or agents.

Regulation (EC) No. 330/2010 allows a supplier to restrict active sales by a buyer party to the agreement, to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by, for instance, appointing an exclusive distributor for a particular customer group in a certain territory.

Active sales means actively approaching individual customers by, for instance, direct mail, including the sending of unsolicited e-mails, or visits, or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory.

Passive sales, on the contrary, means responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are passive sales.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

The supplier can refuse to deal with customers that do not have specific and necessary requirements and restrict its distributor's ability to deal with particular customers in case of so-called 'selective distribution'. For instance,

the supplier may decide to sell through a limited number of points of sale in a geographical area, which are selected based on their characteristics (eg, quality, capacity, training, etc). An advantage of this approach is that the supplier can choose the most appropriate or best-performing points of sale and focus effort (eg, training) on them.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Law No. 287 of 1990 is the applicable competition and fair trading act in Italy and the Italian Competition Authority is the independent competent body. Having as its aim citizens' welfare, the Authority enforces rules against anti-competitive agreements among undertakings, abuses of a dominant position as well as concentrations. As far as distribution agreements are concerned, Law 287/90 does not provide different rules from those provided for EU level. As a matter of fact, Regulation No. 330/2010 is directly applicable in Italy to distribution agreements that have to be performed on the Italian territory.

In Italy, the private parties can obtain compensation by bringing an action for damages before a national civil court.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

First of all, in order to be entitled to any action versus parallel or 'grey market' imports, the distributor must be granted exclusivity on territory and on use of the supplier's trademarks, preferably through the selective distribution structure (see question 19).

Having said that, parallel imports from other countries once importation in EU has been already lawfully made cannot be prohibited, while infringement of the exclusivity right to use a certain trademark in one territory can be alleged in order to try to stop an importation.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

The Antitrust Law does not provide any restrictions on the ability of a supplier or distributor to advertise and market the products it sells. The supplier and the distributor are free to establish and agree on these issues and on how to pass all or part of cost of advertising to its distribution partners.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Trademarks in Italy are protected by means of registration with the Italian Trademarks and Patents Office. Protection is stated by Decree-Law 30/2005 (the Italian IP Code), which consolidated the laws and regulations relating to industrial property and introduced special remedies for safeguarding IP rights.

Know-how, trade secrets and other business-critical confidential information are expressly recognised by articles 98 and 99 of the Italian IP Code and are generally protected by rules on unfair competition. The parties can enter into a technology-transfer agreement, which is quite common in Italy even if used only in particular sectors.

24 What consumer protection laws are relevant to a supplier or distributor?

In Italy all local laws and EU consumer protection legislation has been collected into a consolidated act: the Consumer Code. This act is Legislative Decree No. 206, dated 6 September 2005, which came into force on 23 October 2005. It covers all the different stages in consumer dealings, from advertising to correct information, from consumer contracts in general to product safety, access to justice and consumer organisations.

According to the Consumer Code the distributor shall be liable towards consumers as the seller of the goods or services.

The Consumer Code also provides for the manufacturer's liability for any defects of the product. Liability may also be imposed on any party who holds itself out to be the manufacturer through the use of a name or trademark, and any entity who imported the product into the European Union.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

According to the Consumer Code, specific rules govern the liability of a supplier of defective goods. In particular, the damaged party has the right to obtain from the seller the manufacturer's name and address; if the seller fails to reply to the request of the damaged party within three months and the manufacturer is not identified in any other way, the seller is subject to the same liability as the manufacturer. In case of a trial initially started against the seller, the manufacturer can be requested to participate at any time as an interested party. If the manufacturer does not challenge such a request and attends the trial, the trial continues exclusively against the manufacturer, and the supplier is considered free from any liability to the damaged party.

Article 104, paragraph 7 of the Consumer Code requires sellers and manufacturers, when they know or ought to know that a product which they have placed on the market poses hazards to the consumer to immediately notify the competent authorities (to which article 106, paragraph 1 refers) of the actions taken to prevent risk to consumers. The new legislation imposes a number of additional duties on manufacturers and distributors. They must provide consumers with all information necessary to evaluate the risks arising from the product's normal and foreseeable use, adopt measures proportional to the product's characteristics that will enable the consumer to identify the risks, and take any necessary steps to avoid those risks. Product recalls are regulated in details in article 104, paragraph 8 of the Consumer Code. Manufacturers and distributors are required to organise direct removal of the products from consumers, destroy unsafe products, and support all related costs.

In the distribution agreement the parties can regulate who is responsible for carrying out and absorbing the cost of a recall. If the parties do not regulate such provision, the Consumer Code provides that for manufacturing defects the retailer is considered liable to the consumer, at least in the first instance. In fact, the sale agreement is executed between consumer and retailer and the manufacturer is only a third party. The Consumer Code, however, recognises to the retailer the right to claim for the costs incurred for the removal of a manufacturing defect from the supplier.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Italian law distinguishes between warranty rules for the sale of goods to an entrepreneur (B2B sales) and a consumer (B2C sales).

With regard to B2B sales, the Italian Civil Code requires the seller to provide the buyer with several warranties.

Pursuant to article 1490 of the Italian Civil Code, the seller must warrant to the buyer that the sold goods are free from defects that may make the goods unsuitable for their intended use or considerably decrease the value of the goods. The defects warranty has a minimum term of one year, commencing on the date of delivery of the goods. Any agreement or contractual clause that excludes or limits the defects warranty is not effective if the seller has intentionally hidden the defects from the buyer. The buyer may make a claim within eight days of the discovery of any defects, unless the law or the parties provide a different term. Any late notice of defects is ineffective.

As a remedy for breach of the defects warranty, the buyer is entitled to ask for termination of the agreement or a reduction of the purchase price.

With regard to B2C sales the Consumer Code applies to all sale agreements (and related warranties): (i) concerning 'consumer goods'; and (ii) between an entrepreneur (a person who enters into the sale agreement in connection with its business) and a consumer. The Consumer Code defines 'goods' to be any moveable things, even if they are component parts or are to be assembled, except for, inter alia, water, gas and electricity. The Consumer Code requires two kinds of warranties to accompany the sale of consumer goods: the legal mandatory warranty and the voluntary additional warranty.

Under a legal mandatory warranty, the seller is obliged to deliver to the buyer consumer goods that are fully consistent with the parties' sale agreement. This consistency is assumed in certain cases, including, inter

alia, where the goods are suitable for their intended use or have their represented qualities. A legal warranty has a term of two years commencing from the delivery of the goods. The consumer must bring any claim within two months of the discovery of the inconsistency. Any late notice is ineffective. The consumer is entitled to select one of three remedies for breach of the legal warranty: (i) substitution or repair of the goods; (ii) upon the occurrence of certain conditions, a reduction of the purchase price; or (iii) termination of the agreement.

Under a voluntary additional warranty the seller may decide (but is not obliged) to provide to the buyer a voluntary additional warranty along with the legal warranty. The seller is strictly bound by the terms and conditions of any voluntary warranty. A voluntary warranty must comply with certain requirements of the Consumer Code: it must indicate its term and the other main conditions and must be drafted in Italian. The voluntary warranty may supplement, but cannot replace, the legal warranty.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

In Italy the law that regulates the processing of personal data is Legislative Decree No. 196/2003 (the Privacy Code), according to which the owner of the personal data (the 'data controller') shall mean any natural or legal person, public administration, body, association or other entity that is competent, also jointly with another data controller, to determine purposes and methods of the processing of personal data and the relevant means, including security matters, who can decide to appoint a 'data processor'.

The Privacy Code provides for certain requirements, among which are the information to be given to the data subject and consent to be given by the latter, under certain circumstances. Basically, the exchange of information about the customers and end-users of their products requires prior information to be given to them about the processing and its purposes.

In relation to any transfer of personal data to non-EU countries and to any country that does not provide EU-standard data protection, special arrangements need to be taken in order to comply with the Privacy Law. Indeed, the Privacy Law requires that data transfers should not be made to non-EU or non-EEA countries that do not ensure adequate levels of protection.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

In principle, a supplier can approve or reject the persons managing the distribution partner's business if such right is provided for by the agreement, which can also require the supplier's authorisation for the appointment of sub-agents or sub-distributors. Termination can be made only for breach of specific contractual obligations and cannot be at the sole discretion of the supplier.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Basically, according to Italian law, the commercial agent independently promotes the execution of the sales contract or otherwise procures sales of products or services on behalf of the principal. Therefore, if the agent agreement is genuine, this risk should not exist.

However, as a general rule, in Italy an employment relationship may exist de facto irrespectively from the relevant nomen juris given by the parties to the agreement. With respect to the supplier's employees, the risk of being treated as an employee of the supplier exists only if the supplier (through any officer or representative) actually directs the work to be done and such employees are subordinated to it.

The Italian courts decide on a case-by-case basis, seeking and ascertaining the distinctive elements of the employment relationship (ie, the subordination of the employee in terms of the employer's power to direct and regulate, resulting in the limitation of the employee's independence and inclusion within the organisation). Other elements, such as the absence of risk, the continuity of performance, respect of the company's working time and form of payment, are not decisive but could contribute to building a picture of an employment relationship.

30 Is the payment of commission to a commercial agent regulated?

The payment of commission to a commercial agent is regulated by article 1748 et seq of the Italian Civil Code. Basically, the agent's right to commission arises when the principal fulfils his or her performance or when he or she would have to perform pursuant to the sales contract signed with the customer. Thus, unless the parties make a derogation to this rule the right to commission arises when the principal performs the sales contract, normally by delivering the goods. The parties are free to contractually postpone this term, but only to a point not later than the moment at which the buyer fulfils, or would have to fulfil, his or her obligation. It is common practice to make use of this option and to provide within the contract that the right to commission only arises when the customer pays for the goods.

The principal is also obliged to inform the agent within a reasonable time whether it intends to accept or refuse an order submitted by the agent.

The principal is bound to submit to the agent, no later than the last day of the month immediately following the end of each quarter, a written statement of account of the commission due. The statement of account shall indicate all items used in the calculation of the commission. The commission due must be paid to the agent within the aforesaid period (ie, the last day of the month following the quarter to which the commission refers).

The principal must place all necessary information at the agent's disposal so that he or she can check the amount of commission due. For this purpose the principal may provide the agent with extracts of its accounting records.

31 What good faith and fair dealing requirements apply to distribution relationships?

The general principles of good faith and fair dealing are set forth in articles 1337 and 1375 of the Italian Civil Code and are also applicable to distribution agreements. The distributor must act fairly and in good faith, before and after the formation of the agreement.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

With reference to distribution agreements there are no laws that require registration with or approval from any government agency. While with reference to intellectual property licence agreements according to article 138 of the Italian Industrial Property Code must be registered, any deeds that establish, modify or transfer rights concerning industrial property titles must be made public through registration at the Italian Patent and Trademark office.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

With reference to distribution agreements Italian laws do not specifically regulate 'distribution' agreements, so there are no restrictions on provisions in such contracts or limitation on their enforceability. However, there are general mandatory provisions such as: (i) the termination clause must refer to specific and listed breaches and events and requires a specific approval by a separate additional signature according to article 1341 of the Italian Civil Code; and (ii) article 1341 of the Italian Civil Code states that standard contractual conditions drafted by one party are only effective if, at the time the contract is executed, the other party knew or should have known of them through using ordinary diligence and onerous clauses are ineffective if they have not been expressly approved in writing by the other party. The provisions that require a double signature are those that provide limitations of liability; grant the right to withdraw from the contract or suspend its performance; or impose on the other party forfeiture, limitation of the right to raise defences, restriction to the freedom to enter into contractual relationships with third parties, tacit extension or renewal of the agreement, arbitration clauses or derogation to jurisdiction or the competence of the courts.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

There are no restrictions on the parties' contractual choice of a country's law to be governed by Italian law, in accordance with the general principle of the freedom of the parties to choose the applicable law (EU Regulation 593/2008, Rome I). However, overriding mandatory provisions of Italian laws shall apply in any event.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

There are no restrictions on the parties' contractual choice of courts or arbitration tribunals to resolve contractual disputes. The recognition and enforcement of foreign judgments in Italy is governed by article 64 of the Private International Law Act (Law No. 218 of 31 May 1995), which makes reference to international conventions and regulations. The main regulation is Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments (the Brussels I Regulation). International arbitration is also a good option, Italy being party to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

The Italian court system has different kinds of courts depending on the relevant case matter. A typical distribution agreement falls under the ordinary jurisdiction, which is a three-level system: the court of first instance, the court of appeal and the Supreme Court. In general, Italian court proceedings can last a long time – up to two or three years for a first instance judgment. There are no restrictions on foreign businesses making use of such courts and procedures and they can expect to receive fair treatment (or at least the same treatment given to Italian parties).

The main disadvantage of the Italian courts is the long time required before receiving a decision, while the advantages are the limited costs and the impartiality.

Update and trends

At the moment in Italy there are no proposals for new legislation or regulations or to revise existing legislation or regulations. The only recent news regards the issue of a new Economic Collective Agreement for the industry sector.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Yes, an agreement to mediate or arbitrate a dispute is enforceable in Italy, which is party to New York Convention of 1958. The general principles regarding the characteristics of disputes that can be devolved to arbitrators are set out in article 806, paragraph 1 of the Code of Civil Procedure: 'the parties can decide to arbitrate disputes arising between them that does not have as their object inalienable rights, unless expressly prohibited by law.' The two exceptions are disputes that concern inalienable rights and any other dispute that cannot be devolved to arbitrators to express statutory prohibition.

The advantages for a foreign business of resolving disputes by arbitration are the speed, the possibility of choosing the arbitrators, and the highest level of efficiency during the procedure and therefore not being affected by the common delays experienced in court; while the major disadvantages are the very high costs. Another disadvantage is the growing standardisation of the arbitration procedure, which is increasingly making it seem like an ordinary proceeding.

Marco De Leo **mdeleo@rinaldilawf.com**

Via Conservatorio, 15
20122 Milan
Italy

Tel: +39 02 76008860
Fax: +39 02 76006944
www.rinaldilawf.com

Netherlands

Tessa de Mönnink

De Grave De Mönnink Spliet Advocaten

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes, under Dutch laws, a foreign supplier may establish its own entity in the Netherlands to import and distribute its products.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes, under Dutch laws, a foreign supplier may be a partial owner of a local company – situated in the Netherlands – of the importer of its products.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Importers owned by a foreign supplier may be subject to any form of business entity existing under Dutch laws, in particular: private limited liability companies (BVs); public companies (NVs); sole proprietorships; general partnerships; and limited partnerships. Private limited liability companies and public companies are legal entities. General partnerships, limited partnerships and sole proprietorships are non-legal entities. The question of whether a business entity is a legal entity or not affects the importer's liability.

The requirements for forming and maintaining a business entity depend on what form of business entity is incorporated. In the event that a private limited liability form is used by the importer, the following requirements apply: a statement of no objection from the Dutch Ministry of Justice and a notarial deed of incorporation including the articles of association.

The formation of business entities is, in particular, governed by:

- book 2 of the Dutch Civil Code (DCC) for legal entities;
- book 7A DCC; and
- the Commercial Code.

There are also several specific laws, for example:

- the Works Councils Act;
- the Commercial Register Act 2007; and
- the Commercial Register Decree 2008.

All business entities must be duly registered in the Commercial Register of the Dutch Chamber of Commerce. Further information can be found at www.kvk.nl/english-kvk-sites/.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Business entities that are incorporated under foreign law, but are active on the Dutch market rather than within their own country, are subject to the Companies Formally Registered Abroad Act (the CFRA Act). The CFRA Act does not apply to members of the European Union (EU members) and countries that are members of the European Economic Area Agreement. All other entities will have to comply with certain requirements that also apply to Dutch entities (registration in the Commercial Register and the filing of annual accounts with the Commercial Register where the business entity is registered).

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes, a foreign supplier may own an equity interest in the local entity that distributes its products in the Netherlands.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

In principle, taxable profits realised by corporate entities that are for tax purposes resident in the Netherlands – for example, Dutch limited liability companies (BVs and NVs) – are subject to the Dutch corporate income tax rate of 25 per cent insofar as their taxable profit is in excess of €200,000. The first €200,000 of taxable profit is taxed at a reduced rate of 20 per cent. Dividends received and capital gains derived from a shareholding to which the Dutch participation exemption applies are exempt from Dutch corporate income tax.

Dividends distributed by a Dutch tax-resident company are generally subject to 15 per cent Dutch dividend withholding tax. A reduced rate or an exemption from Dutch dividend withholding tax may be available; for example, as a result of the application of a tax treaty or if the Dutch participation exemption applies. In principle, dividends distributed to an EU shareholder holding more than 5 per cent are also exempt from Dutch dividend withholding tax. In general, Dutch corporate taxpayers can credit dividend tax withheld against corporate income tax due.

Individual shareholders holding more than 5 per cent in the nominal share capital of a company (substantial interest) are generally subject to Dutch individual income tax in respect of dividends received and capital gains derived from such substantial interest at a flat rate of 25 per cent. Individual shareholders holding less than 5 per cent in the nominal share capital of a company are generally subject to Dutch individual income tax at a flat rate of 30 per cent calculated over a deemed return of 4 per cent on the average value of such shareholder's total amount of savings and investments.

Individuals performing distribution activities in the Netherlands, either in the form of tax-transparent partnerships or as sole entrepreneurs, are generally subject to income tax at progressive rates, up to a maximum rate of 52 per cent. Dutch individual entrepreneurs may apply a number of beneficial tax facilities.

No taxes are levied upon the set-up of a business in the Netherlands.

Wages paid by a Dutch employer are subject to Dutch wage withholding tax and Dutch social security premiums. Dutch wage withholding tax is creditable against the Dutch individual income tax liability in full. Attractive tax benefits are available for foreign employees if these employees have certain specific skills that are scarce in the Netherlands.

Dutch value added tax (VAT) is currently 21 per cent. Reduced VAT rates of 6 per cent and zero per cent apply in respect of certain supplies, such as the supply of agricultural products. Imports performed by Dutch entrepreneurs generally are subject to Dutch VAT. In principle, the importing entrepreneur may credit or refund the VAT paid on the imported supplies. Exports from the Netherlands are generally exempt from Dutch VAT.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

All of the below distribution structures are available to a supplier in the Netherlands.

Distributors
Distribution agreements are agreements (or relationships) whereby the supplier provides its distributors the right (and also obliges them) to resell and distribute the relevant products or services in its own name and on its own account.

Commercial agents
Commercial agency agreements are agreements (or relationships) whereby the principal charges the commercial agent, which the latter undertakes, for a remuneration, to act as an intermediary in the realisation of contracts and possibly to conclude such contracts in the name and on account of the principal without being subordinate to the latter.

Use of (employed) sales representatives
Employment agreements are agreements whereby the sales representative is working, in general for a monthly salary, according to specific instructions and in the name and on account of the employer.

Franchising
Franchise agreements are agreements (or relationships) whereby the franchisor provides its individual franchisees with the right (and also obliges them) to exploit a business following a business-concept of the franchisor. In the course of the contract's duration, the franchisee has the right and duty to make use of the franchisor's brand name, know-how, the technical and business methods, the method of working and other matters that fall under the industrial and intellectual property of the franchisor. The franchisor hereby supports the franchisee with some continuous commercial and technical support.

Some franchise agreements are lengthy documents with handbooks prescribing in detail how the franchisee should use the franchise formula; other franchise agreements are short and concise. In theory a franchise agreement may also be established based on an oral agreement. In practice, it is common to conclude a franchise agreement in writing.

Right to sell under a private label
A supplier may also provide a third party the right to resell and distribute its products or services under the third parties' private label. Such sales are on the third parties' own account and in their own name.

Trademark licensing
Trademark agreements are agreements whereby the licensor grants the licensee the right (and may also oblige it) to exploit the relevant trademark for certain products or services in a certain territory. The licence can be granted on a pending application or a registered trademark right, and can be limited in time or perpetual, exclusive or not exclusive, limited in scope (for certain use only), for free or for consideration. A trademark licensing agreement can be (very) similar to a franchise agreement.

Joint venture
A supplier may also work closely with a local distributor in the form of a contractual business undertaking (without any partnership or incorporation) as a joint venture or set up a business entity with the local distributor.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Distribution, franchising and trademark licensing
Distribution, franchising and trademark licensing are, from a civil law point of view, not specifically regulated under Dutch laws. Instead, the general laws of contract apply as well as Dutch court decisions. Book 6 DCC sets out the requirements relating to the formation of contracts. These provisions must be read in conjunction with the more general rules regarding juridical acts; that is, acts intended to invoke legal consequences provided in book 3 DCC.

There are no industry-regulatory constraints for distributors or licensees in general. However, franchisors that are members of the NFV are bound by the rules in the European Code of Ethics for Franchising (the Code) drawn up by the European Franchise Federation (www.eff-franchise.com).

There are no specific government agencies that regulate the relationship between a supplier and its distributor, franchisor or licensee.

When dealing with distribution, franchise and licence agreements – and other vertical agreements – competition laws and more particularly, Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the applicability of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices) are applicable. The Authority for Consumers and Markets (ACM, www.acm.nl/en/) ensures compliance in the Netherlands with competition laws (for more detail see questions 39 and 40).

Commercial agency
The relationship between the principal and its agent is governed by section 4 of book 7 DCC (articles 7:428 BW up to and including 7:445 BW and articles 7:401, 402, 403, and 426(2)). There are no specific government agencies that regulate the relationship between a principal and its commercial agent.

Employed sales representatives
The relationship between a supplier and an employed sales representative is governed by section 10 of book 7 DCC (articles 7:610 up to and including 7:691) and several other employee-related legislation such as the Working Hours Act, the Minimum Wages and Holiday Allowance Act, etc. The relationship can furthermore be governed by the conditions laid down in a collective labour agreement.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Distribution agreement
Dutch laws do not restrict or limit the right to terminate a distribution agreement. However, this does not mean that a party can always terminate the agreement and even if it can, it may be obliged to respect a certain notice period or pay compensation or indemnity, or both. A contract with an indefinite term may in principle be terminated for convenience. This is the prevailing opinion, affirmed by the Dutch Supreme Court. However, under certain circumstances a party may have to show cause to terminate the agreement.

In any case, a reasonable notice period must always be observed, the length of which depends on the circumstances of the matter. Although standard practice was that courts granted notice periods of up to six to 12 months, some recent higher court decisions imposed notice periods of two to three years, even when the contract stated a shorter period.

If the contract term expires, and the supplier decides not to renew the distribution relationship, it depends on the provisions in the contract if the minimum notice periods as set out above apply. In case of automatic renewal, the same provisions apply. In case of automatic termination, there is, in principle, no need to observe a minimum termination notice period (unless the supplier has indicated towards the distributor (explicitly or implicitly) that it wants to continue the agreement, also after expiration).

Agency agreement
If the agency agreement does not include a notice period, the required minimum notice periods are:
- four months during the first three years;
- five months during the fourth, fifth and sixth years; and
- six months during the following years.

(Article 7:437(1) DCC.)

In the event the (written) agency agreement does include a notice period, the minimum of such note period is:
- one month during the first year;
- two months in the second year; and
- three months in the following years.

(Article 7:437(2) DCC.)

In the event of a termination of an agency agreement, it should be terminated at the end of a calendar month.

If the contract term expires, and the principal decides not to renew the agency relationship, it depends on the provisions in the contract whether the minimum notice periods as set out above apply. In case of automatic renewal, the same provisions apply. In case of automatic termination, there is, in principle, no need to observe a minimum termination notice period. A goodwill compensation may, however, still be payable by the principal (see question 10).

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Distribution
In the event of termination of a distribution relationship, the supplier may be required to pay an indemnity for investments or costs made by the distributor, in case these investments cannot be earned back due to the termination of the contract and the supplier was aware – or should have been aware – of the investments made. So far, a higher court in the Netherlands has not granted a goodwill compensation to the distributor upon the termination of a distribution agreement.

Commercial agency
In the event of a termination of a commercial agency relationship, the principal may have to compensate its agent for goodwill and investments or costs made, which the agent may lose as a result of the termination.

Article 7:442 DCC contains a mandatory law provision that entitles an agent to a goodwill compensation to the extent the agent acquired new customers or new business from existing customers for the principal, and the principal will still benefit from this after the termination. Such goodwill compensation should be claimed by the agent within one year from the contract's termination and can under Dutch laws not exceed the average of one year's commission calculated over the last five years (or its entire term, if the contract lasted less than five years).

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Yes, under Dutch laws, a contract provision prohibiting the transfer of the distribution rights is enforceable.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality covenants in distribution agreements are enforceable under Dutch law.

Distribution contracts in the Netherlands may include a financial penalty provision that can be invoked in the event of the other party violating the confidentiality clause. The courts shall have the right to mitigate such penalties. This mitigation right cannot be contractually excluded.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Distribution
Following Dutch and European competition rules, it is not allowed to impose any direct or indirect non-competition obligations on the distributor (such as restrictions on the distribution of competing products) if the duration of these obligations exceeds a duration of five years. Non-competition obligations that are tacitly renewable for a period of five years or more are considered to be concluded for an indefinite period and are thus also not allowed.

Non-compete arrangements are arrangements that result in the buyer purchasing from the supplier (or a designated third party) more than 80 per cent of the buyer's total purchases of the contract goods and services. However this five-year limitation does not apply when the goods or services are resold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer.

Following Dutch and European competition laws, it is not always allowed to agree upon non-competition obligations on the distributor after the distribution agreement has been terminated. Such non-compete obligation is only allowed when it is deemed indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period and is limited to a maximum period of one year.

Commercial agent
Following article 7:443 DCC, it is not allowed to impose a non-compete obligation if the duration of such obligation exceeds a duration of two years after the duration of the contract. Furthermore, it can only relate to the goods (or services) and territory that are the subject of the agency agreement. The non-compete provision has to be in writing.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Distributor
A supplier may not control the prices at which its distribution partner resells its products. As in all other EU member states, Commission Regulation 330/2010 and the EC Guidelines thereto provide the relevant framework for the competition law assessment of all vertical agreements with an effect on trade between the member states. This Regulation, inter alia, prohibits resale price maintenance as well as certain restrictions regarding the territory or group of customers that can be served.

Commercial agent
A principal may control the prices at which its sells its products. When the agent promotes the products it can be obliged to adhere to the principal's price list and conditions.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Distributor
A supplier may suggest resale prices, but, as also set out in question 14, he or she may not in any way impose minimum or fixed prices. The distributor should be free to establish the resale prices and may only be held not to exceed a certain maximum price.

Commercial agent
Yes, when dealing with a commercial agent a principal may in general control and influence the prices. In fact, those are not 'resale' prices as the principal contracts with the customers itself, or the agent does this on its behalf and on its account.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Distributor
A supplier may not set minimum resale prices, however, the supplier is allowed to give a distributor or a customer a 'lowest price guarantee'.

Commercial agent
The principal may control the resale prices and is also allowed to offer its customers a 'lowest price guarantee'.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

In principle, no. However, within certain – selective – distribution systems, a supplier should not establish conditions in a 'discriminatory or subjective' manner.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Distributor

Within the Netherlands (and the EU), practices that restrict trade are prohibited. The Commission Regulation on vertical agreements, inter alia, prohibits certain restrictions regarding the territory or group of customers that can be served. A supplier may restrict the geographic areas or categories of customers to which a distributor resells and it may also reserve certain customers to itself. Exclusive territories and exclusive customers are permitted, provided that 'passive sales' may not be restricted, which includes sales via the internet. Passive sales are sales where a distributor responds to unsolicited requests from individual customers about the products. A supplier may, however, prohibit its distributors from actively approaching customers outside its exclusive territory by targeted marketing (eg, by sending direct e-mails, visits, or by advertisements on its website specifically targeted at a group customers outside its territory) (active sales).

Commercial agent

A principal may restrict the geographic areas or categories of customers to which its commercial agent resells.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

To restrict a distributor to sell to a customer outside its (exclusive) territory is in general not allowed as this prohibits 'passive sales' (as set out in question 18). However, within a selective distribution system, a selective distributor can be restricted from selling the products or services outside the selective distribution system. Furthermore, in commercial agency relationships the agent can be obliged to verify the creditworthiness of a customer and the principal may refuse customers to its discretion. Finally, the supplier may not allow the sale to certain customers when this damages its brand or reputation or when the supplier wants to keep certain customers (eg, international companies or department stores) for itself. Whether those restrictions are allowed depends on all factual circumstances of the matter.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

EU Commission Regulation 330/2010 and the EC Guidelines thereto provide the relevant framework for the competition law assessment of all vertical agreements with an effect on trade between the member states. The Regulation, inter alia, prohibits resale price maintenance as well as certain restrictions regarding the territory or group of customers that can be served.

The Regulation, inter alia, prohibits resale price maintenance as well as certain restrictions regarding the territory or group of customers that can be served. It is prohibited to limit 'passive sales' by a distributor or franchisee, which includes sales via the internet. It also restricts the duration of a contract where it contains a non-compete clause. As regards purely domestic distribution agreements, the Regulation equally applies by virtue of article 13a of the Dutch Competition Act (DCA). There are no additional Dutch competition laws relating to distribution agreements.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

If an owner of a trademark has put a product under that trademark on the European market either him or herself or with his or her consent, there is little he or she can do about further commercial exploitation, such as resale, etc, on the European market, unless the parallel import is done in such a manner that it damages the reputation of the trademark, for example because it is an upscale brand being sold at dump prices or under dump conditions.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

See also question 18. A supplier may prohibit its distributors from actively approaching customers outside its exclusive territory by targeted marketing (eg, by sending direct e-mails, visits or by advertisements on its website specifically targeted at a group customers outside its territory) (active sales). A supplier may pass (part of) its cost of advertising on to its distribution partner.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

A supplier may safeguard its intellectual property from infringement (by its distributors and third parties) by monitoring any unauthorised use and by taking the appropriate legal actions, once infringement has been noted. In case of use of a licensee, distributor or agent it is safer to restrict the possible independent legal actions of that party by contract and to preserve all decision-making powers in case of a (possible) infringement. Also, the right to sub-license should be excluded or at least made subject to approval by the trademark owner.

Furthermore, a supplier should ensure that all the relevant IP rights are registered for the relevant territory, keep a record of each (registered) IP right, including ownership and payment of renewal dates, etc, and make sure that all employment contracts deal with IP ownership and vest rights in the company.

Patents

A supplier must ensure that before the application of a patent is filed, employees and all relevant third parties (such as possible licensees) sign a non-disclosure agreement. Patent searches can reduce the likelihood of infringement (consider patent monitoring).

Trademarks

A supplier must ensure the copyright of any logo is assigned to the trademark owner. If the trademark is licensed it is important that the trademark owner maintains a degree of quality control over how the mark is used and on what goods and that the goods bearing the trademark meet the quality standards of the trademark owner.

Copyright

A supplier must ensure there are systems in place to prevent unauthorised use of the copyrighted materials. The copyright sign is not required to obtain any copyright but can certainly can be helpful as a warning towards third parties.

Trade secrets and know-how

All licensees, distributors and agents should sign a confidentiality agreement. Upon termination of each licence, distribution, agency or other agreement, all relevant confidential information and documents should be returned to the company or destroyed. All information that is confidential should be marked as such.

24 What consumer protection laws are relevant to a supplier or distributor?

Following the European Directive on Consumer Rights (2011/83/EC), the consumer protection laws have recently been reinforced in the Netherlands (as implemented in the DCC (books 6 and 7) and in the Consumer Protection Enforcement Act. Many of the (new) provisions are relevant for both a supplier and a distributor. Among others, there is a 'cool-off period' for consumers and the information obligations have been reinforced and extended. These obligations apply to sales in a shop, in an online store and outside (eg, on the street).

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Following EU Regulation 178/2002/EC, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, all (possible) unsafe food products must be recalled within a very short period of time after detection. Both the supplier and the distributor are responsible for carrying out such recall. Such responsibility cannot be designated to a particular party. However, as professional parties, they can agree with each other who bears what costs in connection with the recall.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Following article 6:187 DCC, the producer of a product cannot exclude or limit its liability for its products towards end customers or natural persons. A party that imports goods into the EU is also considered a 'producer'. However, as professional parties, the supplier and the distributor can agree between themselves who will ultimately bear the costs of a product liability claim. Any such arrangement will not have an effect towards the end customer or natural person as product liability provisions in the DCC are mandatory laws one cannot exclude or limit.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

In case of a distribution relationship, the distributor will generally be the owner of such information. The information cannot just be exchanged with the supplier, unless for example the exchange of specific information is necessary for the handling of an order. The Dutch Data Protection Act is applicable.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Yes, it is possible to arrange this in the contract.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

In principle, distributors or agents are deemed independent entrepreneurs. Hence, no labour and employment considerations apply. However, they may qualify as 'employees' on the basis that the relationship between the distributor or agent and the supplier does not correspond with the agreement as it is in fact an employment relationship. If the agreement is considered an employment agreement, the distributor or agent is, inter alia, entitled to minimum wage, holiday allowance and payment during illness. Also, laws regarding termination of the employment agreement, including payment of severance, apply. According to tax law, the supplier is required to withhold income tax and social security benefits where the tax authorities deem the relationship between parties a (fictitious) employment relationship. Each agreement is considered on its own merits. The name and wording of the contract between the parties is not decisive. The courts look at the intention of the parties when entering into the agreement, as well as the way in which the parties have given substance to their relationship. If it is established that the distributor or agent is obliged to perform the agreed duties in person, the supplier pays the distributor or agent, directly or indirectly, for these duties and a relationship of authority can be established which manifests itself in the right of the supplier to give specific instructions which the distributor or agent must follow, an employment relationship can be assumed. The following criteria prove to be important: equivalence of the contracting parties, the ability of the distributor or agent to let someone else perform the duties (eg, third parties or employees of the supplier), the distributor or agent bearing the business risk and economic independence of the distributor or agent.

As long as the distributor or agent truly acts as a distributor or agent, pursuant not only to the contract but also to its day-to-day activities, no employment relationship should be deemed to exist. Particularly if the distributor or agent is contracted via his or her Dutch limited liability company, the risk of an employment relationship is limited, at least from a civil law perspective. The tax authorities have a different view on this. However, to minimise the risk from a tax law perspective, the supplier could ask the distributor or agent to submit a declaration of independent contractor status, which the distributor or agent can obtain through the Dutch tax authorities. If a distributor or agent can produce such a declaration, the tax authorities will in principle not assume a (fictitious) employment relationship.

30 Is the payment of commission to a commercial agent regulated?

Yes, this has been regulated in the DCC. An agent is entitled to commission for orders confirmed by the principal after termination of the contract, where the conclusion of that agreement was mainly attributable to the efforts of the agent and such confirmation took place within a reasonable period of time after termination (article 7:431(2) DCC). A provision that makes payment of commission dependent on the execution of the order (and payment by the customer) must be made explicitly (article 7:432(2) DCC).

31 What good faith and fair dealing requirements apply to distribution relationships?

There is a general legal obligation on parties to deal with each other in good faith. Under Dutch laws, general civil law is governed by the principle of reasonableness and fairness. The principle of reasonableness and fairness may not only supplement the existing contract and relationship (based on article 6:248(1) DCC), but may also derogate from the contract that the parties agreed upon at an earlier stage, in the event such provision is, in the given circumstances according to the principle of reasonableness and fairness unacceptable (based on article 6:248(2) DCC). The standard to derogate from an agreed provision, is high. This said, especially a (very) large supplier should be aware that a provision in an existing contract that is very one-sided (eg, a provision that the distribution relationship may be terminated by the supplier at any given moment, respecting a notice term of only 30 days), especially when dealing with a (very) small distributor could be set aside by the principle of reasonableness and fairness, if such provision is unacceptable in the given circumstances. It is not possible to predict what kind of provisions may be set aside, if any, since the court will consider all relevant circumstances, including the economic power of each party, the dependency of the parties from each other, the duration of the contract, the investments made by either party, what each party could reasonably expect from the other party and all other relevant circumstances. As a general rule, Dutch courts have a tendency towards protecting a 'weaker' (smaller) party at the expense of an economically stronger (larger) party.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

There are no particular requirements for distribution agreements or intellectual property licences. Both agreements can even be granted orally, although a written agreement is always preferable for evidentiary purposes. Trademark licences can only be invoked against a third party after registration with the relevant register (holding the registration of the licensed intellectual property right). This is not the case for a distribution agreement.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Distributor

There are no other specific restrictions on provisions in distribution contracts or limitations on their enforceability. However, the principles of reasonableness and fairness play an important role in Dutch contract law. See also question 31.

Commercial agent
All mandatory law restrictions on provisions in agency contracts are contained in articles 7:428 up to and including 7:445 DCC and 7:401, 402, 403 and 426(2), including the following obligations: the principal must assist the commercial agent to perform its activities, provide the agent with the necessary information, give a warning where it foresees that a forecast changes and inform the agent in a timely manner where it will not conclude an agreement as provided by that agent (7:430 DCC).

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Distributor
There are no restrictions on the parties' contractual choice of a country's law to govern a distribution contract.

Commercial agent
There are no restrictions on the parties' contractual choice of a country's law to govern a commercial agency contract. Nevertheless, a mandatory rule of law contained in article 7:442 DCC (based on articles 17 and 18 of European Directive 86/653/EEC) entitles the commercial agent to a goodwill compensation, if the commercial agent performed its activities in the Netherlands (or any other European member state). It is not possible to exclude this goodwill compensation by a contractual choice of law of a different country.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

There are no restrictions on the parties' contractual choice of courts or arbitration tribunals.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

In cases where there is no valid arbitration provision, disputes can be resolved before a civil judge. The sub-district court is competent in smaller claims (under the amount of €25,000) and for particular issues, such as employment and rent-related disputes. Larger claims may be brought before the civil judge of the district court.

In cases where the contract contains a valid arbitration provision, or parties agree upon arbitration after the dispute has started, disputes can be resolved before an arbitrator. The choice for arbitration has to be made in writing. The Netherlands Arbitration Institute (NAI, www.nai-nl.org/en/) is well regarded and is in general less expensive than the more internationally well-known ICC arbitration.

Foreign businesses are not restricted in their ability to make use of these courts and procedures and can expect fair treatment. In principle, there is no difference in the treatment of foreign and domestic business. A disadvantage for a foreign business, however, can be that Dutch court proceedings will be conducted in the Dutch language.

Dutch laws do not provide a general obligation to allow the other party access to all relevant documents it has in its possession as a preparation for proceedings. Following article 843a of the Dutch Code of Civil Procedure Rules, there is only an obligation to disclose documents if the three cumulative conditions set out in this article are met: a party must prove that (i) it has a legitimate interest in disclosure; (ii) the request is made for 'certain documents'; and (iii) the documents requested relate to a legal relationship to which the requesting party is a party. A litigant can also try to get a testimony from an adverse party. Witness examinations are held on the basis of a court order. This will usually be in the form of an interim judgment. A party to the conflict who is called as a witness is obliged to appear in court and to give testimony. Persons who could criminally implicate themselves by their testimony have the right to refuse to give evidence.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Yes, a written agreement to mediate or arbitrate disputes will generally be enforced in the Netherlands and a Dutch court will declare itself incompetent in such event. That said, on 3 June 2014, the High Court of Amsterdam declared itself competent in a matter where Subway (an international restaurant chain) and its Dutch franchisee had signed an agreement in which the parties had chosen to deal with the dispute through arbitration in New York. The High Court ruled that such choice of law clause, under applicable Liechtenstein laws, was too burdensome on the side of the franchisee, especially now the franchisee is economically a much smaller party.

Update and trends

There is ongoing discussion in the Netherlands between scholars and lawyers about whether there should be legislation protecting the franchisee (and distributor) as a generally weaker party than the supplier or franchisor. So far, however, this is only being discussed and no formal steps have been taken.

de grave de mönnink spliet advocaten

Tessa de Mönnink **demonnink@gmsadvocaten.nl**

Jan van Goyenkade 9
1075 HP Amsterdam
Netherlands

Tel: +31 20 820 33 50
Fax: +31 20 820 33 59
www.gmsadvocaten.nl

The principal advantages of arbitration are:

- arbitration offers a choice regarding the language of proceedings – the regular courts in the Netherlands only accept the Dutch language;
- it offers the possibility of agreeing on the country and area in which the proceedings will be conducted;
- it offers the possibility of choosing the number of arbitrators and the time limitations;
- it is, generally speaking, concluded more quickly than regular court procedures;
- it may be dealt with by appointed experts instead of or in addition to lawyers; and
- parties can agree to observe secrecy in arbitration. Regular court proceedings are public.

The principal disadvantages of arbitration are:

- in general, it is much more expensive than regular court proceedings;
- regular court proceedings offer the possibility of appeal; and
- the quality of arbitration may not always be secured, depending on the actual arbitration forum, although NAI and ICC arbitration in general should be of good quality.

Puerto Rico

Edgardo Cartagena, Antonio Bauzá and Gladys Fontánez

Morell Bauzá Cartagena & Dapena, LLC

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign supplier can establish its own entity in Puerto Rico to import and distribute its products as long as it has not previously granted rights to local distributors that are inconsistent with the establishment of the supplier's own entity.

For example, the Puerto Rico Dealers' Contracts Act (Law No. 75 of 24 June 1964), 10 PR Laws Ann section 278 et seq (Law 75) regulates the relationship between a supplier and its distributor, and establishes a rebuttable presumption of impairment in cases when the supplier establishes facilities in Puerto Rico for the direct distribution of merchandise, the distribution of which was previously granted to the distributor. This is particularly applicable to situations where the distributor has exclusive distribution rights.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Law 75 does not prevent or limit a foreign supplier from acquiring partial ownership in a local company that is the importer of its products. Depending on the amount of equity and control acquired by the supplier in the local company, however, practical and legal issues regarding governance of the entity, its operations and the distribution relationship between the local company and the supplier may have to be considered in light of Law 75.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Various forms of business entities are available, but the forms most used are corporations and limited liability companies (LLCs).

Puerto Rican corporations and LLCs are formed by filing articles of incorporation or organisation with the Department of State. The entity must maintain at all times a local office and a resident agent for service of process.

Foreign corporations and foreign LLCs may also be registered by filing an authorisation to do business with the Department of State.

Registrations are made online and they require a $150 government filing fee for corporations and $250 for LLCs. To maintain their registrations, corporations must file corporate annual reports along with a $150 filing fee. These reports must include a balance sheet. LLCs only have to file a $150 annual filing fee; no report is required. These fees change from time to time.

Corporations and LLCs are governed by the Puerto Rico General Corporations Act of 2009 (Act No. 164 of 16 December 2009), which has been drafted to mirror Delaware's statutes.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

There are no specific restrictions as to foreign investment and foreign ownership of domestic entities. Generally, foreign businesses are subject to the same requirements as Puerto Rican entities. Since federal laws extend to Puerto Rico, federal controls on foreign investments are applicable. In cases involving foreign (non-US) individuals doing business and residing in Puerto Rico, immigration laws will apply.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

See question 2.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Although Puerto Rico is a territory of the United States, under federal rules it is considered a foreign country. As such, Puerto Rico has autonomy to impose taxation on individuals and entities.

Federal taxation applies only in certain specific situations. The income tax system has been modelled on the Federal Internal Revenue Code. Income taxes on individuals and corporations have been the principal taxation in Puerto Rico. In 2006 the government approved sales tax legislation. The government is also in the process of approving a major tax reform. Under the new legislation we can expect that the income taxation will be modified by a value added tax (income taxation will still be applicable but reduced significantly).

Individual residents of Puerto Rico and domestic corporations are subject to Puerto Rican income taxation on their worldwide income (foreign tax credits are allowed to avoid double taxation of the same income). The income taxation is determined on the net taxable income of the individual or the corporation.

The net taxable income is subject to income taxes based on progressive tax tables. In the case of individuals the rate ranges from 5 per cent to 33 per cent. In the case of corporations the rate ranges from 5 per cent to 39 per cent.

Non-resident individuals and foreign corporations not engaged in business in Puerto Rico are subject to taxation only on income generated from Puerto Rican sources. Puerto Rican income taxation is imposed through withholding taxes that are reduced from payments made to non-resident individuals and non-resident foreign corporations. The withholding tax rates range from 10 to 29 per cent. The person making the payment is required to make the withholding and send it to the local authorities.

Foreign corporations that have a presence in Puerto Rico are considered as resident corporations and are subject to income taxation on the income from Puerto Rican sources and certain categories of foreign source income that are connected to its Puerto Rican business.

Personal and real property tax is computed at the applicable tax rates of the municipality where the property is located. A municipal licence tax is imposed on the gross volume of business transacted in each municipality in Puerto Rico. A 7 per cent sales and use tax is imposed on certain taxable items at the point of sale. An excise tax is imposed on certain articles when they are imported into, sold, consumed, used, transferred or acquired in Puerto Rico.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The distribution structures available to a supplier doing business in Puerto Rico include direct distribution by the supplier or an affiliate, independent distribution, sales representatives, franchising, brokers, private labelling, trademark licensing and joint ventures. The choice of the structure will depend on the nature of the supplier's business and the manner in

which it wishes to develop, operate and control its business in the Puerto Rican market. In addition, the determination of which law will apply to the distribution structure may influence which structure is used. For example, distribution and franchise relationships may be covered by Law 75, while sales representatives and maybe even some brokers and agents could be covered by the Sales Representative Act (Law No. 21 of 5 December 1990), 10 PR Laws Ann section 279 et seq (Law 21). Law 21 protects sales representatives in a manner similar to the protection extended to distributors under Law 75.

Both Law 75 and Law 21 are highly protectionist statutes that therefore require careful analysis, on a case-by-case basis, prior to setting up distributor or sales representative relationships.

There is no specific statute in Puerto Rico governing or regulating the creation of, operation or investment in franchises as such, and those aspects of doing business with franchises would generally be subject to US laws and covered by the FTC rule, because Puerto Rico is part of the United States. The relationship between a franchisor and its franchisees, of course, has many of the characteristics of a plain, non-franchise labelled distribution relationship and as such may be covered under Law 75. Moreover, Law 75 specifically lists distribution by franchise as covered by the statute.

Other distribution structures, such as those with brokers, independent label sellers, joint ventures with the distributor or sales representatives and contracts for logistics and warehousing services may or may not be covered by the two main statutes depending on the nature and specifics of the relationship, and have to be analysed case by case.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Law 75 regulates the relationship between a supplier and its distributor that is actively promoting the supplier's product in Puerto Rico. Law 21 regulates the relationship between the supplier's agent acting as a sales representative and the supplier. Both of these laws regulate relationships within the chain of sale or distribution. Any matter not specifically covered by the specialised statutes will be supplemented by the Puerto Rico Commerce Code (10 LPRA section 1001 et seq) and the Puerto Rico Civil Code (31 LPRA section 1 et seq).

There is no government agency entrusted with particularly enforcing these two statutes. Judicial enforcement is the most common method of invoking the rights afforded by these two specialised laws. Arbitration is another common method for resolution of disputes arising under the two statutes or under more general principles of law covering the distribution or sales representation relationship.

Both distributors and sales representatives are bound by regulations under the Department of Consumer Affairs (DACO), which regulates truth in advertising, promotional campaigns and contests, and related matters. While this agency and its regulations may not typically govern the formation, existence or termination of the relationship, they do frequently affect how distribution and sales representation is done and therefore 'regulate the relationship' to a certain extent.

There are no formal self-regulatory constraints that would officially affect the distribution or sales representation relationship.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Even if allowed by contract, Law 75 and Law 21 prohibit either the termination of a distribution relationship during its contracted term or the refusal to renew it at expiration, unless there is 'just cause' or the distributor or sales agent is compensated for the termination or refusal to renew, assuming it is entitled to compensation.

Under either Law 75 or Law 21, there is no specific list of acts or events that constitute 'statutory just cause' allowing termination of a distribution or sales representative contract. Both laws, however, define the concept in general form, as follows: (i) the breach by the distributor or sales representative of its essential obligations under the distribution or sales representation agreement, or (ii) any act or omission of the distributor or sales representative that adversely and substantially affects the interests of the principal or grantor (supplier) in the development of the market or the sale of merchandise or services.

Case law has identified examples of situations that will more likely than not meet the general just cause criteria of the statute, such as the distributor's failure to pay for the merchandise purchased from the supplier, the distributor's own failure to renew, and the supplier's withdrawal from the market under certain circumstances. However, identifying in advance what may be considered just cause by a court, jury or arbitrator remains a challenge that will largely depend on the facts of each situation.

In addition, these statutes protect the distributor or sales agent by subjecting the enforcement of typical 'just cause' contractual provisions to a higher standard. For example, under Law 75, the breach of clauses preventing or restricting changes in the capital structure, or in the managerial control of the business, will not automatically constitute just cause justifying termination, unless the supplier shows that such breach may affect, or has truly and effectively affected, the interests of the supplier in the development of the market, distribution of the merchandise or rendering of services in an adverse or substantial manner. Other restrictions exist.

Suppliers should also keep in mind that Law 75 and Law 21 both protect not only against termination without just cause but also against what the laws describe as 'impairment' of the relationship. A classic example of impairment would be sales by a supplier to a distributor, contrary to an agreement of exclusivity with another, who would then argue its rights are being impaired by the sales to the third party.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Law 75 provides general guidance for the compensation of damages in the event of termination without cause. Law 21 has a similar set of guidelines for compensation of sales representatives that are terminated without just cause, but it also has an alternative compensation section that allows, at the request of the sales representative, an alternate compensation calculation: an amount which shall not be greater than 5 per cent of the total sales volume for the years of representation. The court has the discretion of modifying the compensation to ensure it does not constitute an unfair enrichment at the expense of the supplier. In establishing the amount of the alternate compensation, the court shall mainly take into account the compensation received by the sales representative from the supplier and the number of years and sales volume that the sales representative produced during said relationship.

The final determination of damages and entitlement to compensation, however, will ultimately have to be reached by a judge, jury or arbitrator after pondering whether actual damages have been suffered by the distributor or sales representative. The distributor or sales representative will have the burden of proving its damages.

Under Law 75, a court may allow attorneys' fees and a reasonable reimbursement of expert fees to the prevailing party. Law 21, however, has no such provision.

Suppliers should also be aware that, in litigation under both statutes, a distributor or sales representative has a right to request, in addition to damages, a 'provisional remedy' to preserve the status quo of the relationship pending resolution of the litigation. The request is similar to one for injunctive relief and the courts tend to apply similar tests, but the dealer is typically not required to meet the high burden of an ordinary injunction. The court or other decision-maker, however, needs to take into consideration the interests of both parties in ruling on the injunction.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Please see question 9. The violation or non-performance by a distributor of a provision in a contract preventing or restricting the transfer of the distribution rights, all or part of the ownership of the distributor or agent or the distributor's or agent's business to a third party will not be held valid as just cause for termination of a distribution agreement unless the supplier shows that such non-performance may affect or has truly and effectively affected the interest of the supplier in a substantial manner in the development of the market, distribution of the merchandise or rendering of the service. The supplier bears the burden of proof.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality provisions in distribution agreements will be enforced in Puerto Rico under our general contracts law in our Civil Code. They will be considered valid unless they are contrary to law, public order or morals. To date, there is no law that has prohibited or limited these confidentiality clauses in distribution agreements.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Clauses that restrict the distribution of competing products during the term of the relationship are enforceable in distribution agreements. After the relationship concludes, such competition restrictions will be enforceable if the court determines that they are reasonably necessary to protect the legitimate interests of the supplier. Such determination will be made on a case-by-case basis. Courts have found that a non-competition clause that survived the termination or expiration of a franchise agreement for two years was enforceable. *Franquicias Martín's BBQ, Inc v Luis García de Gracia*, 178 DPR 978 (2010).

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Federal antitrust law applies in Puerco Rico. Puerto Rico has its own competition statutes that generally mirror those in the United States both in language and interpretation.

In general terms, and under existing US Supreme Court law, a supplier should be able to impose the vertical restraints of maximum resale price maintenance (RPM) and minimum RPM.

Federal and local enforcement of either of the forms of RPM is not pervasive in Puerto Rico, unless part of a nationwide US effort that tends to be of high public profile. Therefore, in very general terms, the larger the companies and the more widespread their reach around the world, the higher the possibility that institutional or governmental involvement may occur to scrutinise the pricing structure or mechanisms of the parties.

In practice, suppliers typically try to exert some control over prices by using suggested minimum resale pricing but not forcing the distributor to meet the pricing by refusing to deal or terminating the contract. Indeed, doing so may also subject the supplier to claims under Law 75 or 21, under allegations of undue impairment of the established relationship.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Please see question 14. If a supplier wishes to implement the use of a minimum advertised price policy, it is preferable that the policy be in place beforehand so that if the dealer is not in agreement, the supplier may determine not to deal with the dealer or negotiate the matter. Once the policy is agreed with the dealer, the situation may be more difficult to navigate. Also, it is the view of many that if a minimum RPM is to be established, it should be the supplier doing so as opposed to the distributor.

The use of other mechanisms of vertical restraint that are not so heavily scrutinised may also achieve the intended pro-competitive purposes with lesser legal exposure risk.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Please see, generally, questions 14 and 15. As to this general question, a distribution contract may specify that the price to a distributor will be equal to those of other distributors, but such a provision should also be included and complied with in contracts with the other distributors, to avoid potential price discrimination exposure.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Please see, generally, questions 14 to 16. This question seems to contemplate sales at different distribution levels.

In general, prices should be the same at the same level, but vertical price restraints are permissible on a case-by-case basis, as much depends on the situation of each circumstance. Volume discounts, for example, are common, but they should be made available to all customers on the same level of distribution, unless other factors justify a difference (eg, additional services rendered by one customer versus the others).

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Please see, generally, questions 14 to 17. All of the vertical restrictions mentioned in the question are generally allowed and ideally should be specified in writing at the time of contracting.

A supplier may restrict the geographic areas or categories to which its distribution partner resells, although in smaller countries enforcement of geographic limits tends to be difficult. The supplier, however, also has the contractual ability to limit the specific market sectors or outlet location areas where the distributor may sell its products. The supplier may also limit within such authorised locations the categories of products to be sold or even the specific products within those categories.

A supplier may reserve certain customers to itself, but it is recommended that the distribution agreement specifically identify such reserved clients and specify the right to modify the list of reserved clients.

Unless specified by contract, we know of no restrictions related to active as opposed to passive sales efforts.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

A supplier can adopt its own sales policy in Puerto Rico and as such deal only with the distributors it chooses. A supplier may also, as discussed above, contractually restrict to some extent a distributor's right to deal with certain customers. There are of course other laws beyond the scope of this chapter that could prohibit a seller from discriminating against customers for reasons such as age, gender and national origin, for example. Other laws prohibit sales of certain products to sectors of the population (such as minors) owing to the nature of the products.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Distribution relationships in Puerto Rico are governed by US antitrust laws. Some of these laws have counterpart local statutes, such as the Puerto Rico Antitrust Act 10 PR Laws Ann section 257 et seq and the regulations promulgated by DACO that relate to unfair or deceptive practices. The Puerto Rico Department of Justice, through its Office of Monopolistic Affairs, is in charge of enforcing local antitrust policies.

These laws and agencies may affect the distribution relationship depending on the circumstances. Price discrimination issues, for example, would be covered by the Robinson Patman Act.

Private parties may bring actions under the Puerto Rico Antitrust Act. A plaintiff may recover three times the amount of damages in addition to costs and attorneys' fees. Actions must be filed within four years of the occurrence of the cause of action.

An injunction may also be filed to prevent losses or damages to the business or property.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Generally, distributors or agents may not be able to detain shipments of diverted products. A supplier, by itself or with the assistance of the distributor, may be able to use technology available to keep track of diverted products that are shipped into Puerto Rico and then attempt to stop the product at its source, a task not often easily accomplished.

The supplier and distributor should clarify in their contracts their respective obligations as to both incoming and outgoing diverted products.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

Advertisement restrictions are imposed by DACO. This agency regulates and inspects periodically on the form of the advertisement and the offer of products to remain vigilant to deceptive and false advertising.

There are no restrictions on a supplier passing all or part of its cost of advertising on to its distribution partners or sharing its cost of advertising. Actually, a distributor's share in the cost of advertising increases the opportunity that Law 75 will apply to its relationship with the supplier.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Intellectual property protection in Puerto Rico is similar to that in the United States. Protection exists under both local and federal statutes.

In terms of trademarks and service marks, the basic manner of establishing rights to a mark is the actual use of the mark. Registration of the mark is not required to establish ownership, but it is recommended because it establishes proof of ownership. If the mark will be used in Puerto Rico as well as other places in the United States, registration at the local and federal level is recommended.

In addition to the benefit of protection under US copyright laws, Puerto Rico also has copyright legislation protecting moral rights of the author of a work. The law establishes that registration is not necessary to protect an author's moral rights over its work but, as with trademarks, registration constitutes prima facie evidence of the validity of the moral rights of the author.

Trade secrets are also protected under local law and their owner may seek damages for violation of any dissemination of such secrets. Patents are applied for before the US Patent Office and are protected by US patent laws.

The supplier may file an infringement claim before the courts to enforce its rights to its intellectual property.

Technology-transfer agreements are not as abundant as other types of distribution, assignment or licensing agreements but certainly take place within the Puerto Rican market, with increasing frequency.

24 What consumer protection laws are relevant to a supplier or distributor?

Consumers are protected by regulations promulgated by DACO. The Regulation against Deceptive Practices and Advertisements protects consumers against practices and advertisements that create a false or misleading appearance on goods and services offered to consumers. The regulation also establishes consumer rights in connection with 'rain checks', rebates, warranties and requests for personal information. Suppliers and distributors that wish to conduct sweepstakes or other promotional contests or campaigns as a way of endorsing or supporting the sale of their products will be subject to the Regulation on Sweepstakes, which requires specific information to be disclosed to the consumer and procedures for the execution of the sweepstake.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

There is no specific local legislation for the recall of products but consumer rights will be protected under the general DACO regulations and policies. The distribution agreement may delineate the party responsible for carrying out and absorbing the cost of the recall.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

The extent of the limitation will depend on the nature of the product sold. For example, under the Motor Vehicle Warranty Act, PR Laws Ann Title 10, sections 2051 to 2065 and DACO's Motor Vehicle Warranty Regulations, every manufacturer must extend the factory warranty to every new motor vehicle registered in Puerto Rico, regardless of where and from whom the consumer acquired it. The warranty to be extended and honoured in Puerto Rico must not be inferior in its terms and conditions to the warranty extended by the maker or manufacturer in benefit of the consumer on the US mainland or in the country the motor vehicle was manufactured.

Once a supplier extends a warranty over its product, the distributor must comply with the requirements imposed by the Regulation against Deceptive Practices and Advertisements in connection with the advertisement of such warranties to the consumer.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The federal rules and regulation that protect consumer privacy and consumer personal information, such as those provided by the Federal Trade Commission, apply in Puerto Rico. See, eg, 16 CFR section 313.1 to 313.18. In addition, under the Regulation against Deceptive Practices and Advertisements, a distributor cannot obtain personal information of any consumer unless such information is voluntarily provided by the consumer and the consumer is advised as to the use that will be given to such information. The information provided by the consumer on a voluntary basis may not be used to promote offers through telemarketing, unless the consumer has expressly consented in writing to such use. The distributor must take the necessary measures to protect the privacy, confidentiality and integrity of the personal information provided by the consumer.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Suppliers and distributors are generally required to be independent from each other for Law 75 or 21 to apply, but a distribution agreement may require a distributor to maintain a certain type of management structure. However, under Law 75 a supplier will not have just cause to terminate the distribution relationship due to a change in the distributor's management unless the distribution agreement provided specifically for that possibility and the supplier can show that the breach will substantially and adversely affect (or has affected) the distributor's interests in the development of the market, the distribution of the merchandise or rendering of the services in question. The supplier will bear the burden of proof to show such injury.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

The interaction between the supplier and its distributor as a whole will be analysed to determine whether an employee relationship exists. Various factors will be taken into consideration to determine the existence of an employee relationship.

The determining factor is that of control retention. An employment relationship exists where the principal or supplier has the right to control the contractor's or distributor's work not only as to the end result, but also as to the manner and means by which the result is accomplished.

The risk of having a distributor as an employee of the supplier is that the supplier will be exposed to Puerto Rican and US labour and employment legislation.

A supplier can take various measures to avoid creating employee relationships with its distributors, among which are the following:

- the distributor should be free to engage in other enterprises or economic activities;
- the distributor should determine his or her own schedule of work;
- the supplier should not require specific days or hours of service;

- the supplier should not supervise the manner in which the distributor renders its services; and
- the supplier may only pass judgement on end results to determine whether the service relationship is beneficial to the supplier.

30 Is the payment of commission to a commercial agent regulated?

No, but general tax withholding obligations will apply to such payments.

31 What good faith and fair dealing requirements apply to distribution relationships?

Good faith and fair dealing requirements apply to all contractual relations, including the negotiation, performance and termination of distribution relationships.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

In addition to the restrictions set forth under Law 75 already discussed, Law 75 provides that the rights granted under such statute cannot be waived. See restrictions on choice of law and forum selection clauses in questions 34, 35 and 37.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Distribution and sales representation contracts must be interpreted pursuant to and governed by the laws of Puerto Rico, and any other stipulation to the contrary will be void. The use of arbitration agreements to settle disputes may affect this provision, particularly when the arbitrator is given broad powers and depending on how the arbitration clause is negotiated and drafted.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Although Law 75 originally prohibited arbitration outside Puerto Rico, that prohibition is no longer valid. Forum selection clauses, on the other hand, requiring the parties to litigate in Puerto Rican courts, have been enforced on some occasions but not on others. The issue remains an open question to be decided on a case-by-case basis where Law 75 is concerned.

Update and trends

There are no proposals for new legislation or regulation that affects the distribution relationship and no amendments to Law 75 and Law 21 are being considered. No current developments are worth mentioning except for matters that are more of a commercial rather than legal nature.

Under Law 21, however, the courts are more likely to uphold forum selection clauses and arbitration outside Puerto Rico is similarly not prohibited.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Puerto Rico has its own judicial system consisting of a Court of First Instance, appellate courts and the Supreme Court of Puerto Rico. Parties may also have access to the US District Court for the District of Puerto Rico, a federal court sitting in Puerto Rico with the same powers and jurisdiction as similar courts in the United States.

Both suppliers and distributors have equal access to either of these courts, with the main restriction being the existence of federal jurisdiction for litigation in federal court. This requisite will generally be met in the case of foreign suppliers. Foreign suppliers will also need to post a non-resident bond in local Puerto Rican courts to secure payment of costs or attorneys' fees. Such bond is not required by rule in federal courts. Either court must, of course, also have personal jurisdiction over the parties in the litigation.

Both court systems may provide relief in law and equity, such as the provisional remedy discussed in question 10.

Foreign suppliers can expect fair treatment in either court system. Under both systems, litigants may require disclosure of documents or testimony before trial. An important difference between the two systems is that a jury is not available in civil or commercial disputes brought in local Puerto Rican courts whereas jury trial is available for those types of disputes in federal court.

There are no particular advantages or disadvantages to a foreign business resolving disputes in Puerto Rican courts, except for those that any party would encounter or perceive when litigating in a foreign country, such as the costs and burden of attending proceedings away from home and under perhaps quite different procedural rules, hiring and working with local counsel and dealing with the generally perceived notion that a local court might favour the local party due to some type of national or

MORELL BAUZÁ CARTAGENA & DAPENA

Edgardo Cartagena **edgardo.cartagena@mbcdlaw.com**
Antonio Bauzá **antonio.bauza@mbcdlaw.com**
Gladys Fontánez **gladys.fontanez@mbcdlaw.com**

Plaza 273, Suite 700
273 Ponce de Léon Ave
San Juan 00917
Puerto Rico

Tel: +1 787 723 1233
Fax: +1 787 282 3672
www.mbcdlaw.com

territorial prejudice or protectionism. Both of the systems in Puerto Rico, however, are predicated on tenets of due process of law like those underlying dispensation of justice in the United States and other countries.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

An agreement to arbitrate disputes will likely be enforced in Puerto Rico. If the dispute is brought under Law 75, however, before the dispute is submitted to arbitration any of the parties must request that a court with jurisdiction in Puerto Rico determine that said clause or arbitration agreement was subscribed freely and voluntarily. Law 75 also creates a rebuttable presumption that any arbitration agreement or clause in a distribution agreement was included or subscribed at the request of the supplier and is an adhesion contract.

There are no limitations (such as on the arbitration tribunal, the location of the arbitration or the language of the arbitration) on the terms of an agreement to arbitrate.

The main advantage of arbitration for a foreign entity is the opportunity to reach an agreement with the local distributor or representative to resolve a dispute outside Puerto Rico and under a law other than Puerto Rican. It is always possible, however, that a court or arbitrator may end up deciding to apply Puerto Rican law regardless of the agreement of the parties. The choice of forum for the arbitration, however, is most likely to be enforced by either courts or arbitration tribunals.

Spain

Ignacio Alonso
Even Abogados

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. Generally foreign persons are authorised to establish their own entities to import and distribute their products in Spain and they are treated as nationals. Nevertheless, some restrictions could be applicable in the sectors mentioned in question 4.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes. There are generally no restrictions on foreign suppliers being partial owners. Some restrictions may be applicable in certain sectors, however, as discussed in question 4.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

An importer can perform its activity through the following types of capital companies:

- joint-stock company (SA);
- European joint-stock company (SE);
- limited liability company (SRL);
- new limited liability company (SLNE); and
- limited partnership by shares (SCom.pA).

Less frequently, a subsidiary of a foreign entity or partnership can be used as a form of business entity.

The company's incorporation requires the signature of a public deed (including the by-laws) by the founding partners before a notary public. The deed must be registered at the Commercial Register.

The following documents must be obtained, prepared and presented in order to execute the public deed of incorporation:

- a certificate (issued by the Central Commercial Register) stating the availability of the company name;
- identification documents, which must be presented to the notary by the shareholders. If the shareholders are represented, their representative must also show a notarised power of attorney;
- the by-laws have to contain certain minimum information. For example, the company's name, the corporation's purpose, address, share capital and its distribution in shares or parts, etc; and
- the company must have a minimum share capital (in money, goods or rights). For an SA, the amount is €60,000 (although it could be only 25 per cent disbursed at incorporation); for an SRL, it is €3,000. It is also possible for an SRL to have less than the mentioned minimum capital: in these cases some rules on reserves, distribution of dividends, and payments to shareholders and administrators will apply. These funds must be deposited in a bank account (if the capital is paid up in cash) directly by the shareholders or (less frequently) by the notary. In the first case, the bank issues a certificate of deposit that must also be shown to the notary public. In the case of capital paid in goods or rights, it will be necessary to identify them and their economic value and, in case of an SA, to provide an expert's report on their value.

The incorporation also needs to decide the way the company will be managed and to appoint at least one director (it is also possible to nominate several or even a board of directors). Each director shall accept the nomination and provide his or her personal data. This person shall also obtain a personal tax identification number. A different company can also be appointed as director (or as a member of a board of directors). In this case an individual shall also be appointed as its representative. No restrictions are foreseen concerning the nationality of the appointed directors.

The company must apply for a tax identification number before the Spanish Tax Administration (as well as its shareholders and directors if they do not already have one). No tax has to be paid for the incorporation.

This procedure could be eased under certain circumstances only for SRLs (and not possible if the shareholder is a foreign entity) by adopting standardised by-laws and following the Electronic Sole Document or through the Entrepreneurial Attention Points.

The company is able to start operating upon its registration with the Commercial Register, although some preliminary transactions can be carried out beforehand. Companies also need to legalise their books, to issue a tax declaration for the beginning of their activity and to be duly registered before the Social Security Administration.

The maintenance of a company mainly requires the directors' annual preparation of the annual accounts, and the annual shareholders' meeting (by which the annual accounts and the directors' activity are approved). If the company reaches some specific requisites, auditors are appointed. Annual accounts must be filed with the Commercial Register.

The law governing the formation of business entities is Royal Legislative Decree 1/2010 of 2 July (in force as of 1 September 2010, last amendment by Act 31/2014 of 3 December), which lays down the standards governing capital companies. The Commercial Register Regulation (RRM) is also applicable to such companies' incorporation and functioning.

The formation of a business entity is governed by the Central Commercial Register and the Provincial Commercial Registers where the company has its corporate domicile.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Generally, foreign business investments are not subject to particular restrictions. Nevertheless, in some cases investors are obliged to make official disclosures of their investments, such as previous declaration of investments when the investor is domiciled in a country that is considered a tax haven, regardless of the amount, and previous administrative authorisation for certain special sectors (television and radio, weapons, gambling, national defence or air transport). Certain investments have to be communicated ex-post to the authorities for statistical, administrative or economic purposes. This is especially true for investments in real estate that exceed €3 million, and if, regardless of the amount, the money comes from a tax haven.

For money laundering purposes, companies also have to inform about the physical person or persons owning directly or indirectly at least 25 per cent of their capital but this is also applicable to national or resident persons.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Tax considerations for the formation of an importer will be the same as those for the formation of a Spanish company.

The formation of the company is usually exempted from taxes although some costs will be incurred in, basically advisers, notaries and commercial register fees.

Foreign business and individuals are submitted to the Non-resident Tax Act and to the specific conventions for the avoidance of double taxation depending on the tax residence of the foreign business or person. These conventions usually treat the incomes obtained depending on their kind and the place they are obtained.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

A supplier may generally use the following structures: distribution, commercial agency, franchise or supply agreements.

A distribution agreement is usually an agreement in which the distributor purchases goods from the supplier and resells them in the territory on a continuative basis and with some additional clauses (non-competition, exclusivity, minimum purchases, use of trademarks, etc). Some different kinds of distribution agreements are possible depending on the specific clauses: for instance exclusive distribution (the distributor is the only one appointed in a specific territory) or selective distribution (the distributor is appointed for selective products – luxury products, for instance – in a specific territory with some additional obligations related to the presentation of such goods).

In a supply agreement the supplier sells the goods to the supplied party on request with the possibility for the latter to resell them usually without specific restrictions as in the distribution agreement.

An agency agreement permits the agent to represent the supplier (the principal) before possible clients for the sale of goods or services. The purchases of goods or services are then made between the supplier and the final client (either directly or represented by the agent on the supplier's behalf).

In a franchise agreement, an undertaking (the franchisor) grants to another party (the franchisee), for a specific market and in exchange for financial compensation (either direct, indirect or both), the right to exploit its own system to commercialise products or services already successfully exploited by the franchisor. These agreements should include, at least:

- the use of a common name or brand or any other intellectual property right and uniform presentation of the premises or transport means included in the agreement;
- communication by the franchisor to the franchisee of certain technical knowledge or substantial and singular know-how that has to be owned by the franchisor; and
- technical or commercial assistance, or both, provided by the franchisor to the franchisee during the agreement, without prejudice to any supervision faculty to which the parties might freely agree in the contract.

Other kinds of agreements such as (re)sales of goods supplied on a consignment basis, occasional intermediary agreements, corners in department stores, or other agreements based on the freedom of the parties, are also possible to distribute products.

All of these structures can be organised either by an independent distributor, agent, franchisee or supplied, or in joint ventures with a foreign supplier, principal, franchisor or supplier.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

There is no specific legislation regarding specific distribution contracts. These contracts, also called commercial concessions, are basically constructed under the general freedom for contracting regulated in the Civil Code in its article 1255. Governing rules are, therefore, a construction made by the authors and case law of the Supreme Court. In this matter the Supreme Court has established that the rules of the Agency Act can be applicable indirectly as interpretative criteria by analogy. European rules related to distribution agreements (particularly those referring to competition law) are also applicable to this kind of agreement.

For the agency agreements the main rules are contained in Act 12/1992 on Agency Contracts of 27 May. This Act implements Directive No. 653/86/EEC of 18 December 1986 and its provisions are mandatory except those expressly mentioned in it.

The offer and sale of franchises is governed by the Retail Commerce Act 7/1996 of 15 January. Article 62 is particularly applicable to franchise agreements. The Act is completed by Royal Decree 201/2010 of 26 February on Franchise Agreements and the Franchisors' Register. The administrative agency in charge of franchise matters is the Franchisors' Register, which is administered by the State Secretary of Commerce (General Directorate of Internal Commerce and General sub-directorate of Internal Commerce) of the Ministry for Economy and Competitiveness. Regional franchisors' registries can be created if the regions' respective legislation foresees it.

Supply agreements are ruled by the Commercial and Civil Code and particularly the rules related to purchase agreements (articles 325 to 345).

The Vienna Convention on Contracts for the International Sale of Goods is also applicable in Spain.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Agency agreements for an indefinite period can be terminated by the parties with prior written notice. The notice period will be one month for every year in which the agency contract was in force (with a maximum of six months and a minimum of one month if the agreement had lasted less than one year). No termination notice is necessary for contracts for a determinate period. Earlier termination is also possible when one of the parties has breached, totally or partially, the obligations legally or contractually agreed or in case of death or death declaration of the agent (not of the principal). In this case, the successors of the principal can terminate the contract with the appropriate termination notice.

Distribution agreements are considered as 'intuitu personae' contracts. This circumstance, together with the exclusivity clause usually included in these contracts, implies mutual confidence between the parties. If this confidence has been lost, the contract can be terminated respecting a specific and agreed prior notice (if any) or a reasonable one (considering that 'reasonable' would usually be interpreted by analogy to the Agency Act as mentioned in the previous paragraph) and provided that the limits of the good faith are not disregarded. A material breach by the other party, besides being considered as contributing to a lack of confidence, usually permits the non-breaching party to terminate the contract by a simple communication with immediate effect.

Franchise agreements are usually set for a determinate period and therefore can be terminated according to the clauses agreed. If nothing is foreseen the general rules applicable to 'intuit personae' contracts can be applied.

Supply agreements are usually agreed upon request (not on a continuative basis) and do not include further obligations once the products are sent and paid for. New orders will usually constitute new agreements.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

When an agency contract terminates, the agent has the right to compensation if certain requirements are reached:

- the agent has increased the number of clients or sensibly increased activity with a previous client, or has contributed to increased sales;
- the previous activity of the agent is deemed to have produced substantial advantages for the principal (supplier); and
- such compensation is appropriate owing to the existence of agreements limiting the competition, loss of commissions or other circumstances.

This compensation could not exceed in any case the average yearly amount of the remuneration received by the agent in the previous five years or during the whole contractual period if it was shorter.

In the case of distribution agreements, nothing is foreseen for compensation and parties can expressly exclude it. Nevertheless, if nothing is foreseen courts tend to apply by analogy the same criteria herein mentioned for agency agreements. In this case, the amount to be considered is usually the gross margins obtained by the distributor.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

These provisions are usually contained in the distribution or agency agreements and are enforceable provided the reasons for prohibition are clearly stated in the agreement. As mentioned before, these are usually considered 'intuitu personae' agreements and, therefore, the specific characteristics of the agent or distributor are considered essential for the continuity of the agreement.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

In principle there are no limitations to the enforcement of confidentiality provisions in distribution agreements before, during or after the expiration of the agreement and negotiations provided these agreements are not made in abuse of rights or could be considered excessive for the purposes.

In franchise agreements a franchisor can expressly impose a confidentiality provision before the contract is signed, which will affect all the information the franchisor is obliged to disclose.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Restrictions on the distribution of competing products cannot usually be implied in a distribution contract but have to be clearly agreed by the parties.

It is possible to contractually extend the distributor's non-competition obligation to the distribution of non-competing products. In order to determine whether a product is competing with another product it will be necessary to study the respective markets and the characteristics of the products and not only their uses.

On the other hand, and in general terms, Spanish antitrust law does not admit non-competition obligations for the distributor after the termination of a distribution contract.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Together with the general EU antitrust rules, the Spanish Antitrust Law prohibits, in similar terms, direct or indirect resale price maintenance as well as other commercial conditions imposed by the supplier. Nevertheless competition authorities have authorised in some cases the fixing of maximum prices.

In agency agreements, however, there are no restrictions on the fixing of the final prices since the sale is made by the principal, who fixes them, and there is no resale. The agent is only acting as an intermediary or as a representative of the principal.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

In distribution agreements, a recommended price is admissible when there is sufficient competition between distributors: it therefore works as a maximum price and permits the consumers an easy comparison of different offers.

Resale price maintenance clauses in franchise agreements have been considered null and void by the Supreme Court when the franchisor has not only recommended prices to the franchisee but has sent a list of resale prices. These clauses have been considered restrictive even in cases where only a minimum price or a minimum and a maximum price was fixed and the price was fixed not for all products, but only for some of them.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

In general terms, prices are freely established by the parties and there are no special dispositions provided the distributor remains free to decide them.

Nevertheless it will be considered unfair to sell goods below the cost of production or purchasing prices when this is likely to mislead consumers about the level of prices of other products or services of the same establishment; when it is done with the purpose or effect of discrediting the image of a different establishment; or when it is done as part of a strategy to eliminate a competitor from the market.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

As mentioned above, prices are freely established. Therefore suppliers could charge different prices to different customers based on different circumstances.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Yes, it is possible for a supplier to restrict contractually the geographic areas or categories of customer to which its distribution partner can resell. Exclusive territories are permitted and quite often agreed in distribution agreements.

The reseller is also authorised to reserve certain customers to itself or even the direct sales in the agreed territory.

Usually the exclusivity prevents other distributors from actively selling in other territories (actively promoting the activity in territories different from the one specifically granted) but does not prevent them from accepting orders (passive sales) from these territories.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

A refusal to deal could be acceptable in case of active sales outside the territory agreed or by restricting the sales to specific kinds of clients.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Competition law is applicable to distribution agreements. The Spanish Competiton Act 15/2007 of 3 July includes prohibitions similar to European competition law, particularly on agreements limiting distribution or fixing reselling prices. Nevertheless agreements respecting the conditions foreseen in EU Exemption Regulations are also admitted under Spanish law as well as those specifically admitted by an internal royal decree.

These restrictions are enforceable by the National Commission for Markets and Competition and are usually public procedures. The Commission will pursue those agreements that being prohibited are not authorised by a specific norm or particular authorisation and which are of significance.

Private parties can also bring actions under competition laws searching for damages compensation.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

An exclusive distributor usually implies that is the only authorised person to sell the goods within the exclusive territory. In this case the supplier will not be usually authorised to sell directly to final customers in the same territory. Nevertheless, these clauses do not oblige the supplier to take the necessary measures to avoid possible exports to the distributor's exclusive territory and 'parallel imports' cannot be completely avoided by the supplier.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

The ability to advertise and market products is usually agreed in the distribution agreement. Parties are free to include and share such obligations and costs.

Advertising and marketing obligations in a distribution agreement can be relevant when terminating the agreement early with due reason and when calculating the goodwill (clientele) compensation.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Copyright and other intellectual property rights (trademarks, patents and know-how) are protected under the specific legislation: the Intellectual Property Act, the Patents Act and the Trademarks Act.

The Patents and Trademarks Acts generally oblige the registration of the patents and trademarks at the Patent and Trademark Office in order to protect them. Licences granted for the use of such patents and trademarks are also possible and should also be registered in order to grant licensee and third-party rights.

Copyright can also be registered at the Intellectual Property Register to provide evidence of the author's rights, but it is not compulsory.

These rights are therefore protected by their registration. In case of an infringement or an attempt to infringe by the distribution partner or by third parties the supplier can, in some cases, oppose them before the Patent and Trademark Office or sue them before the competent courts.

Technology-transfer agreements are common depending on the kind of product.

24 What consumer protection laws are relevant to a supplier or distributor?

The Consumers Act (Royal Legislative Decree 1/2007, as amended by Act 3/2014) is applicable to consumers: those persons (even moral persons) acting in a sphere different from their commercial or professional activities. Therefore, these regulations are not applicable to the commercial activity of a supplier with its distributor. Consumer protection laws are, however, relevant to suppliers and distributors in their relationships with consumers as defined by the Consumers Act.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Parties in a distribution agreement are free to agree the party responsible for carrying out and absorbing the costs of a recall. Usually this will depend on the nature of the goods distributed.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Warranties for products are foreseen in the Consumers Act and in these cases they cannot be limited by agreements between a supplier and a distributor. Liability can be excluded in some cases foreseen in the Act such as (among others) when the defect did not exist at the time of putting the product into circulation, the product was not manufactured for its sale or distribution, or the defect was not detectable according to the existing knowledge at that point in time.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

In general terms, the information containing personal data is owned directly by the affected persons. Entities are authorised to use such data when there is an express authorisation.

The exchange of information about customers and end-users is governed by the Data Protection Act and regulations and supervised by the Spanish Data Protection Agency. Usually the collection, processing and transmission of data requires the express consent of the affected persons. These regulations also foresee the procedure for obtaining personal data in possession of a specific person, and for cancelling the authorisation previously given for such treatment.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Parties are free to agree on the clauses they consider appropriate for their relationship. The distribution agreement being an intuitu personae agreement in which the personality of the managers could be essential, this circumstance can be included. Nevertheless, in order to validate such a clause it is necessary not to leave it to the sole interpretation of one party but to state objective elements to decide. In some cases courts have considered that the modification of the administration and direction of the distributor could be considered as a loss of trust sufficient to terminate the distribution agreement.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

This circumstance will not be usually a problem if the distributor or the agent are commercial undertakings. The problem could arise if either the distributor or the agent were individuals. In this case (which is less frequent for distributors than for agents) the relevant question in order to avoid being treated as an employee is the independence from the principal or supplier for the organisation of their activity, the instructions received, and other elements in the managing of their business.

Particularly, in the specific case of agents, there is a different regulation contained not in the Agency Act but in the Royal Decree 1438/1985 affecting agents acting as employees. If this was the case, these agents will be affected and the regulation ruled under labour law.

The first criterion to distinguish commercial agents and agents-employees is the responsibility of the agent assuming the risk of the transaction (if the agent assumes the risk, it will be considered as a commercial non-labour agent). But even this is not enough because the Agency Act also foresees its application to agents who do not assume this responsibility. Therefore, the second element to distinguish an independent agent from an employee is the higher or lower independency from the principal. In order to be considered as an independent agent, the agent has to be free to

organise their activity and timetable according to their own criteria, with their own personnel and premises, their own organisation and administration. That said, if the agent acts from within the principal's organisation he or she will usually considered as an employee. In any case, this is an element to be considered carefully when drafting the agency agreement.

In general terms, the consequences of being considered as an employee are the application of the labour law, which usually foresees higher protection for them than the commercial law (the Agency Act in case of agents).

30 Is the payment of commission to a commercial agent regulated?

Yes. Although the concrete amounts are freely agreed upon by the parties, the payment of remuneration is regulated and compulsory under the Agency Act. The commission for the agent's activity can be foreseen as a percentage of sales, as a fixed amount or as a combination of both systems. Where the parties cannot agree on a commission amount the agent will be remunerated according to the uses of commerce in the place where the agent carries out his or her activities.

The Agency Act also regulates in which cases the agent has the right to receive this commission. Basically the agent can ask for the commission when the transaction has been agreed with a client within the territory (in case of exclusive territories) or with clients to whom the agent had the exclusivity.

The Agency Act also foresees other circumstances related to commission: (i) the right to commission in case of transactions concluded after the termination of the agency agreement (transactions due essentially to the agent's activity, or in case of orders received before the termination of the agreement); (ii) the moment the agent has the right to commission (when the principal has executed the commercial transaction or when the principal would have had to execute it); and (iii) possible conflicts between agents in successive agreements.

31 What good faith and fair dealing requirements apply to distribution relationships?

Good faith and fair dealing requirements are essential in distribution relationships in the negotiation and drafting of agreements, for the duration of the agreement and in the agreement's termination. These requirements are applicable to the activity of both the distributor and the supplier.

Good faith is moreover essential to interpret the agreement or to complete the agreement where the parties had not foreseen some elements. For instance, for prior notice given in good faith when terminating the agreement, in the use of trademarks or for granting compensation in case of termination.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

Intellectual property licence agreements should be agreed in writing and are to be registered within the Trademark and Patent Office.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

In general terms, as previously mentioned, parties are free to agree the conditions of their relationship since there is no express distribution law affecting these contracts. Nevertheless, where parties do not expressly agree certain conditions, courts can apply the Agency Act analogically. This could be particularly important for the termination notice and for the compensation in case of termination of distribution agreements.

On the other hand, the Agency Act is basically mandatory and its principles affect both the principal and the agent except when the possibility to modify its principles has been expressly foreseen.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

The applicable law will be ruled by the Rome Convention on the Law Applicable to Contractual Obligations. Where the parties have not agreed on a particular country's law to govern the contract and if the Rome Convention is not applicable, and in case of different nationalities and national domiciles, the jurisdiction of the place where the agreement has been signed can be applicable. Notwithstanding, in case of absence of choice of the applicable law and in case of purchase of moveable goods, the applicable law will be the one of the place where the goods are located.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Spanish courts do not have exclusive jurisdiction to settle disputes concerning distributors who carry out their activity in Spain. This means that parties are free to choose different courts although in case of Spanish resident distributors the choice of a foreign court could require the enforcement of the court decision in Spain. And relating to the jurisdiction in civil procedures, and in general terms, Spanish courts have exclusive jurisdiction on the recognition and enforcement of foreign decisions in the Spanish territory. For relationships between parties within the European Union, Regulation 1215/2015 of the European Parliament and of the Council (12 December 2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will apply from 10 January 2015.

In the case of agency agreements a rule contained in the Agency Act obliges that the competent court to settle disputes will be the one of the domicile of the agent.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Court procedures are available for both the supplier and the distributor and both parties will be treated, from a legal point of view, identically. No privileged treatments are foreseen for a national party litigating against a foreign party. Neither differences nor restrictions are acceptable in the Spanish legal system.

The advantages a foreign party will find in resolving the disputes in Spain will be related to the proximity to the counterparty. Usually all the previous procedural measures, enforcement, information about the party, etc will be easily obtained from a local court.

Update and trends

On 30 May 2014 the government adopted a previous draft on a new Commercial Code following the proposal presented on 20 June 2013 by the General Codification Commission. The proposal contained regulations on a range of different commercial matters such as commercial undertakings, commercial agreements, competition and industrial property.

However, and although this first proposal also included the regulation for the collaborative contracts with a complete and new regulation on distribution agreements (including franchise agreements), the previous draft does not include this chapter. There are nevertheless new regulations on some aspects that could affect different ways of distribution: a new regulation on commercial purchase agreements, supply agreements and sales made on a consignment basis, and intermediation agreements.

The more relevant dispositions in this previous draft that could affect distribution agreements are: capital companies, unfair competition, defence of competition and restrictive practices, some dispositions on trademarks and patents and general principles for commercial contracts (some dispositions on payments default in commercial relationships, new technologies in commercial transactions, general conditions, vending machines and confidentiality and non-compete clauses, among others).

The previous draft still need to start the legislative procedure and its adoption will depend on the legislative elections foreseen for last quarter of 2015.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Arbitration in the case of distribution agreements is possible under the Spanish legal system. Spain has ratified the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and has its own Arbitration Act based on the Model Act prepared by the United Nations in 1985.

According to the Arbitration Act 60/2003, parties are free to decide the settlement of their disputes by arbitration. The arbitration agreement can be a separate agreement or included as a clause in the distribution agreement. Parties are free to decide the institution to rule the procedure, the place and the language of the procedure.

The advantages of arbitration are usually the possibility of having an expedited decision, the possibility of ruling the procedure in a language other than Spanish and the possibility, if the arbitral institution or the arbitrator are well chosen, of those involved having a deeper knowledge of the area or market concerned or the specific rules on distribution. The disadvantages of arbitration are usually the higher costs and the impossibility of appeal.

There is also a Mediation Act for Civil and Commercial Transactions 5/2012 permitting the parties to solve their disagreements by this alternative dispute resolution system. Parties are also free to regulate to some extent the content of the mediation procedure, the language used and the mediation institution. The advantage of this procedure is the possibility of solving the dispute directly between the parties (and not using a third party: an arbitrator or a judge), helped by the mediator, with controlled costs and in a shorter time frame. The use of mediation does not preclude the intervention of a judge or an arbitrator if the dispute is not settled satisfactorily.

EVEN ABOGADOS

Ignacio Alonso **ignacio.alonso@evenabogados.com**

Lagasca 106, 1º centro
28006 Madrid
Spain

Tel: +34 917 818 470
Fax: +34 911 790 836
www.evenabogados.com

United Kingdom

Michael Dean, Melanie Martin and Laura McIntyre

Maclay Murray & Spens LLP

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign company can conduct business in the UK without setting up a legal entity, thus avoiding most UK company law requirements. If setting up a permanent place of business in the UK to directly carry out business, it must register as an overseas company and register its constitution together with a statement of the power of its directors to bind the company.

Another option is to incorporate a subsidiary company in the UK. The principal advantage over an establishment is that, because UK courts assiduously enforce the doctrine of corporate personality, the main overseas business can, in most cases, be shielded from the risks incurred by the UK business.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes, there are few restrictions on foreign ownership of UK companies. In certain limited situations in regulated industries such as financial services, the controllers of a company must be approved by the regulator.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Several forms of corporate vehicle can be registered in the UK that are suitable for an importer owned by a foreign supplier. Which is most suitable will depend on a range of factors largely to do with the requirements of the markets the entity serves as well as the tax treatment of the entity in the UK and foreign jurisdiction. These include a UK limited company, a UK branch, and partnerships (limited liability partnerships, limited partnerships and general partnerships).

The method of formation will depend on the type of entity. See above for branches and UK establishments. Limited liability companies and limited liability partnerships must be incorporated and registered with Companies House. Limited partnerships are generally set up by contract and require to be registered at Companies House. General partnerships are created by agreement or simply by entering into a relationship in common with a view to profit (there need not be an underlying written contract for a partnership to be created). The primary statutory legislation that applies is the Companies Act 2006, the Limited Liability Partnership Act 2000, the Limited Partnership Act 1907 and the Partnership Act 1890 respectively.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

No single piece of legislation regulates foreign investment in the UK. There is no general requirement for foreign investment in the UK to be registered.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes, subject to the usual competition law concerns.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

The UK tax system broadly applies equally to foreign suppliers and UK suppliers operating in the UK. Profits from a UK limited company and a UK branch of a foreign supplier forming a UK permanent establishment are taxed similarly, and will generally be liable to UK corporation tax. Partnerships (including LLPs) carrying on business in the UK will generally be tax transparent. Often the tax treatment of the UK entity in the relevant foreign jurisdiction, and whether tax transparency is desirable, will influence the more suitable entity in each case.

The UK tax considerations depend on the activities carried on in the UK. If the entity employs individuals then it is likely that it will be obliged to deduct income tax and employees' national insurance contributions from payments made under the UK's pay-as-you-earn system, and remit such tax deducted together with employer's National Insurance contributions to HM Revenue and Customs. Furthermore, the business should consider whether it is obliged, or whether it may be desirable, to register (and account) for value added tax.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

A distribution relationship can be:

- Exclusive: appointment of one distributor for the territory or a particular customer group and the supplier is prevented from appointing another distributor or selling into the territory or customer group directly.
- Sole: appointment of one distributor for the territory or customer group and the supplier is prevented from appointing another distributor for the territory or customer group, but the supplier retains the right to sell into the territory.
- Non-exclusive: no restrictions on the supplier allocating distribution rights to more than one party for a particular territory or customer group or supplying directly.
- Selective: Only approved dealers entitled to handle and resell the goods. Any distributor fulfilling a set of objective, transparent and non-discriminatory criteria, normally based on quality, is admitted to the distribution network. Selective distribution is typically used for high-end or prestige goods.

In contrast, a commercial agent or sales representative is a conduit between the supplier and the customer. The agent does not have a contract for supply with the customer and will normally not bear any financial risk. An agent is regarded as forming part of the supplier's business and is therefore more suitable for suppliers wishing to exercise control over sales to customers. An agent's activities can be limited to introducing customers and contracts to the principal (marketing agent) or they can be sales agents, where the agent enters into contracts with customers on behalf of their principal. Like distribution agreements, agency agreements can be exclusive, sole or non-exclusive.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

There are no specific laws relating to distribution that govern the relationship between a supplier and its distributor. Common law principles of contract will apply to any agreement between the parties, as will certain general statutory provisions.

There are specific rules governing agency relationships where an agent is a 'commercial agent' as defined in the Commercial Agents (Council Directive) Regulations 1993 (the Agency Regulations) whose Regulations are based on the Commercial Agents Directive (86/653/EC). That applies where an agent is a self-employed intermediary who has the authority to negotiate the sale or purchase of goods on behalf of or in the name of a principal, regardless of whether the agent and supplier have a written agreement. There are certain exclusions such as where the agent is involved in the sale and purchase of services.

General statutory rules that may be relevant to both distribution and agency relationships include (but are not limited to):

- Competition law – Chapter I of the Competition Act 1998, which follows European competition rules on vertical distribution agreements, imposing limits on the restrictions that a supplier can impose on a distributor or agent.
- The Bribery Act 2010 – Under section 7 of that Act, a commercial organisation will be guilty if a person associated with it bribes or attempts to bribe another person for a commercial advantage. A person is 'associated' with a commercial organisation for these purposes if that person performs services on behalf of the commercial organisation, including agents and, potentially, distributors. The European Court has, in another context, ruled that a distributor provides services for its supplier (*Corman-Collins SA v La Maison du Whisky SA* (C-9/12)).
- The Unfair Contract Terms Act 1977 (UCTA) – UCTA applies in B2B contracts mainly to unfair terms that have the effect of restricting or excluding a party's liability. Certain contracts, such as international supply contracts, are excluded from the application of UCTA.
- The Data Protection Act 1998 and Privacy and Electronic Communication Regulations – these will have an impact on the relationship between the parties as to how they may share and deal with customer and end-user data.

There is no government agency that specifically regulates the relationship between distributors or agents and suppliers. In practice, there are a number of agencies with which a supplier or distributor may have to deal.

The Competition and Markets Authority (CMA) is the primary competition authority in the UK and is responsible for ensuring that businesses comply with the competition laws. A sector regulator such as the Financial Conduct Authority has competition powers concurrently with the CMA in the financial sector.

Other bodies, such as Trading Standards, the Advertising Standards Authority, the Food Standards Agency and HM Revenue and Customs may also be relevant. There might also be other sector-specific agencies (eg, in the pharmaceutical sector, the Medical and Healthcare Products Regulatory Agency) that also have a bearing on distribution relationships and the reselling of goods. We have not listed all potentially relevant agencies here.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

No, if the provisions on termination without cause are clear and unambiguous the UK courts will uphold freedom of contract, particularly in B2B contracts. It should be borne in mind that there are three legal jurisdictions in the UK. England and Wales is the largest jurisdiction and most contracts are under English law and the English court system. The Scottish courts are largely independent and, while commercial law is often identical or similar, there are some differences. The courts in Northern Ireland apply similar legal principles to those in England and Wales.

However, if the agreement provides for termination without cause and without any notice or the notice provided for is unreasonably short, distributors may be able to rely on the UCTA to argue that this is unreasonable (and, if successful, void and unenforceable). However, such an argument will be available only in a small number of cases due to the technicalities of UCTA.

For instance, UCTA provides that where a business contracts on the counterparty's written standard terms of business, a term by which the counterparty claims to be entitled to provide no performance at all will be considered as having a similar effect to a limitation of liability. It is enforceable only to the extent that it satisfies the reasonableness test (section 3(2)(b), UCTA). It has been suggested that, in certain circumstances, a right to terminate on unreasonably short notice could be considered unenforceable on the basis that a supplier may rely upon it to provide no performance.

If the parties have negotiated a distribution agreement, rather than dealing on standard terms, a clause providing for termination for convenience without notice will not be struck down by UCTA. It is also unlikely that there would be a common law remedy. There would have to be an unconscionable bargain between parties; inequality of bargaining power is not enough.

Where the agreement provides only for termination for cause, or there is no written agreement in place it can nevertheless be terminated provided 'reasonable notice' has been given to the other party. What is considered reasonable in each case is a matter of fact and the courts will consider a range of factors including the degree of formality of the relationship between the parties; whether on termination the parties are restricted from competing with each other; the length of the relationship to the point of termination among other factors. The courts have suggested that nine months would be a reasonable notice period in a case where the relationship lasted two-and-a-half years, the distributor had invested heavily and it would take time to find an alternative brand to represent. In contrast to certain other types of contracts, the court suggested that a longer period of notice may be due in the early years of a distribution relationship given the heavy investment in those years by the distributor and where the return is obtained only once the customer base is established. (*Jackson Distribution Limited v Tum Yeto Inc* [2009] EWHC 982 (QB)).

In an agency relationship the Agency Regulations (assuming they apply) prescribe what is minimum reasonable notice and this is linked to the length of the relationship until termination. The minimum notice period is one month in the first year of the relationship; two months in the second year; and three months in the third year and any subsequent years. It is open to the parties to agree longer periods and it may be open to a party to argue that a longer period is merited.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Distribution

If termination complies with the express terms of the agreement (eg, the agreement provides for termination without cause on notice), no mandatory compensation or indemnity will be payable unless provided for in the agreement. The other party will have no other remedy for termination of the agreement in these circumstances.

If the agreement is silent on the circumstances in which the agreement can be terminated, common law implies that the agreement can be terminated only upon reasonable notice (see question 9).

If the agreement is terminated in breach of the express terms of the agreement or reasonable notice is not given regarding termination no mandatory compensation or indemnity is payable. The distributor may be entitled to damages for breach of contract. Where Scots law applies, the courts may prefer to enforce performance if not validly terminated.

Agency

In an agency relationship to which the Agency Regulations apply, the Agency Regulations provide that an agent is entitled to compensation or an indemnity for termination in certain circumstances. Where UK law applies, the parties can choose either for indemnity or compensation to apply. If an indemnity is not expressly provided for, the agent will be entitled to compensation. It is not possible for the parties to exclude the right to indemnity or compensation in the contract. Indemnity is capped (at one year's commission) and is due only to the extent that the agent has brought in new customers or significantly increased the principal's business with existing customers and substantial benefits continue to be derived by the principal

from those customers. Compensation is calculated to be equivalent to the value of the agency business, including goodwill, at termination (*Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Limited* [2007] UKHL 32).

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Parties are generally free to contract on the terms as they wish. The UK courts are likely to enforce a clause prohibiting the transfer of the distribution rights to the supplier's products to a third party. What is more commonplace, however, is that such a transfer would be subject to the supplier's consent.

A provision prohibiting a change in ownership of the distributor or the transfer of its business to a third party is less common. A more common approach is for the supplier to have a termination right in the event of a change of control or transfer of business of the distributor that it does not consent to.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality clauses in distribution agreements are common and will generally be enforceable. However, it is sensible to restrict such clauses to what is reasonably required to protect confidential information, having regard to the geographic and product scope of the distribution agreement and duration. Depending on how they are drafted, confidentiality provisions have the potential to restrict competition contrary to article 101(1) TFEU or Chapter 1 of the Competition Act. This would render such clauses void and unenforceable unless an exemption is available under the Vertical Restraints Block Exemption Regulation (VRBE) (ie, both the supplier and the distributor each have a market share below 30 per cent in their respective markets).

On 14 July 2010, the English High Court ruled in *Jones v Ricoh UK Limited* [2010] EWHC 1743 (Ch) that a clause in a confidentiality agreement breached article 101 TFEU and was therefore void and unenforceable. In that case, the confidentiality agreement concerned confidential information relating to CMP's (Jones' company) clients (which it needed to disclose to Ricoh during the course of their trading relationship) and restricted Ricoh from using this customer information to trade directly with them. The clause prevented Ricoh and its 150 group companies from making or accepting any approach to or from any contact with any client of CMP, any governmental body or regulatory or other authority or any other person who to Ricoh's knowledge 'has any prospective connection' with CMP. When Ricoh bid for a contract with one of CMP's clients, CMP sued Ricoh for breaching the confidentiality agreement.

The court held that the wide scope of the clause breached article 101 TFEU by object and effect. It went further than was necessary to protect CMP's confidential information. Although CMP argued that the clause benefited from an exemption under VRBE, the court found that for the purposes of the confidentiality agreement, the parties were not acting at different levels of trade (a prerequisite for the application of the VRBE).

Confidentiality agreements or clauses between undertakings clearly operating at different levels of trade, such as suppliers, distributors or agents, are likely to have a greater chance of benefiting from the exemption available under VRBE, to the extent that they restrict competition.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Non-compete obligations are dealt with under the VRBE and to the extent they comply with its conditions, will be enforceable.

For the purposes of the VRBE, a 'non-compete obligation' includes any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services, as well as any direct or indirect obligation on the buyer to purchase more than 80 per cent of the buyer's total requirements of that product or its substitutes. To benefit from the protection of the VRBE and ensure enforceability, the non-compete should not exceed five years' duration or be indefinite (an obligation that is automatically renewable is regarded as indefinite). A longer duration is permissible only where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties. In those circumstances the duration of the non-compete should not exceed the period of occupancy of the premises by the distributor.

A post-term non-compete obligation will not benefit from the VRBE unless:

- it is limited to goods or services that compete with the contract goods or services;
- it is limited to the premises and land from which the buyer has operated during the contract period;
- it is indispensable to protect know-how transferred by the supplier to the buyer; and
- it is limited to a period of one year after termination of the agreement.

In selective distribution, resellers can be prohibited from selling competing products in general, as long as the duration of that obligation is not capable of exceeding five years and the obligation is not targeted so as to exclude 'particular competing suppliers'.

Clauses that are not protected by the VRBE would have to be individually assessed under article 101(3) TFEU and would carry a greater risk of unenforceability.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

Distribution

In distribution arrangements, the supplier cannot control the prices at which its distribution partner resells its products. Under the VRBE, no protection is available where the supplier directly or indirectly dictates fixed or minimum resale prices of the buyer.

Recommended or maximum sales prices are acceptable but should be analysed carefully to ensure they do not constitute indirect resale price maintenance. Other forms of indirect resale price maintenance include:

- fixing maximum discounts from prescribed prices;
- making supplier rebates and reimbursement of promotional costs subject to downstream pricing level;
- linking price to competitors' resale prices; and
- threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations.

The VRBE Guidelines of the European Commission suggest an efficiency defence is available:

- when RPM is used during the introductory period of expanding demand;
- for a coordinated short-term low price campaign (two to six weeks) in a franchise system (a distribution system applying a uniform distribution format); or
- in relation to complex or experience products, the extra margin would allow distributors to provide additional pre-sales services and free-riding is a problem.

A ban on supplying discounting outlets would be regarded as interference in pricing policy except where the ban was imposed in the context of protecting the culture and prestigious image of a brand or mark and contained in a trademark licence (*Copad SA v Christian Dior*, Case C-59/08).

Agency

In agency relationships, the principal can retain complete control over the price at which its agent resells its products provided the agency relationship is regarded as 'genuine agency'. The determining factor is the financial or commercial risk borne by the agent in relation to the contract activities: those directly related to the contracts entered into by the agent for the principal; and those associated with investment for entry to the market – usually 'sunk' costs. When the agent bears no such risks, or insignificant risks, its activities are not economically distinct from the principal's, and article 101 TFEU does not apply. If an agency agreement lies outside article 101 TFEU, all clauses that are an inherent part of the agency agreement are free from scrutiny. The principal may legitimately restrict the customers to

whom or territory in which the agent sells the goods, and also dictate the price and conditions for sale through the agent.

If an agent cannot be regarded as a 'genuine agent', it must be permitted to use its commission to offer discounts to customers.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

A supplier is entitled to suggest resale prices (commonly referred to recommended resale prices or RRPs), but should avoid applying any incentives or pressure to abide by those RRPs as this would be likely be viewed as indirect RPM.

It is likely that in the EU minimum advertised pricing policies would be viewed as an indirect means of RPM and would not benefit from the VRBE. Nor are unilateral minimum retail pricing policies accepted. Announcing a minimum resale price and refusing to supply those distributors that did not observe it would probably be regarded as indirect RPM and involving consensus or acquiescence.

There are other ways in which a supplier can attempt to influence pricing, which fall short of RPM. For example, it can oblige distributors to follow its instructions with regard to advertising provided that those instructions do not seek to regulate the advertising of prices or conditions of sale. This does not prevent a supplier from encouraging the distributor to achieve optimum brand positioning, provided there are no incentives offered or pressure applied to price at or above RRP.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Until recently, such 'most-favoured customer' clauses (MFC clauses), were relatively unexplored in EU or UK antitrust law. A spate of cases has, however, highlighted their prevalence, particularly in relation to online retailing and has forced the authorities to take a closer look at their effects.

Such clauses are particularly likely to raise competition concerns where the customer benefiting from the clause is dominant and the effect of the clause is to reduce the incentive of the supplier to offer other customers discounts, thereby aligning prices at a higher level than would otherwise be the case. This may not be very likely in a distribution context and, in the absence of other restrictive effects, MFCs may be enforceable.

The scope of the MFC may also be important to its assessment, particularly in an online context, where products or services are sold via a number of different channels. In a recent investigation in the UK into the private motor insurance sector, the CMA drew a distinction between the use of 'narrow' and 'wide' MFCs in agreements between private motor insurance providers and price comparison websites (PCWs). Although the CMA recognised that MFCs on PCWs may result in efficiencies (such as reducing search costs for customers), it concluded that it was not necessary for MFCs to be drafted widely to achieve those benefits. Therefore, it found that 'narrow' MFCs which require that the price on the insurer's own website is no cheaper than that offered to the PCW were acceptable. 'Wide' MFCs, which require that the price offered to the PCW to be no higher than the price offered by the insurer directly or via any other channel, are to be prohibited by means of an order (the Swedish Competition Authority has taken a similar approach in the hotel online booking sector).

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Permitted conduct

Provided a supplier is not dominant (and, as discussed below, dominance may begin at market shares of 40 per cent and above), it is free to price its products as it chooses. Suppliers can charge different prices to direct customers according to their location. In practice, this allows a company to direct its subsidiary in one territory not to sell products to customers located in other territories. Instead, that subsidiary can refer those customers to the associated company in their own territory. Dominant companies should avoid this activity.

European Commission guidance also provides that a dual pricing agreement between a supplier and an independent distributor may fulfil the conditions of article 101(3) TFEU in some limited circumstances. For example, where offline sales include installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims and may therefore justify different pricing on and offline.

Unlawful conduct

Agreements to restrict parallel trade

Price discrimination devised to restrict where buyers can resell the products will infringe article 101 TFEU. This typically involves 'dual pricing policies', which offer discounts for products that are resold only locally or charge a premium price for products intended for export.

Dual pricing will rarely be regarded as unilateral conduct. Rather, such policies are the result of vertical agreements between the supplier and distributor which have as their object or effect the restriction of intra-brand competition contrary to article 101(1) TFEU. In the *GlaxoSmithKline* (GSK) cases, the European Court of Justice concluded that, for an agreement to exist, it is sufficient for the parties to show a joint intention to conduct themselves on the market in a specific way. Signing the sales conditions (which contained dual pricing) and returning them to GSK indicated GSK's and the wholesalers' joint intention to adhere to the conduct and limit parallel trade.

Price discrimination amounting to an abuse of dominance

Discriminatory pricing by dominant companies (including discrimination based on nationality or location) for customers who are equivalent is prohibited unless the difference in treatment can be objectively justified (eg, by genuine cost savings or market conditions). A dominant company is permitted to set different prices between various member states where there are already distinct geographical markets and the differences relate to the variations in the conditions of marketing and competition.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Generally, buyers (and their customers) should be free to resell within the EEA without restraint. Restricting sales by the buyer outside specified territories or specified customers is a serious restriction, whether imposed directly (by contract) or indirectly (eg, by an incentive scheme). Schemes designed to monitor the destination of goods (eg, differentiating serial numbers) may be regarded as illegally facilitating market partitioning. However, there are some limited exceptions which allow market partitioning to some degree:

Exclusive distribution rights

A supplier may legally prevent a buyer from selling actively to customer groups or territories reserved exclusively for the supplier or to another buyer. Active sales means actively approaching individual customers by, for instance, sending unsolicited e-mails or advertisements on the internet which are specifically targeted at customers in that territory. The supplier must not restrict a buyer's ability to make passive sales into reserved areas (ie, sales in response to unsolicited demand). Consequently, other than the limited circumstances below, suppliers cannot offer distributors within the EEA absolute territorial protection from parallel imports from other EEA territories even where they have an exclusive distribution network.

Territories or customer groups that are not allocated exclusively (ie, non-exclusive appointments or customers or territories reserved to supplier non-exclusively) cannot be protected either from active or passive sales.

However, restrictions on all sales, even passive sales, are acceptable in some exceptional cases, such as where they are necessary to create a new product market or to introduce an existing product on a new market. Even restraints on parallel imports will be acceptable for two years, insofar as intended to protect a distributor in a new geographic market.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Provided a supplier is not dominant, it can unilaterally refuse to deal with particular customers without breaching competition law.

A supplier can restrict a distributor's appointment to a particular customer group, thereby preventing active sales by that distributor to other customers, provided those other customers are exclusively allocated to another distributor or reserved by the supplier.

A supplier can also prevent a distributor from selling to end consumers, thereby keeping the wholesale and retail level of trade separate.

However, it cannot otherwise agree with a distributor that it should not deal with particular customers. There are 'soft measures' which can be taken by suppliers to highlight to distributors the benefits of focusing on their allocated customers or territory. Such measures should not amount to an agreement, however, and distributors should not be penalised for doing so. Seemingly unilateral acts can be viewed as consensual.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Internet sales

Suppliers should not impose an outright ban on internet selling by their distributors. This is regarded as a serious infringement of EU and, accordingly, UK competition law. The same principles as outlined above apply to sales via the internet (ie, passive sales cannot be restricted, but active sales can in certain circumstances). Sales via the internet are generally viewed as passive, except where adverts or marketing efforts are specifically aimed at customers in other territories.

Court actions under competition law

Parties can bring actions of various kinds for breaches of competition law. Those who have suffered loss as a result of a breach of competition law will have a claim in damages. Such claims can be stand-alone claims (where the claimant needs to prove the breach of competition law, causation and loss) or 'follow-on' actions (where the claimant can rely upon a decision of a competition authority finding that a party has breached competition law as proof of that breach). In a follow-on action the claimant must, therefore, prove only causation and loss.

In the distribution context, a distributor may be able to claim damages if, for example, the supplier has been engaged in price fixing with other suppliers and the prices paid by the distributor are higher than they might otherwise have been.

Similarly, a party may be able to claim damages even if it is a party to an agreement that is anti-competitive provided the party seeking to claim damages was in a weaker position than the other party in the negotiation of the contract such that it was not genuinely free to choose the terms of the contract (*Courage v Crehan* [2002] QB 507).

Damages in the UK are generally compensatory. Punitive damages are not available in the UK for breach of contract.

More commonly in distribution disputes, parties can use competition law to defend court action if, for example, the clauses being sued upon are unenforceable because they restrict competition.

However, in the case of *James McCabe v Scottish Courage* regarding the severability of an exclusivity provision that was potentially anti-competitive the Court held an exclusivity provision (which was unlawful) could not be severed from the agreement as to do so would damage the fundamental nature of the agreement between the parties and that the clause was instrumental in inducing the supplier to enter into the contract in the first place. If the clause is unlawful and is key to the agreement, the whole agreement is unenforceable.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Some limited protection from active sales efforts that constitute parallel imports is obtained by appointing distributors exclusively for particular territories and seeking to prevent active sales between those territories. It may also be helpful to keep the wholesale and retail level of the market separate. However, the concept of passive sales in the EEA means that no system is watertight against passive sales; it is difficult to take action against parallel imports without there being some element of risk or uncertainty.

Another option, where appropriate and justified by the nature of the products, is to set up an EEA-wide selective distribution system. Although sales between authorised distributors across borders cannot be prevented in such systems, sales to unauthorised distributors can be. However, all authorised distributors must be able to make active and passive sales to end consumers (including over the internet), subject to the supplier being able to require that sales are made from a particular location, so again, parallel sales cannot be ruled out.

Certain steps can, however, be taken to educate the distributor on the problems of parallel imports; that does not amount to an agreement not to make passive sales across borders. However, care should be taken with this approach as it can easily stray into an agreement to prevent passive sales:

- clear communication about the brand standards that are expected is important, including clear, objective and consistent quality standards for websites and shops;
- it could be made clear to the distributor that the supplier will not increase its marketing support should sales be boosted by orders from outside of their channel or territory;
- it could be agreed with the distributor that the resource involved in selling into the approved channel is maintained at all times (ie, is not reduced as a result of making passive sales outside the territory);
- the supplier could require that the distributor explains in marketing materials the benefits of buying locally from that distributor; and
- the supplier is permitted to discuss the effect that parallel trade has on margins with a distributor, provided it does not penalise the distributor for selling outside its territory or channel.

UK (and EU) trademark legislation allows trademark proprietors to object to the importation of products from outside the EEA into the UK or EEA if they have not consented to these goods being sold in the EEA.

Proprietors can also object to the importation of genuine products originally authorised by them for sale elsewhere in the EEA, if there are legitimate reasons for the proprietor to oppose further dealings in the goods. Legitimate reasons include: (i) where the condition of the goods has changed; (ii) where the goods have been repackaged in breach of conditions set out in case law; and (iii) where luxury goods have been resold outside the proprietor's selective distribution network.

The case law suggests that proprietors can object to sales by the distributor to resellers outside the selective distribution network if they can show that further sale by the resellers will seriously damage the reputation of the trademark. For example, if the proprietor can show that the supply of luxury goods to a reseller who operates discount stores will seriously harm the trademark's reputation, then the proprietor can object to this (*Copad v Christian Dior*).

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

UK legislation and industry codes of practice regulate the advertising and marketing of products. These are standard rules, not specific to distribution arrangements. The rules apply when marketing to businesses and consumers. The rules aim to ensure that all advertising is legal, decent and not misleading. Industry-specific rules also apply in areas such as pharmaceuticals and food and drink.

Parties to a distribution contract are free to agree terms relating to advertising. Further, suppliers can retain complete control over all marketing. However, more typical advertising provisions in distribution agreements include:

- making the distributor responsible for advertising in its territory, and the associated costs;
- setting a minimum annual expenditure on advertising (often a percentage of turnover); and
- limiting a distributor's freedom to actively advertise in territories other than its own (see question 18).

As advertising will require use of the intellectual property rights of the supplier, distribution agreements typically include a licence of those rights, and express terms requiring the supplier's prior consent before advertising

material is made public. It is also typical to require distributors to adhere to instructions issued by a supplier regarding all advertising materials.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Suppliers can safeguard their intellectual property rights (IPR) from infringement by distribution partners through the terms of the distribution contract. Some of the typical provisions used to protect IPR from such infringement include:

- obligations on the distributor to refrain from doing anything that may infringe or devalue the IPR in question;
- prohibitions on distributors applying for a registered trademark which is identical, or similar to, the supplier's;
- prohibitions on distributors registering domain names that incorporate the supplier's trademarks;
- prohibitions on distributors selling competing products although the term of such clauses must be less than five years to benefit from EU competition law exemptions (see question 13 for further information);
- requirements for distributors to seek the prior consent of the supplier before producing advertising material incorporating the supplier's IPR; and
- obligations on distributors regarding the transfer and use of confidential information and trade secrets.

It is also common for suppliers to include terms in a distribution agreement to help protect against third-party infringement. Some typical provisions include requiring a distributor to: (i) notify the supplier of any third-party IPR that is, or that may be, infringing the supplier's IPR; and (ii) cooperate in any IPR infringement proceedings against third parties.

Although it is common for distribution agreements to contain licence terms for branding, it is less common for patents. If patents are relevant, the parties would typically enter a separate technology-transfer agreement. The Technology Transfer Block Exemption Regulation 2014 (TTBER) exempts such agreements from assessment under competition law subject to fulfilling certain criteria, including market-share thresholds. Such agreements would typically include provisions allowing the supplier to terminate the contract if the distributor challenges its IPR. However, including this term in a non-exclusive licence would remove the benefit of TTBER and expose the agreement to assessment under competition law.

24 What consumer protection laws are relevant to a supplier or distributor?

There are a wide range of consumer protection laws that are relevant in the context of distribution. These will mainly apply to the distributor. These are summarised very briefly below:

- The Sale of Goods Act 1979 (SGA) – primarily implies terms as to the distributor's title to the goods, their correspondence with their description and any sample, and their quality and their fitness for purpose.
- The Supply of Goods and Services Act 1982 (SGSA) – governs contracts for services, including goods transferred under a contract for services.
- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (Consumer Contracts Regulations) – these implement most of the Consumer Rights Directive (2011/83/EU).
- The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) – apply to unfair terms in contracts between a consumer and a distributor or supplier of goods or services.
- UCTA – applies to contract terms or notices that seek to limit or exclude liability.
- The Consumer Rights (Payment Surcharges) Regulations 2012 (Payment Surcharges Regulations) – bans traders from charging consumers excessive payment surcharges above the costs of processing payments.
- The Consumer Protection form Unfair Trading Regulations 2008 (CPUT Regulations) – prohibits sales practices that are misleading by action or omission or are otherwise unfair or are aggressive.
- The Provision of Services Regulations 2009 (POS Regulations) – places certain obligations on service providers.
- The Electronic Commerce (EC Directive) Regulations 2002 (E-Commerce Regulations) – places requirements on information service provider about how contracts concluded through electronic means will be made.
- The Consumer Protection (Distance Selling) Regulations 2000) (Distance Selling Regulations) – the Distance Selling Regulations require a distributor to provide certain information to consumers, provide consumers with a right to cancel within seven days and receive a refund and set out specific delivery times unless otherwise agreed.
- The Consumer Rights Bill (CRB) – the Consumer Rights Bill will consolidate and reform a large part of consumer law in the UK. It is envisaged that the CRB will come into force in October 2015. The CRB sets out statutory rights and tiered remedies for consumer contracts for goods and services, and introduces digital content as a separate category of contract. The law on unfair contract terms in consumer contracts are reformed, and private actions for breach of competition law are introduced. The powers of enforcement authorities under some consumer protection legislation are also reformed.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

The General Product Safety Directive (implemented in the UK by the General Product Safety Regulations 2005) requires products placed on the market to be safe. Where a product presents risks to safety, recall will be a last resort where other measures would not suffice to prevent the risks involved. Product recall can be undertaken voluntarily or at the request of a relevant authority (which in the UK are the trading standards department of local authorities). Distributors are expected to cooperate with the manufacturer to avoid risks or implement a recall if this is deemed necessary.

The parties are free to agree which party is responsible for carrying out and absorbing the cost of a product recall. However, a manufacturer cannot contract out of liability to a consumer that has suffered harm as a result of an unsafe product.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

The extent to which warranties and liabilities can be excluded or limited differs between B2B contracts and consumer contracts.

Business-to-business

UCTA provides that a business cannot exclude liability for death or personal injury as a result of negligence.

The Consumer Protection Act 1987 prevents a business from limiting or excluding liability for death, personal injury or loss of or damage to property caused by defective products.

The SGA implies a number of warranties in contracts for the sale of goods; including good title to sell the goods and that the goods are as described, of satisfactory quality and fit for purpose. Suppliers can expressly exclude the implied terms in relation to the quality of the goods, subject to the reasonableness requirement discussed above. However, the implied term as to good title and no encumbrances cannot be excluded.

Otherwise, a party is free to limit liability for loss or damage caused by negligence, subject to a test of reasonableness under UCTA. What is reasonable is a question for the courts. The onus to prove a clause is reasonable is on the party wishing to rely on it.

Liability for breaches not involving negligence, such as misrepresentation (including pre-contractual misrepresentation), breach or non-performance of contract and breach of statutory duty, will be subject to UCTA only when found in standard form contracts (or consumer contracts, discussed below). Such limitations of liability will be subject to the reasonableness test. Those not appearing in standard form contracts will not be subject to UCTA.

Consumer contracts

Like B2B contracts, liability for death or personal injury as a result of negligence cannot be excluded in consumer contracts under UCTA. None of the terms implied by SGA, including those relating to the quality of the goods, can be excluded. Although other exclusions and limitations of liability (including for breaches not involving negligence) are subject to the same reasonableness test under UCTA as applies to B2B contracts, it is less likely that the test will be satisfied in consumer contracts, particularly if there is a blanket exclusion. Limitations and exclusions in consumer contracts

are also subject to a further test of 'fairness' under the Unfair Terms in Consumer Contracts Regulations 1999.

Nor is it possible to exclude loss or damage caused by negligence of the manufacturer in a guarantee relating to goods sold to consumers. (UCTA section 5(1)).

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Data protection and privacy legislation in the UK applies to organisations dealing with personal data, which in this context is likely to include customer data. The legislation is not specific to distribution arrangements. Each country within the EU has its own national laws addressing data protection. In the UK, this area is primarily governed by the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003.

Under the legislation, individuals must be informed about the data that is being collected about them, how this data will be used and the details of the parties collecting and using the data. The party that determines how the data shall be processed is deemed to be the data controller (or 'owner') of that data. It is the data controller who is responsible for complying with the applicable law. UK privacy regulations also impose limits on the use of individuals' data for marketing. Failure to comply with the data protection and privacy rules have the potential to lead to significant fines. However, these are typically reserved for only the most serious breaches.

If a supplier imposes an obligation on a distributor to share end-customer data within the distribution agreement, supplementary obligations should be included requiring the distributor to obtain the necessary consents from the end-customers to facilitate both the sharing with the supplier, and the supplier's subsequent use of the data.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

The courts will be reluctant to intervene when the parties have agreed clear and unambiguous provisions to govern their contractual relationship. A termination right for the supplier in the event of dissatisfaction with the distributor's management is, however, a wide and subjective provision, so could be the subject of dispute before the courts. Targeting individuals whose employment may be jeopardised is not without risk. Care should be taken as regards the criteria for objecting: a claim of discrimination on, among others, race, creed, gender or age would be a serious issue.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Yes, this may be a risk and will be determined by the nature of the relationship in practice. The degree of mutuality of obligation, the control exercised by the supplier over the distributor or agent and whether work has to be performed personally by the distributor or agent are the principal determining factors. Additionally, where a distributor or agent is a company, their employees and employment liabilities could be transferred to the supplier where, after the termination of the distribution or agency agreement, the supplier proposes to bring the distribution or agency services in-house (see Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)).

If it is determined that a distributor or agent is an employee of the supplier, the supplier is liable as the employer for the entire employment. If an employee of a distributor or agent becomes an employee of the supplier through TUPE, their normal terms and conditions of employment will apply post-transfer, their continuous service will be unbroken and the supplier will inherit all employment liabilities. For example, if the distributor or agent provided sick pay benefit over and above the statutory regime, the supplier would be contractually obliged to provide the same benefit post-transfer, even if none of its own employees is so entitled. All of the usual UK employment rights would also apply to these employees, including holiday pay, national minimum wage, statutory sick pay, maternity, paternity, parental and adoption rights (including statutory payments), statutory notice, auto-enrolment in a pension scheme and, after two years' continuous service, a right not to be unfairly dismissed and a right to a statutory payment if made redundant.

In order to protect itself, a supplier would generally ask the distributor or agent to indemnify them against any employment liability as part of the distribution or agency agreement. This would include a clause splitting employment liabilities between the parties according to whether they arose before or after the transfer date. Indemnities in respect of the application of TUPE are usually very detailed and are a point for negotiation between contracting parties.

30 Is the payment of commission to a commercial agent regulated?

Yes. The Agency Regulations prescribe for the circumstances in which an agent will be entitled to the payment of commission (Agency Regulations 7–9) Broadly, the agent is entitled to 'reasonable remuneration taking into account all aspects of the transaction'. This includes commission on transactions concluded during the term of the agency relationship arising in whole or in part as a result of the agent's actions; and transactions concluded after termination of the agency relationship which are 'mainly attributable' to the agent and are concluded within a 'reasonable period' after the agency contract terminated. 'Mainly attributable' requires a causal link between the agent's activities and the contract being concluded and case law has determined that nine months after termination is a 'reasonable period'.

The timing of when commission becomes due and when payment of commission should be made is also covered by the Agency Regulations (Regulation 10).

31 What good faith and fair dealing requirements apply to distribution relationships?

Contract law does not recognise a general implied duty to perform contracts in good faith. This differs from the situation in many other countries, including France and Germany, which recognise some form of implied term that in agreeing and performing contracts the parties should act in good faith.

However, the courts are willing to give effect to express obligations to act in good faith in a wider range of commercial contracts, and in some instances have shown that they are prepared to imply a duty of good faith. The meaning and effect of good faith are likely to vary considerably depending on the context. Broadly, a good faith requirement involves acting with honesty, genuineness and integrity.

The case of *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) is significant as the High Court implied a duty of good faith to a distribution agreement. The claimant, Yam Seng, entered into a distribution agreement with the defendant, ITC, pursuant to which ITC granted Yam Seng the exclusive rights to distribute certain fragrances bearing the brand name 'Manchester United' in specified territories in the Middle East, Asia, Africa and Australasia. The contract period initially ran from 12 May 2009 until 30 April 2010, but was later extended until 31 December 2011. The judge determined that ITC was in breach of certain express terms of the contract. The judge found that one breach was repudiatory, but also went on to consider whether a duty of good faith was to be implied into the contract.

The court suggested that in some B2B contracts, good faith should be implied into a contract between two businesses, especially where the type of contract, such as a distribution agreement, involves one or both parties having to expend considerable time, effort and money in preparing to put the contract into practice. The judge explained the importance of good faith and fair dealing in 'relational contracts' such as joint venture agreements, franchise agreements and long-term agreements.

However, UK courts are still generally reluctant to imply terms into contracts. In a recent case, *SNCB Holding v UBS AG* [2012] EWHC 2044, the High Court confirmed that judicial power to imply terms into contracts is subject to 'strict constraints' and any implied term must mirror what the contract actually means.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No, however, it is considered best practice to register any agreement that includes a licence of a patent, registered trademark or registered design with the UK Intellectual Property Office.

Although it is not common practice, the parties to a distribution agreement which includes a licence of registered trademarks, registered designs or patents, may consider detailing this licence in a separate document annexed to the main distribution agreement. The benefit of this approach is that the licence can then be registered separately from the main distribution agreement, therefore protecting the commercial terms from potential public disclosure.

The benefits of registering licences include:

- if the IPR are later sold to a third-party purchaser, it is sold subject to the burden of the registered licence. This means even where the third-party purchaser was unaware of the licence, they require to honour it going forward;
- similarly, if the owner of the IPR attempts to grant an exclusive licence which would conflict with the pre-existing registered licence, the original licensee's position is protected and their licence stands;
- in respect of licences of registered trademarks (common in distribution arrangements to allow the distributor to carry out advertising), unless the licence states otherwise, registration grants the distributor the right to call upon the supplier to take action to prevent others from infringing the trademark, and the right to bring infringement proceedings if the supplier fails to do so. If the licence is exclusive, the licensee may be entitled to bring proceedings in its own name; and
- in respect of licences of patents (in the unusual scenario where a patent is licensed to a distributor), if the distributor is an exclusive licensee then it will be entitled to bring infringement proceedings in its own name.

Finally, failure to register a registered trademark licence or patent licence within six months may affect the amount that can be recovered by the distributor in a court action for infringement.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Contracts may include implied contractual terms that have not been expressly agreed between the parties but are deemed to be incorporated into the contract by a court as a result of : (i) usage or custom; (ii) the previous course of dealings of the parties; (iii) the intentions of the parties; (iv) common law; and (v) legislation. These rules are not specific to distribution contracts.

Examples of the legislation most relevant to distribution agreements that imply contractual terms and that have been discussed in this chapter include the SGA, SGSA and UCTA.

Others include:

- the Late Payment of Commercial Debts (Interest) Act 1998 – implies the level of interest that shall be payable on outstanding amounts due under a contract unless the contract specifies otherwise; and
- the Contracts (Rights of Third Parties) Act 1999 – allows a third party to enforce a contract term where (i) the contract specifically provides for this; or (ii) a term confers a benefit on a third party and the contract does not preclude the third party from enforcing this term. This legislation does not apply to the whole of the UK, however other jurisdictions have laws with comparable effect and so the position is similar throughout the UK.

Common law will also be relevant to distribution agreements. Particularly pertinent may be provisions relating to termination. Notwithstanding that a contract may have detailed provisions for termination, a party will always have a common law right to terminate a contract where there has been a sufficiently serious breach of the contract.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

There are no restrictions in the UK on the parties' contractual choice of governing law.

Where no choice of law is made between the parties, EC Regulation 593/2008 (Rome I), in respect of contractual obligations, and EC Regulation 864/2007 (Rome II), in respect of non-contractual obligations, will apply.

Under Rome I, contracts will generally be governed by the law of the country with which the contractual obligations are most closely connected. In non-contractual obligation situations, the general rule in Rome II is that the law of the country in which the damage occurred will be the governing law.

Both Rome I and Rome II are subject to exceptions to the general rule. For more information see the text of the Agency Regulations.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

There are no restrictions in the UK on the parties' choice of courts, nor on the choice of arbitration tribunals to resolve contractual disputes.

Parties should take advice from counsel in other jurisdictions to ensure that if proceedings are issued in the courts of that jurisdiction, the foreign court will enforce the jurisdiction clause and either stay proceedings in favour of the UK courts (either Scotland or England and Wales, as applicable), or accept jurisdiction as required. An arbitrator purportedly appointed in Scotland or England automatically has the power to rule on challenges in their jurisdiction.

Practical considerations such as ease of enforcement of any award by an arbitrator will impact upon the choice of arbitration tribunal.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

There are different courts and procedures in the UK, depending on whether the action is raised in the courts of Scotland or the courts of England and Wales.

Courts

Generally, disputes before the courts of England and Wales are allocated between the County Court (claims up to £100,000); and High Court (claims more than £100,000).

In Scotland, civil cases can be heard in the applicable Sheriff Court (the equivalent of the English County Court) or the Court of Session. The exclusive jurisdiction of the Sheriff Courts is due to increase imminently. Under the new rules, Sheriff Courts will have exclusive jurisdiction over cases with a value up to £100,000 (the current threshold is £5,000).

Procedures

The procedure before the County Courts and the High Court in England and Wales is set out in the Civil Procedure Rules 1998 as amended from time to time (CPR), and supplemented by court-issued guidance.

In Scotland, there are three forms of procedure in the Sheriff Court, depending on the value of the claim:

- small claims– claims of up to £3,000;
- summary cause – claims between £3,000 and £5,000; and
- ordinary cause – claims over £5,000.

An appeal against a decision by a sheriff can be made to the Sheriff Principal or to the Inner House of the Court of Session.

The Court of Session is the highest civil court in Scotland. At first instance, cases are heard by a single judge in the Outer House. Appeals are heard (usually by three judges) in the Inner House. Decisions by the Inner House are subject to appeals to the Supreme Court of the United Kingdom.

A separate, tailored, procedure for commercial actions is used in certain Sheriff Courts (including Glasgow, Edinburgh and Aberdeen) and in the Court of Session.

Remedies

The remedies most likely to be sought in respect of distribution agreements in the UK are: (i) damages (ie, compensation for breach of contract); and (ii) specific implement (ie, an order compelling a party to comply with its contractual obligations or to prevent a party from carrying out some action). There is no substantial difference in the remedies available in Scotland and England and Wales.

Fair treatment

There are no restrictions on foreign businesses using the courts or procedures of Scotland or England and Wales. Foreign businesses can expect to be treated fairly and equally. That said, a foreign company may be ordered by a Scottish court to find security for expenses, also known as caution (ie, consign a specified sum with the court pending the outcome of the action). However, orders for caution are granted relatively rarely.

Disclosure

In England and Wales parties to proceedings are obliged to disclose at the outset the documents on which they rely; documents that adversely affect their case; documents that adversely affect another party's case; and the documents that support another party's case, subject to the rules on privilege (CPR 31.6). It is also possible for a party to require disclosure of specific documents before proceedings are commenced in certain circumstances. Litigants can request that the court issue a witness summons against an adverse party or third party requiring that witness to attend at court to give evidence or produce documents to the court under CPR 34.2.

In Scotland, there is no obligation of such upfront disclosure as in England and Wales. A party can seek to recover documents by means of a commission and diligence. The court must be persuaded that the documents are relevant to the case and will only grant an order for recovery for specific documents. A party to a litigation can seek to recover documentation from an opponent prior to the commencement of an action by seeking an order under section 1 of the Administration of Justice (Scotland) Act 1972. A party to litigation cannot be compelled to provide a witness statement. However, commercial procedures typically require parties to lodge formal witness statements with the court in advance of a proof (hearing on evidence).

Advantages and disadvantages of resolving disputes

The English court system is generally held in high regard internationally due to the independence and impartiality of its judges, the quality of their decision-making and the transparency of the court's procedure. Many foreign companies prorogate jurisdiction to England and Wales for that reason.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Agreements to mediate will be enforceable in the English and Scottish Courts, assuming a bona fide contract has been formed which is subject to the jurisdiction of that court.

An agreement to arbitrate disputes will usually be enforced in England and Wales and recognised under the Arbitration Act 1996. There are requirements for validity such as having been made in writing and relating to a subject matter capable of settlement by arbitration. In addition, there are mandatory provisions that will apply to all arbitrations in England falling within its scope (eg, the provisions of the English Limitation Act 1980). Beyond this, the English regime is permissive and does not contain restrictions on the location or language of the arbitration.

Similarly, there are mandatory rules relating to arbitrations initiated in Scotland.

The advantages of resolving disputes by way of arbitration as opposed to through the courts are that arbitration is likely to be quicker and parties will have more say in who is appointed to preside over the dispute resolution process (eg, an arbitrator with specialist experience in the subject matter of the dispute). In England and Wales, the Arbitration Act 1996 confers upon the English Courts powers to make orders in support of arbitral proceedings, such as freezing injunctions or orders for the preservation of documents, for example. London is widely recognised as one of the world's leading international arbitration centres. Numerous arbitral bodies have offices in the city and there is substantial specialist arbitration expertise throughout the legal marketplace. The UK is party to numerous international conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to facilitate recognition and enforcement of awards made by arbitral tribunals in this jurisdiction.

The main disadvantage of resolving disputes by way of arbitration is the limited right of appeal. In addition, while resolving a dispute by arbitration can be quicker, parties will be expected to meet the arbitrator's costs and, as such, it is not necessarily cheaper.

Maclay Murray & Spens LLP

Michael Dean **michael.dean@mms.co.uk**
Melanie Martin **melanie.martin@mms.co.uk**
Laura McIntyre **laura.mcintyre@mms.co.uk**

1 George Square
Glasgow
G2 1AL
United Kingdom
Tel: +44 330 222 0050
Fax: +44 330 222 0053
www.mms.co.uk

1 London Wall
London
EC2Y 5AB
United Kingdom
Tel: +44 330 222 0050
Fax: +44 330 222 0054

United States

Andre R Jaglom

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Generally, yes, unless the supplier's country, the supplier itself or its principal is the subject of a trade embargo or sanctions. As of December 2014 the countries on the embargo list are Cuba, Iran, North Korea, Sudan and Syria. The lists of embargoed countries and sanctioned individuals and entities are maintained by the Office of Foreign Assets Control (OFAC) of the US Department of Treasury. For details see the OFAC sanctions page: www.treasury.gov/resource-center/sanctions.

There are also certain industries in which foreign ownership is restricted or regulated, either nationally or by certain states, such as defence contracting, banking and alcoholic beverages.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Generally yes, subject to the embargoes, sanctions and certain industries noted in question 1.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Any importer, whether foreign-owned or not, should operate through a form of entity whose liability is limited to the assets of the entity, to minimise the risk of the owners' assets being available to satisfy claims for the activities of the business. The most common of these are the corporation and the limited liability company (LLC). These are formed under state law by filing documents with the chosen US state, and that state's laws will govern the entity as to its internal governance and the relationships among the owners and the entity.

While LLCs are generally more flexible with respect to governance, economic structure and corporate formalities, for a foreign parent a corporation will often be preferable from a tax perspective. See question 6.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Generally there are no restrictions, subject to the responses to questions 1 and 2. US states generally do require, if an entity is 'doing business' in the state, that it 'qualify' to do business, which involves a filing with the state, agreement to be subject to jurisdiction of the state, and appointment of an agent for service of legal process in the state. The definition of 'doing business' varies somewhat by state and is extremely fact-based, but generally includes the operation of a business facility in the state. Typically a company that fails to qualify when it is required to do so will not be entitled to maintain any action or proceeding in the courts of the state. Of course, there are likely to be tax consequences for a foreign business that operates directly in the United States.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

See questions 1 and 2.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Foreign businesses and individuals are generally subject to federal (national US) income tax on their taxable income that is deemed to be 'effectively connected' with a US trade or business ('effectively connected income' or 'ECI') at the normal rates applicable to US persons. Non-US persons must file a US income tax return to report such income and may deduct the expenses of the US business. A foreign corporation that has ECI is subject to an additional 30 per cent US branch profits tax on its after-tax net income. A foreign person is also subject to a 30 per cent US withholding tax on US-source 'fixed or determinable annual or periodic' income, which generally includes dividend income.

If a foreign entity provides services in the US, and those services are performed by employees of the foreign entity, the foreign entity will be engaged in a US business. This means that the foreign entity will have to file a US tax return and report and pay tax on its ECI from those services. Also, if the foreign entity invested in a US operating business directly or through an entity treated as a partnership for US tax purposes, the foreign entity itself would be required to file a US tax return and pay taxes on its share of any ECI generated by the operating business.

In order to alleviate both the implications of having to file a tax return in the US and the payment of the branch profits tax, the foreign entity could establish a US subsidiary corporation to employ the individuals who will perform services in the US or to hold the foreign parent's investment in a US operating business. The US subsidiary would file a US tax return and would be subject to US tax at regular US corporate income tax rates on the income generated by the US business, less its business expenses. If the US subsidiary makes any distributions to the foreign parent during the time that it was operating or holding an investment in a business in the US, the distributions would be subject to a US dividend withholding tax at a rate of 30 per cent (or any lesser rate provided in an applicable income tax treaty between the US and the foreign entity's home country). When the US subsidiary sells its US business or its investment in a US business, the US subsidiary would be subject to US tax on any net gain realised on such sale. However, the US subsidiary could then fully liquidate and distribute the proceeds from its business or its investment to its foreign parent, and that liquidating distribution would not be subject to US withholding taxes. Accordingly, a foreign business or individual can avoid a second level of US tax (ie, the branch profits tax or dividend withholding tax) on its US business or its investment in a US business if it makes its investment through a wholly-owned US corporation, and the US corporation does not make any distributions to the foreign parent until it fully liquidates.

However, depending on the tax rules of jurisdiction where the foreign business is located and the structure of the foreign company, it may be preferable to structure the US subsidiary entity as a US partnership that elects to be treated as a corporation for US tax purposes. This structure will have the same US tax benefits of investment through a US corporation as discussed above and may also allow the investing company or its equity owners to receive a tax credit in its local jurisdiction for the US corporate taxes paid by the US subsidiary. Often income tax treaties between the US and other countries can affect the preferred structure and offer opportunities to reduce the total tax burden from a foreign business's US operations.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The options for distribution in the US, for the most part, are limited only by the creativity of the business people structuring the relationship. The most common are discussed below.

Direct distribution
Distribution by the foreign supplier using its own employees or through a subsidiary. See questions 1 to 6.

Commercial agents and sales representatives
The agent does not purchase or take title to the goods, but rather sells them on behalf of the foreign supplier and receives a commission. Matters such as who actually delivers the product, who generates the invoice, how risk of non-payment is shared and other logistical matters may be addressed by contract, together with a definition of each party's duties and how the relationship may be terminated.

Independent distributors
The supplier contracts with an independent distributor that buys goods from the supplier, taking title to those goods, and resells them at a profit to its own customers. The details of the relationship, including the responsibilities of each side and the right to terminate are defined by contract.

Franchising
Franchising, under the typical definition, amounts to the use of independent distributors who are licensed to use the supplier's trademarks, either in the business name or in the products sold, are required to follow a prescribed marketing plan or method of operation, and pay a franchise fee to the supplier. The specific definition and the consequences of being deemed a franchise vary from state to state. In many US states, franchises are regulated in one or both of two ways. First, many states and the Federal Trade Commission require disclosure documents in a prescribed format to be provided to the franchisee and, in some states, registered with the state. Second, some states regulate the substance of the relationship between franchisor and franchisee in various ways, most notably by restricting the franchisor's right to terminate or not to renew the relationship except for statutorily defined good cause, often requiring a specified period in which the franchisee may cure any default. States that regulate franchising often require franchisors to submit to jurisdiction and appoint an agent for service of process in the franchisee's state.

Joint ventures
A joint venture can be established by a foreign supplier with its distribution partner in the US, whether the partner is an agent, distributor or franchisee, by having the local distribution entity owned in part by the supplier, directly or through a subsidiary, or through another form of sharing of profits and expenses. An ownership interest can provide greater control through ownership rights and representation on a board of directors or management committee.

Licensing of manufacturing rights
A foreign supplier may license a US manufacturer to use its intellectual property – patent, copyright, trademark or trade secrets – to make its products locally and sell them. While all the implications of licensing intellectual property are beyond the scope of this chapter, care must be taken by the licensor to maintain quality control over the finished product and the use of the intellectual property. Failure to do so can not only put the brand equity at risk, but also risk the loss of trademark protection.

Private label
Distribution of products under a private label amounts to a reverse licensing arrangement, where a US distributor or retailer distributes the foreign supplier's products under the US business's own trademark. In essence, the supplier gives up its own brand name in exchange for the distribution strength of its US partner, with the supplier reaping no enhanced brand value. Control over sales, distribution, marketing and advertising are in the hands of the local brand owner, resulting in negligible distribution costs to the supplier, and virtually no control, save perhaps for sales and performance benchmarks in the contract, with benefits to the supplier limited to its profits on sales of the product.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

By and large, the relationship between supplier and distribution partner is governed by contract, which the parties are free to structure as they wish. Notable exceptions are: (i) business franchises, which are regulated by federal disclosure requirements and by various state disclosure, registration and relationship laws, discussed briefly in question 7; and (ii) federal and state laws governing certain industries, which can regulate the right of a supplier to terminate a distribution relationship, among other aspects of the relationship. There are federal laws governing automobile dealers and petroleum products retailers (gas stations). Many states have similar laws for those industries, and there are state laws governing beer, wine and spirits, farm equipment and occasionally other industries. (Understanding the laws and regulations governing businesses and individuals in the US is complicated by the fact that there is regulation both at the national, federal level and at the state level by each of the 50 US states, Washington, DC, and US territories and possessions, such as Puerto Rico, the US Virgin Islands and Guam.)

Many industries have adopted codes of conduct applicable to companies in the industry, which suppliers often incorporate into their distribution agreements so they become part of the contract. (Some companies incorporate similar codes of conduct that they have adopted individually.) Such incorporated codes of conduct are enforceable just like any other contract provision.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Again, the parties' freedom to contract generally governs the distribution relationship, including the parties' right to terminate or not to renew the relationship without cause or for specified reasons. As indicated in question 8, however, some states' laws restrict the ability of franchisors and suppliers in certain industries to end a relationship. Where a statutory restriction exists, it often prohibits termination without 'good cause', 'just cause' or a similar formulation. Such cause is often narrowly defined and typically does not include poor performance, but often does include a material failure to comply with reasonable contractual requirements, which makes clearly drafted and substantively reasonable contractual performance standards important. Moreover, many states require that, before termination occurs, the franchisee or distributor be given a specified period of time – often 60 or 90 days – in which to cure any deficiency or breach. The statutory 'good cause' requirements typically – but not universally – apply equally to a failure to renew a contract on expiration.

In the absence of such a statute, however, there is generally no restriction on the parties' ability to agree on the conditions for termination with or without cause.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

When an applicable statute restricts termination without good cause, as discussed in question 9, or where a termination violates a contract's terms, the wrongfully terminated distributor may recover damages, and in some cases may be able to obtain injunctive relief preventing termination. (The requirements for injunctive relief vary from state to state, but often require irreparable harm not adequately compensable with money damages. That is often interpreted to mean a likely inability for the business to survive in its current form.) Where damages are to be awarded, the amount will vary from state to state and usually is not defined by any specific formula or multiple of profits or sales. Often the damages will be defined as the fair market value of the distributor's business in the terminated product lines (ie, what a willing buyer and a willing seller, neither under compulsion to deal, would agree on for the price of the business). Damages may also be calculated as the net present value of the profits that would be earned by the distributor in the absence of termination. In the absence of an applicable statute or breach of contract damages will not be assessed for a proper termination.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

In general, yes. However, as discussed in question 8, there may be specific laws applicable to certain industries that affect the enforceability of such provisions.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality agreements are generally enforced as written, subject to normal contract defences such as fraud or unconscionability, and subject to the obligation to disclose information in legal proceedings and government investigations. US courts have broad disclosure requirements, and the presence of a confidentiality provision will not shield information from discovery if it is material and necessary in the prosecution or defence of an action. While courts disfavour protective orders to maintain the confidentiality of information filed with the court, they can be obtained where necessary to protect competitively valuable information or in other cases where good cause can be shown, particularly where the parties to a litigation can agree, and confidentiality agreements between litigating parties are not unusual to protect sensitive information provided in discovery.

Information disclosed to government agencies may be subject to public disclosure under federal or state freedom of information laws, although there are exceptions, and protection of sensitive information should be discussed with the government prior to disclosure. It is prudent to include in confidentiality agreements a provision calling for advance notice and cooperation from the party being compelled to disclose, to the extent permitted, prior to making a disclosure required by law, so that the party whose sensitive information may be disclosed can seek appropriate protection.

Trade secrets – information that is not generally known and provides a competitive advantage to the owner – will be protected from disclosure or misappropriation where the owner has taken appropriate steps to maintain confidentiality, including obtaining written confidentiality agreements from all employees and others to whom the information is disclosed.

Confidentiality agreements in the US typically exclude from protection information that the receiving party can demonstrate (i) was already known to the receiving party at the time of disclosure; (ii) became public without fault of the receiving party; (iii) is developed independently by the receiving party without reference to confidential information of the disclosing party; or (iv) is learned by the receiving party from a third party not owing any obligation of confidentiality to the disclosing party. Where the information to be protected is not in fact confidential, as in these situations, a court may not enforce the agreement.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

In the absence of market power, a supplier generally is free to restrict a distributor's sales of competing products, although some state laws limit this ability. Where exclusive dealing requirements are so broad as to foreclose a substantial portion of the market, they may be found unlawful as an unreasonable restraint of trade under the antitrust laws. Restrictions that extend beyond the term of a distribution agreement are disfavoured in some states, and generally must be ancillary to the contract and in furtherance of its lawful purposes, as well as reasonable as to (i) the products restricted, (ii) the geographic scope of the restriction, and (iii) duration. Where a supplier provides a turnkey operation, as in a classic franchise, and discloses all the details of how to operate the business, such post-term restrictions may be more broadly permitted, particularly if they are short in duration and cover a limited geographic area.

14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?

In general, US antitrust laws, such as section 1 of the Sherman Act, in the absence of monopoly power, address concerted action, not unilateral conduct. Thus, if the supplier itself is making the sale, as with owned outlets, a controlled subsidiary or, in most jurisdictions, through a true agent, the pricing is unilateral and usually not problematic. But an agreement between independent entities in which the supplier regulates the resale prices of a distributor, franchisee or licensee, raises antitrust concerns.

In 2007, the US Supreme Court held, in *Leegin Creative Leather Products, Inc v PSKS, Inc*, that all vertical agreements (ie, agreements between buyer and seller) even as to resale prices, are judged under federal law by the 'rule of reason,' under which the court must determine whether the anti-competitive harm from the conduct is outweighed by potential competitive benefits, rather than the per se rule making conduct unlawful without regard to any claimed justifications. In *Leegin*, the Supreme Court noted a variety of situations in which resale price maintenance (RPM) may be anti-competitive, and suggested several factors relevant to the rule of reason inquiry, including the number of suppliers using RPM in the industry (the more manufacturers using RPM, the more likely it could facilitate a supplier or dealer cartel), the source of the restraint (if dealers are the impetus for a vertical price restraint, it is more likely to facilitate a dealer cartel or support a dominant, inefficient dealer), and where either the supplier or dealer involved has market power.

Importantly, the states do not always follow federal precedent in enforcing their own antitrust laws and so may not follow *Leegin*. Indeed, some states have antitrust statutes that explicitly bar RPM programmes. Thus, some state authorities will apply the per se rule to RPM under state law. The result is a patchwork of states accepting or rejecting the *Leegin* approach in enforcing state antitrust laws. Consequently, before implementing any RPM programme, counsel must carefully examine each relevant state's treatment of RPM, especially as state law continues to develop, review all the facts, and determine whether any of the factors described by the Supreme Court in *Leegin* are present, or whether there are other indications that the proposed programme will have anti-competitive effects rather than enhancing interbrand competition.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

It is lawful in the US for a supplier to suggest resale prices, so long as there is no enforcement mechanism and the customer remains truly free to set its own prices. In addition, under the rule announced in 1919 by the US Supreme Court in *United States v Colgate & Co*, a supplier may establish a unilateral policy against sales below the supplier's stated resale price levels and unilaterally choose not to do business with those that do not follow that policy, because only agreements on resale pricing may be unlawful. But care must be taken not to take steps that would convert such a unilateral policy into an agreement. When a supplier's actions go beyond mere announcement of a policy and it employs other means to obtain adherence to its resale prices, an RPM agreement can be created. *Colgate* policies can be notoriously difficult to administer, because salespeople often try to persuade a customer to adhere to the policy rather than be cut off (with the resulting loss of sales to the salesperson), instead of simply terminating sales upon a violation, and such efforts can be enough to take the seller out of the *Colgate* safe harbour and into a potentially unlawful RPM situation.

Minimum advertised price (MAP) policies that control the prices a supplier advertises, but not the actual sales price, are also generally permitted, although the issue of what constitutes an advertised price for online sales can have almost metaphysical dimensions. In order to avoid classification as RPM, the MAP policy must not control the actual resale price, but only the advertised price. The closer to the point of sale that advertising is controlled, the greater the risk. Thus, in the bricks and mortar world, policies restricting advertising in broadcast and print media are more likely to be permitted; restrictions on in-store signage would be riskier, and restrictions on actual price tags on merchandise most likely would be deemed a restriction on actual, rather than advertised, price. Online, sellers have most often restricted banner ads and the price shown when an item is displayed, while restrictions on the price shown once a consumer places an item in his or her shopping cart carry a greater risk, which explains why some items are displayed with the legend 'Place item in cart for lower price.' Where the supplier does not prohibit an advertised price inconsistent with the supplier's policy, but instead, as part of a cooperative advertising programme, conditions reimbursement of all or a portion of the cost of an advertisement on compliance with a supplier's MAP policy, the risk is reduced, although not eliminated.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

In general yes. Such 'most favoured customer' clauses are widespread, and courts generally have applied the rule of reason and found that such clauses do not unreasonably restrain trade.

In 2010, however, the US Department of Justice filed an action in federal court in Michigan against health insurer Blue Cross Blue Shield (BCBS), claiming its use of such clauses thwarted competition in violation of antitrust laws. The Department asserted that, because of its market power, BCBS harmed competition by requiring hospitals to agree to charge other insurers as much as 40 per cent more than they charged BCBS. (The case was voluntarily dismissed by the Justice Department after the state of Michigan passed a law prohibiting health insurers from using most favoured customer clauses). And in the *Apple Computer e-books* case, a federal district court found that a most favoured customer provision in Apple's contracts with publishers that required the publishers to lower the price at which they sold e-books in Apple's store if the books were sold for less elsewhere – notably by Amazon.com – violated the antitrust laws. An appeal is pending.

The presence of most favoured customer clauses may also lead a supplier to reject an otherwise attractive offer from a customer to take surplus inventory at a lower price, because the discounted price would have to be offered to all customers with a most favoured customer clause. Contract drafters should therefore examine whether a most favoured customer clause raises antitrust risks in the context of their client's particular market share and pricing practices, with particular caution advisable where market power is present.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Yes. The federal Robinson-Patman Act prohibits, with certain exceptions, price differences (as well as discrimination in services or facilities) in contemporaneous interstate sales of commodities of like grade and quality for use or resale within the US that causes antitrust injury. The basic principle is that big purchasers may not be favoured over small ones. The Robinson-Patman Act also requires promotional programmes to be available to customers on a proportionally equal basis. The Act does not apply to services, leases or export sales.

The statute is often criticised, and is honoured more in the breach than the observance, as quantity discounts are commonplace and government enforcement actions are rare. Private damage actions, however, are still brought with some frequency, although the requirement of showing antitrust injury is often an obstacle to success. To prevail under the statute, a plaintiff must show that the price difference had a reasonable possibility of causing injury to competition or competitors, a standard that has been tightened by recent case law.

There are two principal defences to a Robinson-Patman Act claim. First, showing that the price difference was justified by cost differences is a defence. This defence, however, is notoriously difficult to establish, requiring detailed data as to the cost differences applicable to the different sales at different prices. Second, under the 'meeting competition' defence, prices may be lowered to meet (but not beat) a competitor's price, where there is a good faith basis for believing the competitor actually made a lower offer. If a copy of the competitor's invoice or price quotation cannot be obtained, the company should gather as much information as possible to support the belief that the competitor offered the lower price. The lower price must not, however, be confirmed with the competitor, which could provide evidence supporting a horizontal price-fixing conspiracy by the suppliers. Rather, the supplier should obtain that information through other sources, such as customer documentation or market surveys.

There are also state laws that restrict price discrimination. Some are generally applicable and modelled on the Robinson-Patman Act, but apply to intrastate sales instead of or in addition to interstate sales. Others restrict 'locality discrimination' – charging different prices in different parts of a state. Some states, such as California, have unfair competition laws that prohibit below-cost pricing (which in certain circumstances may also violate federal law) and the provision of secret and unearned rebates to only some competing buyers. Other state laws apply to specific industries, such as motor vehicles or alcoholic beverages, and prohibit discrimination in pricing to dealers.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

As a general rule, yes. Non-price vertical restraints are judged by the rule of reason in the US and are generally permitted, in the absence of market power. Customer and territory restrictions, such as exclusive territories pursuant to which a distributor is allocated a specific territory outside of which it may not sell and within which no other distributor may sell the supplier's goods, thus are governed by the rule of reason. Exclusive territories necessarily reduce intrabrand competition between distributors of the same products. But by eliminating one distributor 'free-riding' on the promotional and service efforts of another and undercutting its price, and thus making it feasible for the distributor to sustain those efforts, exclusive territories enhance interbrand competition between suppliers of competing products, and so are generally viewed as pro-competitive on balance.

The distinction between active and passive selling applicable in Europe is not generally relevant under US antitrust law. Another distinction from the European approach is that restrictions on online sales are viewed as a non-price vertical restraint, and so are judged by the rule of reason and generally permitted, in the absence of market power. Courts have upheld prohibitions on mail order and telephone sales under the rule of reason, and restrictions on internet sales – even an absolute prohibition – should be judged no differently.

Note, however, that customer allocation by competitors is a horizontal arrangement rather than a vertical one and is per se illegal. It is thus critical that the impetus for exclusive territories come from the supplier in a vertical arrangement and not from dealers or distributors making a horizontal allocation of territories.

Many US cases apply a 'market power screen' in rule of reason cases, and uphold non-price vertical restraints whenever the defendant lacks market power. Such restraints, including exclusive territories, will be viewed more sceptically if market power exists.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

In general a business that does not have market power is free to choose its customers and do business or not do business with whomever it wishes. That can include restricting a distributor's ability to do business with particular customers or classes of customers, a vertical restraint that will be judged by the rule of reason, as discussed in questions 14 and 18. A supplier with market power will be more limited in its ability to engage in such practices, if an adverse effect on competition can be shown, and there are circumstances in which courts have found that a monopolist may have an obligation to deal, or to continue dealing, with its competitors.

Note that an agreement among competitors at the same level of distribution not to deal with certain customers, or to restrict with whom customers may deal, will be treated as a horizontal, per se illegal restraint, rather than as a vertical restraint governed by the rule of reason. Thus where a restriction on dealing with certain customers originates with a group of competing distributors, a supplier may be at risk of being found to be an illegal participant in that horizontal conspiracy, where the same restraint originated by the supplier might well be lawful.

There may be some industries in some states where a supplier is required to deal with all customers. For example, in many states, alcoholic beverage wholesalers must sell to all licensed retailers.

20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

As discussed in questions 14 and 18, vertical agreements between suppliers and distributors are generally governed by the rule of reason, under which the anti-competitive effects of the restraint are weighed against any possible pro-competitive effects, and in the absence of market power, will usually be found lawful. In contrast, horizontal agreements among competitors at the same level of distribution relating to matters such as pricing,

allocation of customers or territories, or production levels, are prohibited by the per se rule.

Accordingly, it is important for suppliers and distributors not only to avoid such agreements with their competitors, but also to avoid putting themselves or their distribution partners into a position where they might be deemed participants in a horizontal conspiracy at either distribution partner's level of distribution. Thus, suppliers should not exchange current or future pricing or production information with their competitors, should not use their common distributors to facilitate such information exchanges, and should not agree to territorial allocations made by their distributors rather than imposed by the supplier, Distributors should not share with one supplier pricing or production information received from another. Similarly, suppliers should not share information with each other about their common distributors, as such exchanges could support a claim of a concerted refusal to deal should both suppliers then decide to terminate their relationships with the distributor.

Returning to purely vertical relationships, a supplier may not require its customers to purchase one product (the tied product) in order to be able to purchase another product (the tying product), if the supplier has substantial economic power in the tying product market and a 'not insubstantial' amount of commerce in the tied product' is affected. One of the difficult questions in a tying analysis is whether there are in fact two distinct products, one of which is forced on customers who would not otherwise purchase it as a result of market power with respect to the other.

The antitrust laws are enforced both by government action and by private party litigation. At the federal level, both the US Department of Justice and the Federal Trade Commission enforce the antitrust laws. They may seek criminal or civil enforcement penalties. Jail terms are not uncommon for antitrust violations, especially horizontal ones. Maximum fines for each violation are US$1 million for individuals and US$100 million for corporations. In addition, both federal agencies can bring civil actions to enjoin violations of the antitrust laws, disgorge profits, impose structural remedies and recover substantial civil penalties. The federal agencies often cooperate with foreign antitrust authorities in investigating violations.

State attorneys general also actively prosecute antitrust cases and have similar authority to the federal agencies within their own states. State antitrust laws also provide civil and criminal penalties, and the states frequently cooperate with each other and with the federal agencies in multistate investigations and prosecutions.

Last, but certainly not least, private plaintiffs may bring civil actions under the antitrust laws and recover treble damages – that is, three times the actual damages caused by the violation – and attorneys' fees (not the usual rule in the US, where each party generally pays its own legal fees, regardless of who prevails). The exposure in an antitrust action can thus be extremely high, as can the costs of litigation.

Acquisitions of businesses or interests in businesses, including a supplier's purchase of an ownership interest in a distributor, may be subject to filing requirements and federal antitrust agency review if certain thresholds are met as to the size of the transaction and the size of the parties.

21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Importation of goods bearing a registered trademark, even if genuine, can be blocked through the US Customs and Border Patrol Service, provided the non-US manufacturer is not affiliated with the US trademark owner, under the Tariff Act, which prohibits the importation of a product manufactured abroad 'that bears a trademark owned by a citizen of [...] the United States'. In addition, where parallel imported goods are materially different from the US goods in quality, features, warranty or the like, a trademark infringement claim is possible where customer confusion is likely.

There is less ability to restrict grey market importation under a copyright theory. The Supreme Court held in 2013, in *Kirtsaeng v John Wiley & Sons, Inc*, that a copyright owner cannot exercise control over a copyrighted work after its first sale, even if that first sale occurs outside the US. Moreover, reliance on an insubstantial element of a product protected by copyright to attempt to block parallel imports may be held to be copyright misuse, which prevents enforcement of the copyright.

22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

Advertising is regulated by both federal and state laws that prohibit false, misleading or deceptive advertising. Where advertising makes statements that could reasonably be interpreted as an objective factual claim (in contrast to statements like 'world's best water,' that are more likely to be regarded as puffery), the advertiser must have reasonable substantiating documentation to support the claim before the advertising is disseminated.

Federally, advertising is regulated principally by the Federal Trade Commission. The FTC has broad authority under the FTC Act to prevent 'unfair or deceptive acts or practices' and more specific authority to prohibit misleading claims for food, drugs, devices, services and cosmetics. The FTC can sue in the federal courts, and often will enter into consent orders with defendants in advance of litigation that may incorporate a variety of remedies.

The FTC considers advertising deceptive if it contains misrepresentations or omissions likely to mislead consumers acting reasonably to their detriment. While the FTC must show the deception was material to consumers' purchasing decisions, it does not have to show actual injury to consumers. Similarly, the FTC deems advertising to be unfair if it causes or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition.

The most common remedy in advertising cases is an order to enjoin the conduct complained of and prevent future violations. Where such an order is not enough to correct misunderstandings caused by misleading advertising, the FTC may order corrective advertising. In addition, the FTC may seek other consumer redress or disgorgement of profits, and, in the case of violations of prior orders or trade regulation rules, civil penalties.

The states regulate advertising in similar ways under a variety of state unfair competition and unfair trade practice statutes. These are enforced by the state attorneys general in a manner similar to the FTC.

Finally, private parties – often competitors – can bring actions in the state and federal courts to enjoin or seek damages for false or deceptive advertising that causes harm to competitors or consumers.

There are additional restrictions on specific types of advertising. Sweepstakes, in which prizes are awarded by chance to consumers who have made a purchase or provided some other consideration, are regulated by many states, some of which require prior registration. Endorsements are regulated, most notably by the FTC Endorsement Guidelines, which are intended to ensure that statements of third-party endorsers reflect an honest statement of the endorser's opinion and are substantiated to the same extent as required for the advertiser's own statements. The Guidelines require, among other things, disclosure of any relationship between the endorser and the supplier of the product, including requiring the supplier to ensure that bloggers who review a product disclose when the supplier provided a free sample for evaluation and that employees who comment on their employer's products or services on social media or websites disclose that relationship.

Finally, there are specific regulations governing certain claims, such as those asserting health benefits, or claiming 'green' products, and many industries have adopted self-regulatory advertising codes that should be followed.

There are no restrictions in the US on suppliers requiring reimbursement or contributions for advertising costs from distribution partners, or on distribution partners agreeing to share in the advertising expenses. Freedom of contract governs, and it is commonplace to include provisions governing the sharing of advertising costs or the contribution from each party to advertising funds to support the products being distributed.

23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

Trademarks

Trademarks receive some protection in the US by virtue of use in the US under the Lanham Act and under the common law of the states where they are used. The preferable, more effective way to protect trademarks in the US is to obtain trademark registrations through the US Patent and Trademark Office. US trademark registrations can be based on a supplier's

home country trademark registration or on use in interstate or foreign commerce in the US. Applications can also be based on an intent to use the trademark in the US, but the registration will not be issued until the supplier has submitted proof of actual use in the US. US federal trademark registration can also be obtained under the Madrid Protocol if the supplier's home country is a signatory to the treaty.

Only the owner of a trademark may obtain a US registration. Accordingly, in general, the supplier, not the local distributor, will be the applicant. Contracts typically forbid the distributor from registering the trademark to protect the supplier from infringement by its distribution partner.

Patents

In general, patent protection in the US must be sought in conjunction with patent protection in the supplier's home country. If a US patent application has not been filed within a specified period of time – usually one year – after the home country filing, a US patent will not be available. A longer period may apply under the Patent Cooperation Treaty if the home country is a signatory.

Assuming there is US patent protection, the supplier may enforce the patent through private lawsuits in US courts against infringers. Both injunctive relief and damages are available remedies. Where the infringing goods are imported into the US, an exclusion order from the International Trademark Commission may also be sought. While this procedure is faster, no damage remedy is available. Unauthorised sale of patented products by the distribution partner is usually regulated by contract but can also be remedied through an infringement suit.

Copyright

Under the US Copyright Act, the copyright in a work of authorship, including textual, artistic, musical and audio-visual works, is protected from the moment the work is fixed in a tangible medium of expression. Publication with a copyright notice is no longer necessary to retain US copyright protection. However, a supplier's ability to protect its copyrights in the US is significantly enhanced by registration with the US Copyright Office. First, registration is required before a copyright can be enforced in the US courts. Second, where a copyright has been registered before an infringer's activities began, the remedies available for infringement are enhanced: the plaintiff need not prove actual damages from the infringement, but may elect to recover 'statutory damages' in an amount, to be set by the court or jury, of up to US$150,000 per infringed work in the case of wilful infringement. In addition, where the copyright is registered, the plaintiff may recover, at the court's discretion, the costs of the suit including attorneys' fees.

Trade secrets and know-how

See question 12 concerning protection of trade secrets as against distribution partners. Third parties who steal trade secrets (eg, by industrial espionage or hiring of key employees) may be sued for theft of trade secrets. For employees, mere knowledge in a particular field acquired through long experience with one employer is not a protectable trade secret that will prevent a key employee from changing jobs. In such circumstances non-compete agreements may give suppliers some protection, but there are limits on the time frame and geographic scope.

Technology-transfer agreements

Technology-transfer agreements are typically used to transfer technology from development organisations, such as universities or government, to commercial organisations for monetisation. They are not commonly used to structure the relationships between commercial suppliers and their distribution partners, where a licence agreement is more common.

24 What consumer protection laws are relevant to a supplier or distributor?

There are many federal and state consumer protection laws that are important to suppliers and distributors, well beyond what can be addressed in any detail here. At the federal level, these include a number of laws relating to consumer credit, including the Fair Credit Reporting Act, Truth in Lending Act, Fair Credit Billing Act, Fair Debt Collection Practices Act, Identity Theft and Assumption Deterrence Act of 1998 and Credit Accountability, Responsibility, and Disclosure Act. Other federal consumer protection laws and regulations include the CAN-SPAM Act (regulating the use of unsolicited commercial e-mail), FTC Used Car Rule, FTC Mail or Telephone Order Merchandise Rule (which covers internet and fax sales as well as telephone and mail order sales and regulates shipment times and related statements and cancellation rights), FTC Telemarketing Sales Rule under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and various labelling and packaging requirements for food and beverages, textiles and wool, appliances, alcoholic beverages and other industries. To gain a sense of the range of regulations and to review FTC guidance on the subject, visit the FTC website at www.business.ftc.gov.

In addition, most states have very broad consumer protection laws governing unfair or deceptive trade practices and specific laws governing industries such as mobile homes, health clubs, household storage, gasoline stations and others. Often these provide a consumer right to rescind contracts made in certain circumstances within a defined period. For example, in New York, there is a 72-hour right to cancel for door-to-door sales, dating services, health clubs and home improvement contracts. Contracts for such transactions must clearly state the right to cancel.

See also questions 22 and 26 regarding advertising and warranties.

25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

Recalls of products are regulated by a number of federal and state agencies, including the Food and Drug Administration, the US Department of Agriculture and the Consumer Product Safety Commission. In addition, manufacturers, importers and distributors often initiate voluntary recalls to remove a defective or dangerous product from the marketplace before it can cause harm, so as to avoid the potential liability and reputational harm that can come from damage, injuries or deaths.

It is prudent to define in the distribution contract the parties' respective responsibilities in the event of a recall, including who may decide to initiate a recall, how it will be implemented, and who will pay the costs, including credits that customers may require for recalled products.

26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

There are both federal and state laws regulating warranties. The main federal law is the Magnuson-Moss Warranty Act, which applies to consumer products with a written warranty. While there is no requirement that a warranty be offered, if a written warranty is provided, then the Act requires certain disclosure of warranty terms, imposes certain requirements, and mandates certain remedies for consumers.

The Act and Federal Trade Commission Rules under it require that a written warranty be stated to be either 'full' or 'limited' for any consumer product that costs more than US$10, and imposes disclosure requirements for products costing more than $US15. Specified information about the coverage of the warranty must be set forth in a single document in simple, readily understood language, and the warranties must be available where the products are sold so that consumers can read them before deciding to purchase.

A warranty is 'full' only if: (i) it does not limit the duration of implied warranties (discussed below); (ii) warranty service is provided to anyone who owns the product during the warranty period, not just the first purchaser; (iii) warranty service is provided free, including costs of returning, removing and reinstalling the product; (iv) the consumer may choose either a replacement or a full refund if the product cannot be repaired after a reasonable number of attempts; and (v) consumers are not required to do anything as a condition to obtain warranty service (including returning a warranty card), other than to give notice that the product needs service, unless the requirement is reasonable. If any of these conditions is not met, then the warranty is limited rather than full.

The FTC requires disclosure of certain elements in every warranty, including precisely what is and is not covered by the warranty, when the warranty begins and ends, how covered problems will be resolved and, if necessary for clarity, what will not be done or covered (eg, shipping, removal or reinstallation costs, consequential damage caused by a defect, incidental costs incurred), and a statement that the warranty 'gives you specific legal rights, and you may also have other rights which vary from state to state'. Any additional requirements or restrictions, such as acts that will void the warranty, must be disclosed.

The Magnuson-Moss Act prohibits a written warranty from disclaiming or modifying any warranties that are implied under applicable law, as discussed further below, although a limited warranty may limit the duration of implied warranties to the duration of the limited warranty, subject to contrary state law.

A written warranty cannot be conditioned on the consumer product being used only with specific other products or services, such as particular accessories, but it may provide that it is voided by the use of inappropriate replacement parts or improper repairs or maintenance. A waiver can be obtained from the FTC if it can be shown that a product will not work properly unless specified parts, accessories or service are used.

The FTC, the Department of Justice and consumers can sue to enforce the Act, and consumers can recover their court costs and reasonable attorneys' fees if successful. The Act also encourages businesses to establish informal dispute resolution procedures to settle warranty disputes. Such procedures must meet certain requirements, and must be non-binding on the consumer.

In addition, other federal laws and regulations govern such topics as warranties for consumer leases, used cars and emissions control systems and advertising of warranties.

In almost all states, warranties are governed by the Uniform Commercial Code, which provides for an express warranty, an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. The implied warranty of merchantability is an implied promise, whenever the product is sold by a merchant, that the goods will function properly for the ordinary purposes for they are used, would pass without objection in the trade, are adequately packaged and labelled, and conform to any promises made in labelling or packaging. The implied warranty of fitness for a particular use exists only when the seller has reason to know the purpose the buyer intends to use the product for at the time it is sold and the buyer relies on the greater knowledge and recommendation of the seller in selecting the product.

The extent to which implied warranties may be disclaimed varies by state. Where permitted, disclaimers usually must be conspicuous, usually interpreted as boldface capital letters. Similarly, state law may permit sellers to limit the damages and other remedies available in case of a breach of warranty. Notice of such disclaimers also generally must be conspicuous.

Many states also have specific 'lemon laws' governing motor vehicles.

27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

In contrast to many other countries, privacy regulation in the US has been limited to a few specific areas, such as children's information, medical information and financial services. Instead, the regulatory focus has been on matters such as transparency to the consumer with respect to the manner in which information will be used and shared and the security protections in place, as well as the procedures to be followed in the event of a security breach. The FTC and other federal agencies have adopted rules in these areas, generally requiring notice to consumers about collection and use of information; consumer choice with respect to the use and dissemination of information collected from or about them; consumer access to information about them; and appropriate steps to insure the security and integrity of any information collected. The FTC has been active in regulating behavioural advertising, mobile apps and information security, and businesses gathering customer information should familiarise themselves with the FTC's guidance in these areas.

In general, companies collecting information about consumers must say what they will do with collected information, and do what they say. Within that construct, and subject to the specifically regulated areas, suppliers may exchange customer information with their distribution partners freely, so long as adequate notice of that information exchange has been provided to consumers.

Virtually all states also have adopted legislation governing consumer information, with data breach legislation imposing notification obligations and remedial action in the event of a security breach being the most common. These state requirements sometime conflict, which can create problems. A number of states impose specific security obligations on businesses that collect consumer information.

Parties should clearly define in their distribution contract who owns the customer information that has been collected, who has access to it, and the applicable confidentiality obligations (which must conform to the parties' stated privacy policies, which in turn must be consistent with each other). In the absence of such a definition, customer data is likely to belong to the party that collected it, but the sharing of such information without a statement of the recipient's obligations may result in the recipient's ability to do as it wishes with the information. Suppliers and their distribution partners also should cooperate in planning to prevent security breaches, and to respond to them in accordance with applicable law when they occur.

28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Under the general principle of freedom of contract, the parties generally may provide as they wish with respect to supplier control over the persons who manage the distributor. Thus, the contract can grant authority to a supplier to approve or reject the individuals who manage the distribution partner's business or the distribution of the supplier's products specifically, as well as to terminate the agreement if not satisfied. And again, this general principle is subject to specific franchise or industry regulation, as discussed in questions 8 and 9. Particularly for alcoholic beverages, many states have laws designed to protect the independence of wholesale distributors; in such states provisions giving suppliers control over distributor management may be problematic and unenforceable. And where termination is limited to statutorily defined good cause as discussed in questions 8 and 9, a right to terminate for dissatisfaction with management may be unenforceable.

29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

There is a risk that distributors – especially single-employee companies or sole proprietorships – might be deemed employees of the supplier. The tests for distinguishing bona fide independent contractors from employees vary from state to state, agency to agency, and statute to statute, but they generally weigh various factors, including:

- Does the distributor perform work for other clients and market its services to the general public, or does it work exclusively for the supplier?
- Has the distributor made substantial investments in its own vehicles or other equipment?
- May the distributor hire its own employees?
- Does the distributor control its schedule and how it accomplishes its work or is it subject to the supplier's instructions?
- Is the parties' relationship limited in duration, or open-ended?
- Does the distributor have substantial skills, experience, and training, or is supplier training required?
- Are the distributor's services similar to those of the supplier's employees?
- Does the distributor earn a profit on resales or receive a sales commission or other compensation for its results, or is it compensated for its time, eg, on an hourly or salary basis?
- Does the distributor receive employee-type benefits, eg, vacation days, sick pay, health insurance?

No single factor is dispositive – the determination is made on the totality of circumstances in the facts of each case. The distribution agreement, while not dispositive, should state the parties' intent.

Misclassification may result in substantial employment and tax liabilities for the supplier, including retroactive pay and benefits, other damages and substantial fines and penalties. Employees are generally entitled, among other benefits, to minimum wage and overtime compensation, discrimination and workplace safety protections, unemployment benefits, workers' compensation and disability insurance, protected family, medical, and military leaves of absence, and a right to participate in the employer's retirement and health plans and other benefits. While there are federal employee rights, specific benefits vary from state to state.

Suppliers should engage experienced employment counsel to analyse the relevant facts and determine the proper classification.

30 Is the payment of commission to a commercial agent regulated?

About half the US states have laws regulating commission sales representatives. These laws typically require written agreements setting forth how commission is calculated and require payment within a specified period after termination. Some laws provide for double or treble damages for violations. A few, such as Puerto Rico and Minnesota, restrict a supplier's right to terminate a sales representative without statutory 'good' or 'just' cause. In some states, sales representatives may also be protected by franchise laws in certain circumstances. See questions 8 and 9.

31 What good faith and fair dealing requirements apply to distribution relationships?

A covenant of good faith and fair dealing is implied by the laws of most states in all commercial contracts, including distribution agreements. This requires the parties to deal with each other in good faith, but generally does not supersede express contractual provisions. Thus a complaint that a supplier terminated a distribution contract in bad faith, in violation of the covenant of good faith and fair dealing, will generally not succeed in the face of a contractual provision allowing the supplier to terminate without cause. Indeed, cases in a number of states hold that a claim cannot be based solely on a breach of the implied covenant of good faith without some breach of an express provision as well.

In contrast, other courts have found a violation of the implied covenant of good faith where suppliers have acted to the disadvantage of their dealers, notwithstanding an express provision permitting the conduct at issue. For example, a federal district court found that sales by the Carvel ice cream company to supermarkets might violate its duty of good faith to its franchisees, notwithstanding its contractually reserved right, in its 'sole and absolute discretion', to sell in the franchisees' territory via the same or different distribution channels.

Similarly, some courts have found a violation of the implied covenant of good faith where the manner in which a supplier exercised its contractual rights demonstrated bad faith, such as disparagement of the distributor or misappropriation of confidential customer information in connection with an otherwise permitted termination.

Moreover, some of the specific industry laws discussed in questions 8 and 9 impose an explicit obligation of good faith on suppliers and distributors that may be independently enforceable.

32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

With the exception of those state franchise laws that require registration of disclosure documents, as discussed in question 7, there generally are no such requirements.

33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Except for the specific industry regulation and franchises, discussed in questions 8 and 9, and the antitrust restrictions discussed throughout this chapter, the parties are generally free to structure their relationship as they wish. Of course, distribution contracts are subject to the usual contract enforceability defences, such as fraud, unconscionability, lack of consideration and the like. As discussed in questions 26 and 31, there are certain warranties and a covenant of good faith and fair dealing implied by law; laws governing specific industries and franchises may impute or require other provisions.

In addition, if the contract gives a supplier effective control over the distributor's operations, it may be held vicariously liable to third parties for the distributor's negligence or other misconduct. Similarly, a supplier may be liable for conduct of a distributor that is required by the supplier or represented as part of the supplier's operations.

Governing law and choice of forum

34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

A choice of law provision in the distribution contract selecting the law of a specific state or country may be enforced, if the jurisdiction chosen bears a reasonable relationship to the transaction (eg, the supplier's or distributor's home jurisdiction). Such contractual choice of law provisions, while generally enforced, are sometimes disregarded by courts in deference to the public policy of states with business franchise or protective industry laws of the sort discussed in questions 8 and 9, or because the validity of the contract containing the clause was questioned. And courts have refused to enforce choice of law provisions that bear no reasonable relation to the parties or contract.

In selecting a particular state's law, note that this may result in the application of either a more or less restrictive state franchise law than might otherwise be the case.

Combining a choice of favourable law with an arbitration clause will enhance the likelihood of the choice of law being enforced. The strong federal policy in favour of arbitration, embodied in the Federal Arbitration Act, generally has been held to support the parties' choice of law to be applied in arbitrations, even in the face of explicit state law to the contrary, as discussed in question 37.

Unless the parties provide otherwise, the United Nations Convention on Contracts for the International Sales of Goods will govern contracts for sales of goods between parties who have their places of business in different contracting states, of which the US is one.

35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

The parties can provide in the distribution contract for all litigation to be brought in a court located in a particular state or country and can waive their right to seek a transfer. These clauses are sometimes enforced and sometimes not. The Supreme Court, in *Burger King Corp v Rudzewicz*, has held that a franchisor can constitutionally enforce a forum-selection clause against its franchisees in an action commenced by the franchisor in its home state. Courts in the distributor's home state, however, may refuse to enforce a forum-selection clause on the ground that the public policy interests of the distributor's state outweigh the parties' choice. Note also that state franchise laws may expressly prohibit the choice of another state as a forum. Federal courts, however, will apply federal law to determine whether to enforce such a clause, notwithstanding any such state view; the forum clause is not dispositive, but should be considered together with the other factors normally weighed in a transfer motion, at least where the choice is between two federal districts.

A showing of state policy sufficient to outweigh a forum clause may be difficult to make. For example, Maryland courts have held that a forum selection clause favouring the franchisor's home state was enforceable despite being incorporated into a form contract where the franchisor had superior bargaining power, reasoning that there was no fraud involved, and a federal district court in New York upheld a one-sided forum clause that restricted venue in actions by a franchisee, but not in actions by the franchisor. In contrast, the District of Puerto Rico declined to transfer a dispute to California courts as required by a contractual forum clause, as Puerto Rico was more convenient for witnesses, and there was no evidence justifying transfer other than the contract clause.

As discussed in more detail in question 37, arbitration clauses specifying a particular forum are likely to be enforced under the Federal Arbitration Act. The Seventh Circuit US Court of Appeals reversed a district court decision and ordered arbitration in Poland pursuant to contract in a case under the Illinois Beer Industry Fair Dealing Act, holding that while the state's public policy expressed in that statute required Illinois law to apply notwithstanding the contract's choice of Polish law, that public policy could not overcome the Federal Arbitration Act policy in favour of arbitration.

36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Suppliers and their distribution partners have access to both state and federal courts to resolve their disputes, although, as noted in question 4, a company that fails to file its qualification to do business in a state in

which it meets the definition of 'doing business' usually will not be entitled to maintain any action or proceeding in the courts of the state. This rule applies to both US companies formed in other states and non-US companies, and in general foreign businesses have equal access to the courts. By and large, foreign companies can expect fair treatment in US courts, especially in the federal courts and courts of the larger commercial states. Some states, such as New York, have a well-established body of commercial law and have created specialised commercial courts with judges experienced in commercial disputes, making these courts a desirable forum for dispute resolution.

Discovery in US courts is very broad, typically requiring disclosure of documents and electronic materials, responses to written interrogatories and deposition testimony of witnesses whenever material and necessary in the prosecution or defence of an action. This does substantially increase the cost of litigation in US courts. In response, subject to a showing of a need for greater discovery, some courts have enacted rules that place limits on the length of depositions, the number of witnesses that may be deposed and the number of interrogatories that may be propounded. Electronic discovery of documents and e-mail is also generally quite broad and can be a significant cost, although some courts may shift that cost to the party seeking the discovery in certain circumstances.

Alternative dispute resolution methods may be agreed to by the parties, such as non-binding mediation or binding arbitration, discussed in response to question 37, and certain industry regulations and industry self-regulatory codes may provide or require certain disputes, such as a claim of wrongful termination, to be resolved before government agencies or industry boards.

37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

A provision for binding arbitration of disputes in place of the courts will generally be enforced under the Federal Arbitration Act (FAA), which favours arbitration agreements, even in the face of state law to the contrary. Note, however, that where state law requires – as some state business franchise laws do – a disclosure that a choice of law or choice of forum provision, including an arbitration clause, may not be enforceable in that state, a question arises as to whether the parties really agreed to the provision. The Ninth Circuit US Court of Appeals has held that a contractual choice of forum for arbitration was unenforceable because of such a mandated disclaimer, finding that the franchisee had no reasonable expectation that it had agreed to arbitrate out-of-state.

Provisions limiting the relief arbitrators may award to actual compensatory damages, or expressly precluding punitive damages, injunctive relief or specific performance, will also generally be enforceable. The US Supreme Court has held that FAA's central purpose is to ensure 'that private agreements to arbitrate are enforced according to their terms', so that the parties' decision as to whether arbitrators may award punitive damages will supersede contrary state law. Similarly, courts generally will also enforce a provision for a particular arbitration forum.

However, care should be taken in drafting arbitration clauses not to overreach, because even under the FAA, arbitration agreements may be set aside on the same grounds as any other contract, such as fraud or unconscionability. For example, the Ninth Circuit held an arbitration clause unconscionable, and so unenforceable, where franchisees were required to arbitrate, but the franchisor could proceed in court. A district court in California rejected an arbitration clause as unconscionable where the arbitration clause blocked class adjudication (requiring each case to be resolved individually) and proved unfavourable for plaintiffs on a cost-benefit analysis. It is thus prudent to adopt a more balanced approach in drafting arbitration provisions.

Arbitration is private, in contrast to the courts and, depending on the court, can sometimes be faster and cheaper. It may afford less discovery and can present problems requiring testimony of non-parties, to the disadvantage of a party who needs them. There is generally no appeal from a legally incorrect or factually unfounded decision and arbitrators often seek a compromise result.

While there is no similar statutory underpinning for provisions requiring non-binding mediation before parties may proceed to court or binding arbitration, such a provision generally will be enforced under principles of freedom of contract.

Update and trends

A developing trend to watch is increased enforcement of the Foreign Corrupt Practices Act (FCPA), particularly in the context of a supplier's liability for third-party misconduct by foreign distributors and agents. The FCPA, a criminal statute, prohibits bribery of foreign officials, political parties and candidates for public office. Under the FCPA, a company or individual can be held directly responsible for bribes paid by a third party if the company or individual has knowledge of the third-party's misconduct. Constructive knowledge, including wilful blindness or deliberate ignorance, is enough to impose liability. Accordingly, it is important to take steps to prevent such misconduct by distributors, agents, brokers, sales representatives, consultants and other local business partners by exercising appropriate due diligence in selecting partners and adequately supervising their activities. Before a supplier enters an agreement with a foreign partner, it must perform FCPA due diligence, require FCPA compliance and reporting in its agreement, and thereafter perform ongoing training, monitoring and audits.

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Andre R Jaglom **jaglom@thsh.com**

900 Third Avenue
New York, New York 10022
United States

Tel: +1 212 508 6740
Fax: +1 646 390 7042
www.thsh.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Government Investigations
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

iPad app

Available on iTunes

Law Business Research

Book title
ISSN 2058-5608

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law