Distribution & Agency

Contributing editor
Andre R Jaglom

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GETTING THE DEAL THROUGH

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Preface

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Distribution & Agency*, which is available in print, as an e-book 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 jurisdictions featured. Our coverage this year includes new chapters on Japan and Korea.

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 the contributing editor, Andre R Jaglom of Tannenbaum Helpern Syracuse & Hirschtritt LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH

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Global overview

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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. Developments in areas such as privacy and data protection and growing concerns over cybersecurity affect distribution relationships as well as a result of the normal sharing of customer information and other data between distribution partners.

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. This difference in attitude came to a head in October 2015 in the *Schrems* case, when the European Court of Justice, based on its understanding of US government access to personal data (an understanding deemed erroneous by the US), invalidated the Safe Harbour arrangement by which US companies who subscribed to its principles could receive personal data from European affiliates and trading partners. The *Schrems* decision has thrown into disarray the sharing of data between EU and US companies, including between suppliers and their distribution partners. The recently announced replacement 'Privacy Shield' arrangement remains subject to challenge. So long as US authorities claim the right to intercept, collect and review communications without a showing of particularised need, the problems identified in the *Schrems* case may potentially be found to apply to the Privacy Shield as well, complicating the sharing of information between the EU and the US.

Moreover, increased cybersecurity concerns have led to regulations at both the federal and state levels imposing security standards and breach notification requirements on businesses. Where applicable, these businesses must ensure that those with whom they share protected data comply with the requirements as well. This means that distribution and agency agreements need to address these issues.

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 to better understand the issues and the questions to ask.

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Brazil

Raquel Stein and Isabela Popolizio Morales

Carvalho, Machado e Timm Advogados

Direct distribution

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

Yes, a foreign supplier could either incorporate its own Brazilian entity or open a subsidiary, affiliate or branch in Brazil.

Regarding the incorporation of a local entity, its administrative headquarters would be located in Brazil, and the company would be ruled by Brazilian law. Except for certain restricted activities mentioned in question 4, there are no restrictions on foreign shareholders participating in the local entity. However, there must be a minimum of two members.

As for the incorporation of a mere establishment or branch, prior government authorisation would be required, granted upon request and presentation of corporate documents, as well as the appointment of a permanent legal representative resident in Brazil. In this case, only legal acts performed on Brazilian territory would be ruled by Brazilian law. However, this latter option is seldom used, since the process to obtain authorisation is quite lengthy and bureaucratic, and it is much simpler to open a new entity with foreign shareholders ruled by Brazilian law.

As for the import of products, in order to obtain the specific licence and documentation for such process this will vary greatly on the nature of the products being imported as well as other factors, such as the level of capital invested in Brazil. Usually the initial imports will be done by third parties while the import licensing is processed.

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

Yes, foreign legal entities and individuals can acquire shares in Brazilian companies. If the shareholder is to be a legal entity, the supplier must enroll with the National Corporate Taxpayer Registry and register at the Central Bank, whereas foreign individuals must be enrolled with the National Individual Taxpayer Registry. It must be noted that, depending on the type of local entity the supplier will own, prior government authorisation may be required, as mentioned 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?

As mentioned in question 1, the best suited format would be to open a new legal entity owned by the foreign supplier. The most appropriate type of entity for a foreign supplier to be a part of is a corporation (*sociedade anônima*) or a limited liability company (*sociedade limitada*), the capital of which is divided into shares or quotas. In these types of entities, the liability of the shareholders is limited to the issue price of the acquired shares. Also, as a general rule, the shareholders' liability will not be extended to their personal assets. Only the assets of the company will be compromised.

Such entities must be formed by at least two individuals or entities that subscribe the shares or quotas of the capital agreed upon and set forth in the articles of incorporation. In relation to the corporation, the company's shares can be publicly sold in the stock market or limited to the acquisition of shareholders who wish to extend their equity interest.

Corporations are primarily regulated by Law No. 6,404 (the Brazilian Corporations Law) and, secondarily, by the Brazilian Civil Code (BCC), mentioned in articles 1,088 and 1,089. Limited liability companies are primarily regulated by the BCC, and if the parties wish, can be subsidiarily regulated by the Brazilian Corporations Law.

Please note that the articles of association of any company, whatever the type of legal entity, must be duly filed at the Commercial Registrar of the Brazilian state(s) where the company's headquarters and branches will be located. This is the governmental body responsible for registering companies and their business activities in Brazil. It answers to the National Department of Business Registration, an agency reporting to the Ministry of Development, Industry and Foreign Trade. In case of limited liability company, any changes to a company's articles of association, such as changes to a company's purpose, share value or number of shares, managers, among other information that needs to be made public and which could affect third parties, must be registered at the Commercial Registrar. The transfer of shares in limited liability companies must be registered at the Commercial Registrar, whereas in corporations, this transfer occurs by recording them in the company's books.

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

There can be restrictions depending on the type of business the company carries out. For example, it is forbidden for foreign entities to invest in the development of activities involving nuclear energy, health services, postal and telegraph services, as well as in the aerospace industry. In addition, there are restrictions on the acquisition of properties located in rural or national border areas, on participation in financial institutions, and on ownership and management of newspapers, magazines and other publications, as well as the media, such as radio and television networks.

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

There is no restriction on a foreign company purchasing shares in corporations, although registration is required, as mentioned in question 2, as well as certain restrictions in the case of the activities mentioned in question 4. The BCC expressly provides that government authorisation for foreign companies to operate in Brazil is not necessary if they wish to operate as part of a Brazilian company.

Nevertheless, said pre-approval would be needed for the foreign company to sell shares in the Brazilian stock market or to open a branch or subsidiary in Brazil.

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?

Whether or not the distributor located in Brazil is owned by a foreign supplier, that foreign supplier's tax obligations will depend on the activities of the distributor (since the taxes vary greatly depending on where the activities are carried out and what the business activities are).

The Brazilian Federal Revenue Service may consider a foreign supplier as having a permanent establishment in Brazil if it is directly

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responsible for operating sales and shipments. The foreign company may also be subject to tax for income obtained in Brazil. Should this be the case, the sums earned may be subject to income tax in Brazil.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The most common options for a supplier to sell its products in Brazil would be to engage distributors and/or agents. However, depending on the object of the business to be carried out, other business models may be more advantageous, especially from a tax and labour risks perspective. Due to Brazil's intricate tax system this can only be ascertained on a case-by-case basis.

The difference between the distributor and the agent is the fact that the distributor purchases the goods from the supplier and sells them directly to the final customer, and the distributor's earnings are based on the difference between the purchase price from the supplier and the price for which it sells the goods to the final clients.

The agent, on the other hand, does not actually purchase the products, merely operating as an intermediary between the supplier and final clients, usually placing orders directly to the supplier. The agent can store the products and deliver them to the final clients, earning commission on the sales it is able to promote on behalf of the 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?

The BCC generally regulates the distribution and agency relationship, in articles 710–721. The main difference between such structures would be the fact that the agent does not purchase the title over the goods before selling them to final clients. The agent has the obligation to promote sales on behalf of the principal, whereas the distributor's relationship with final clients is separate and no longer binds the supplier after the products have been purchased.

Moreover, agency relationships are also regulated by Brazilian Law 4,886/65. Brazilian law makes a distinction between general agency relationships, governed by the BCC, and so-called commercial representatives, commercial agents to whom Law 4,886/65 grants protective rights.

In case of divergence between the two statutes, the most beneficial provision from the agent's perspective will apply, depending on the specific circumstances of each 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?

A supplier may terminate an indefinite-term distribution relationship with or without cause, regardless of the agreement's provisions.

In order to terminate the agreement for convenience, should it be an indefinite-term contract, either party must send prior notice to the other, at least 90 days in advance, as per article 720 of the BCC. The term of prior notice must also be compatible with the nature and volume of investments made by the distributor or agent to perform under the agreement. If the parties do not reach consensus as to said period of time and volume of investiments, this will be decided in court or under an arbitration procedure.

Specifically for agency agreements, also called commercial representatives, Law 4,886/65 provides that, for indefinite-term agreements that have already been in force for six months, termination for convenience will only occur if prior notice of at least 30 days in advance is given, or payment of the sum equivalent to one-third of commissions received by the commercial agent in the previous three months. There is discussion in case law on whether the BCC has overridden this previous term, and now 90 days would be required. As a precautionary measure, we usually recommend a 90-day notice period.

It is also important to note that definite-term agency agreements, regulated by Law 4,886/65, once renewed, even if for a new definite term, will be considered indefinite-term contracts under Law 4,886/65.

As for termination for cause, the distributor or agent must receive consideration for the services rendered thus far, even if the distributor or agent's acts caused damages to the supplier, as per article 717 of the BCC.

Law 4,886/65 specifies the situations that qualify as cause for termination by the supplier, as well as by the commercial agent, in articles 35 and 36, respectively. If the acts or omissions of a commercial agent do not fall under the cases described in article 35, the principal will not be entitled to terminate the agreement with cause.

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

Article 718 of the BCC stipulates that, in the event of termination for convenience by the supplier, the distributor/agent will be entitled to the commissions it is owed so far, including for ongoing sales, as well as the damages applicable.

In the specific case of agency agreements, Article 27(j) of Law 4,886/65 provides that, in such cases, the commercial agent will receive an indemnity, corresponding to one-twelfth of all the commissions he or she earned during the entire relationship.

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 for distribution and agency agreements to prohibit the distributor/agent from assigning or transferring its rights and obligations to third parties without the principal's prior and express consent. This provision would be enforced by the courts. If the contract does not expressly set forth such prohibition, the assignment of the distribution/agency agreement to a third party will be allowed exclusively with regard to the assignee who acquired the contractual position of one of the parties under the agreement in good faith, as per article 286 of the BCC.

Regulation of the distribution relationship

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

Brazilian distribution agreements commonly include a confidentiality clause, providing that such confidentiality obligations remain in force even after the termination of the agreement, usually for five additional years. Courts generally respect and enforce such provisions without limitations, in accordance with the terms set forth in the contract.

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 provided in distribution agreements are generally enforceable, provided that such restrictions do not limit or adversely affect competition and free enterprise, in accordance with Brazilian Anti-Trust Law No. 12,529/11.

Article 711 of the BCC stipulates that exclusivity will be presumed in distribution/agency relationships, when there is no provision expressly stating that no exclusivity will be granted. However, such presumed exclusivity is one-sided, favouring the distributor/agent. For commercial agency agreements, on the other hand, governed by Law No. 4,886/65, exclusivity will not be presumed (article 31, sole paragraph).

Nevertheless, the distribution of terrestrial motor vehicles is regulated by a specific law: Law No. 6,729/79 (known as the Ferrari Law), pursuant to which dealers must be distant from one another in order for each to operate in its own territory, in accordance with measures set forth therein. This would be a sort of selective distribution, which allows for stricter restrictions on the dealers' distribution of products other than the supplier's.

As for the possibility to enforce such restrictions after the agreement is terminated, this will depend on the specific circumstances of the distribution/agency relationship, such as its duration, as well as the impact of such restrictions on the market, which must always comply with Brazilian competition law.

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14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Brazilian law does not prohibit suppliers from setting the resale prices to be used by their distributors. There are, however, antitrust provisions which limit such practice in cases where infractions (acts that impair free competition and have a negative impact on the market) are verified. For instance, resale prices may not be unreasonably below the market price, nor profits be arbitrarily increased (Article 36 of Law No. 12,529/11).

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 long as competition law (Law No. 12,529/11) is complied with, suppliers may set pricing policies or otherwise influence resale pricing conditions, always subject to such limitations.

For instance, item IX of paragraph 3 of article 36 of Law No. 12,529/11 prohibits suppliers that hold a dominant position in the Brazilian market from imposing on distributors, retailers and representatives, resale prices, discounts, payment conditions, minimum and/or maximum quantities, profit margins or any other trade conditions relative to businesses these conduct with third parties. This is analysed on a case-by-case basis.

For reference, a company is deemed to hold a dominant position in the market when it is able to unilaterally, or in coordination, modify market conditions, or when it controls at least 20 per cent of the relevant market, being such percentage subject to alteration by the Brazilian Administrative Council for Economic Defence (CADE) for the specific sectors of the economy.

As for the possibility of setting sales targets to commercial agents, the relationship with which is governed by Law No. 4,886/65, this is also feasible. However, please note that termination by the supplier due to the agent's failure to attain such targets will be interpreted as indirect subordination between agent and principal, which could characterise the relationship as one of employment, subject to labour laws, even more protective towards the agent than the provisions of Law No. 4,886/65.

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?

Brazilian law does not expressly regulate this matter. Parties are free to stipulate the pricing terms as they please. Nevertheless, this could be construed as a violation of the supplier's free enterprise right, according to which he or she is entitled to freely set pricing terms with each distributor.

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?

If the products are to be sold to final consumers, a seller may not charge different prices to different customers for the same product, or unreasonably increase prices (item X, article 39 of the Brazilian Consumer Protection Code (CDC)). Nevertheless, sellers are allowed to offer the same product online and in physical stores for different prices. It is very common to find lower prices on stores' websites than those charged in the stores.

In addition, different types of product may have different target markets, the seller being able to charge differently therefor, according to the materials and production processes used.

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 the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Exclusivity is presumed in distribution/agency relationships (article 711 of the BCC and article 31 of Law No. 4,886/65). If the parties do not wish to have a mutually exclusive relationship, the agreement must clearly and expressly state so. In this case, direct sales by the supplier, or through another distributor/agent, will be allowed.

Territorial exclusivity is, therefore, also permitted, being each commercial agent/distributor restricted to sales in a particular city, region or state. Once exclusivity is granted, sales by other distributors/commercial agents, or by the supplier itself, within the exclusive territory must be paid, as commission, to the exclusive distributor/commercial agent (article 31 of Law No. 4,886/65). Please note that this includes sales made through the internet. Such act by the supplier will also be considered breach of contract, as per article 36(b) of Law No. 4,886/65.

As for categories of customers, this restriction is permitted, as long as competition and consumer laws are not violated. The same product cannot be sold for different prices by the same distributor to different categories of customers. This could be considered an abusive practice by Brazilian courts.

Moreover, Brazilian law does not make a distinction between active and passive sales efforts. The distributor does not have an obligation to intermediate sales for the supplier, since his or her relationship with final customers is one of direct sale. After purchasing the title over the products, sales concern him or her alone.

The agent, on the other hand, renders the service of expanding the supplier's customer network, by conducting businesses on the supplier's behalf. This means his or her sales efforts must be clearly established in the agreement. The agent sends purchase orders to the supplier for approval. A margin for negotiation with final customers can be expressly defined, for example. The customer's failure to pay the supplier by virtue of insolvency allows for a discount to be applied by the supplier on the agent's commission (article 33, paragraph 1 of Law No. 4,886/65). This is the sole hypothesis that permits discounts on commissions. However, the customer's failure to pay the product price cannot cause the supplier to discount the outstanding sums from the agent's commission. This would amount to a del credere clause, expressly prohibited by Law No. 4,886/65 in article 43.

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 prohibited from refusing to sell goods that are in stock, or to render services, directly to those who are willing to purchase them through prompt payment, except in intermediation cases regulated by special laws (item IX of article 39 of the CDC). Anti-Trust Law No. 12,529/11 also prohibits refusal to deal if this limits or otherwise harms free competition or free initiative, dominates the relevant market of goods or services, arbitrarily increases profits, and constitutes an abuse of a dominant position in the market (item XI, paragraph 3, article 36).

Therefore, to refuse to deal with particular customers or to restrict its distributor's ability to deal with particular customers could be considered an abusive practice if not reasonably justified. The circumstances of each case would have to be analysed to verify if the refusal was unjust.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Certain transactions, deemed acts of economic concentration, must be reported to the competition authority, CADE, in accordance with articles 88–91 of Anti-Trust Law No. 12,529/11, as well as CADE Resolution No. 17, of 18 October 2016. The merger control regime and impact on cross-border transactions have recently changed; therefore, as of the issuance of said CADE Resolution in 2016, distribution agreements, as well as any other vertical transactions, are no longer considered reportable transactions. Their clearance is not required by the competition authority. Currently, only agreements with a definite term of at least two years, establishing a common business to explore an economic activity are considered associative contracts, provided that (i) the agreement provides that both companies share risks and profits from the economic activity that constitutes their business purpose; and (ii) the parties to the contract are competing in the relevant market corresponding to their business purpose (article 2, CADE Resolution No. 17/2016).

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Therefore, distribution agreements would not be considered reportable transactions, whether the foreign supplier becomes a partial owner of, or holds equity interest in, the local importer, or establishes its own local legal entity to distribute its own products. The supplier and the distributor would not even be considered to compete against one another in the market if the distribution relationship were non-exclusive, allowing the supplier to sell its products directly in the territory or through another distributor or agent. The product would always be the same because its trademark would always be the supplier's intellectual property.

21 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 relationship between suppliers and their distribution partners is not specifically regulated by Competition Law 12,529/11. Before CADE Resolution 17/2016, Resolution 10/2014 included provisions concerning vertical agreements that had to be reported to CADE, such as certain distribution agreements. With the new Resolution in force, this no longer is the case, as explained in the previous question.

However, parties will always be constrained by antitrust and competition laws to the extent that they must comply therewith. If any mergers or acquisitions between foreign suppliers and local distributors were to happen, where an act of market concentration could be characterised, as per article 88 of Law No. 12,529/11, the parties to said corporate transaction must submit the necessary transaction documents to the local competition authorities, which will then investigate and assess whether this constitutes an abuse of market dominance or damage to economic order in any way.

Brazilian antitrust and competition laws are enforced by CADE, an entity which regulated said enforcement by issuing resolutions on several competition-related matters, such as the one mentioned in the previous answer.

One of CADE's bodies is the Administrative Tribunal. CADE's full administrative court has authority to rule over administrative proceedings with regards to infractions to economic order and overall violations to antitrust and competition laws, and is able to enforce administrative sanctions on breaching companies (article 9 of Law No. 12,529/11). The en banc court's final decisions that impose a fine or another obligation on a company are deemed titles enforceable out of court (article 93 of Law No. 12,529/11). This means they can be enforced more quickly by judicial courts, without the need to reassess the merits of the case.

The following are the administrative proceedings that can be brought under antitrust or competition laws before the en banc court (article 48 of Law No. 12,529/11):

- procedure in preparation for an administrative investigation to verify violations of antitrust regulations;
- administrative investigation to verify infractions to economic order;
- administrative proceeding for the enforcement of administrative sanctions due to infractions to economic order;
- administrative proceeding for the analysis of an act of economic concentration;
- administrative proceeding for the assessment of an act of economic concentration; and
- administrative proceeding for the enforcement of incidental procedural sanctions.

Any individual or legal entity can send a complaint to CADE, with information concerning the companies that are allegedly breaching competition and antitrust laws, as well as their conducts. The Tribunal's General Commissioner has the authority to bring actions under antitrust or competition laws before the en banc court (article 13 of Law No. 12,529/11). The General Commissioner may include in the administrative proceeding any third parties who have rights or interests that may be affected by the decision to be rendered, as well as parties that are entitled to file public-interest civil actions, in accordance with items III and IV of article 82 of the CDC (ie, entities and agencies of the public administration specifically aimed at defending consumer interests and rights).

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

To prevent parallel or 'grey market' imports into Brazilian territory, foreign suppliers must be careful when selling their products. Brazilian courts, such as the Superior Court of Justice (STJ), have already stated that parallel or 'grey market' imports only occur with the consent either of the manufacturer itself and/or one of its authorised distributors in the country of origin, or elsewhere, who sell the products that end up being imported therefrom, entering Brazilian territory legally, to then be distributed by persons other than the supplier's local distributor or agent. Therefore, should the products be sold in a parallel or 'grey market' in Brazil, the supplier will not have a claim against those who purchase the original products legally. According to the STJ, if such claim existed, this would be a violation of the principle of free enterprise, safeguarded by competition law and the Brazilian Federal Constitution (CF) in article 170.

It is presumed that the distributor or agent would be even less successful if it went to court to prevent the existence of such market.

23 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?

It is common for distribution/agency agreements to provide the specific limitations in which the distributor/agent can advertise and market the products it sells. For instance, the supplier may grant the distributor/agent a non-transferable, non-exclusive, definite-term licence to use the supplier's logos, trade name, and other intellectual property.

The sale of products by the distributor/agent must always comply with advertising requirements provided in the CDC. For example, products must be clearly advertised, so as to avoid any type of doubt from the consumer. He or she must easily identify the product, its use, its price, and its specifications. The advertisement must also contain technical, factual, and scientific data (article 36 of Law No. 8,078 (the Consumer Code)). Otherwise, this could be construed as misleading or deceptive advertising, which is prohibited by law and punishable in court. In addition, advertising cannot be discriminatory or incite violence, among other negative behaviour (article 37 of the Consumer Code).

With regard to advertising costs, suppliers may pass all or part thereof on to its distribution partners, as long as the relationship is construed as one of distribution. Since distributors are not paid by suppliers for services rendered (ie, they only earn the difference between the price of products purchased from the supplier and the price they resell the products for), it is perfectly normal for them to bear all advertising costs. Advertising is a tool that helps the distributor increase its sales, in a way that the supplier does not rely on such publicity to continue selling its products to the distributor.

On the other hand, commercial agents, especially under the protection of Law No. 4,886/65, do rely on advertising in order to sell more products and, consequently, earn larger commissions from the supplier. The agent's activities can be seen more like a service rendered to the supplier, since he or she intermediates and approximates the supplier to its final consumers, working as a sort of collaborator of the supplier. This reliance would, therefore, justify advertising costs incurred by the agent to be reimbursed or indemnified by the supplier.

24 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 mandatory, but also highly recommended, that the supplier register its trademark(s) at the National Institute of Intellectual Property (INPI), as well as licence(s) to use the supplier's intellectual property, in order to safeguard its intellectual property from infringement by its distributor/agent, as well as by third parties. Such registrations are regulated by Law No. 9,279/96.

The legal requirements for a foreign company to register its trademark(s) are submissions of the following:

- a power of attorney granted to a person who will apply for registration before the INPI;
- samples of the trademark(s) the applicant wishes to register, including symbols, colours, and stylings (if any);

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- a list of the products or services that are included in said trademark(s); and
- a statement signed by the applicant's legal representative in the country of origin, declaring that the applicant is a duly constituted and existing company in accordance to said country's laws, specifying the activities of the business(es) it carries out, which are directly related to the products or services for which the applicant seeks to register its trademark(s).

If the supplier already has its trademark(s), patent(s) and other intellectual property rights registered in its country of origin, it will benefit in many ways, such as enjoying priority when applying for registration before the INPI, in accordance with the Paris Convention for the Protection of Industrial Property (WIPO) (articles 3, 126 and 230 of Law No. 9,279/96).

Brazilian courts have already ruled that, should the registration of a foreign company's trademark(s) expire for lack of renewal request by the owner, the protective terms of the WIPO cannot be invoked by the owner, due to lack of interest in the continuance of its rights. According to this understanding, the owner of the trademark(s) should strictly comply with national requirements after registration has been granted so as to ensure that its right continues to be enforced.

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

Both supplier and distributor/agent must strictly comply with the terms and conditions set forth in the CDC. Consumers are greatly protected by law and courts, as they are seen as economically disadvantaged parties, as opposed to suppliers, distributors and agents.

26 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?

With regard to recalls, article 10 of the CDC provides that the supplier must immediately inform the local authorities, as well as consumers, through advertisements, as soon as it becomes aware that one of its products or services is dangerous to consumers' health or safety. The cost of such advertisements, which include radio, television, the general press, and any other media form, must be borne by the supplier of the product or service.

The sale of certain types of product, such as food and beverages, medical devices and medications in general, is also regulated by the Brazilian Health Regulatory Agency.

27 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 cases of disputes involving final consumers, article 34 of the CDC provides that suppliers and their distributors/agents/representatives are jointly and severally liable towards the consumer. Therefore, downstream customers in the supply chain can file warranty claims against either the supplier or the distributor, or against both, or against any other party in the supply chain, regardless of where the product's defect originated from (article 12 of the CDC).

The sued party may seek restitution for damages it had to pay to consumers from the party immediately preceding in the supply chain. Therefore, suppliers may be held liable for indemnities paid by distributors to customers, especially in cases of manufacturing defects.

Therefore, neither the supplier nor distributor can limit the warranties provided to their downstream customers. A contractual clause to this effect would be considered abusive and, therefore, void (articles 24, 25 and 51 of the CDC).

If, under item I of article 51 of the CDC, the consumer is a legal entity, the supplier's liability can be limited. Courts analyse each case individually to verify if the consumer, even if a legal entity, still is the disadvantaged party within the relationship. Case law specifies certain conditions that should be met when limiting liability towards legal entity consumers, such as writing the limited liability clause in bold capital letters in order for it to be as clear and visible as possible to the consumer.

28 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 main statutes that regulate the exchange of information and data privacy are the Brazilian Constitution (article 5, X), as well as Law No. 12,965/2015 (the Civil Rights Framework for Internet), which ensures the right to privacy and freedom of speech in communications when accessing the internet (articles 7 and 8 of said law). There is also a bill for a personal data protection law, which is currently being analysed (Bills Nos. 4060/2012 and 5276/2016).

29 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?

If a supplier is not satisfied with the management of its distribution partner's business, he or she may terminate the agreement for convenience (ie, without cause), as per articles 718 and 720 of the BCC. He or she is not entitled to approve or reject the individuals who manage said business. This is something that is usually taken into account prior to choosing one's distribution partner.

30 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 the courts will consider the distributor or agent as an employee of the supplier. This is something that could be sought by a distributor or agent, usually after termination by the supplier.

Employment relationships are not governed by the BCC, and are instead subject to their own set of rules provided in Decree-Law No. 5,452 (the Consolidation of Labour Laws (CLT)). In addition, claims under the CLT must be resolved by labour courts (article 114 of the CF), which have a historic tradition of ruling disproportionately in favour of employees. This explains why the labour courts system is clogged with so many cases.

Therefore, in this context, distributors and agents are likely to go to labour court seeking recognition of an employment relationship, in order to obtain larger sums of indemnities for contract termination, in accordance with the CLT.

It is important to note that the relationship between the supplier and the distributor or agent can be characterised as one of employment, especially if subordination to the supplier is verified, which includes the supplier's control over the distributor/agent's work hours, performance targets, and any other control over its modus operandi. This may be the case even if the agreement's provisions are not specific to employment relationships, because labour laws follow the principle of primacy of reality, pursuant to which the actual facts of the relationship will determine its classification, prevailing over the contractual terms and conditions.

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

Articles 32 and 33 of Law No. 4,886/65 (the Law of Commercial Agents) regulate the frequency and terms of payment of commission. This should occur once purchase orders are paid by final clients, until the 15th day of the month subsequent to the month when the invoice was paid.

In addition, commissions must always be paid monthly, based on the total value of the goods, and must be adjusted for inflation for purposes of prior notice and indemnity in case of termination without cause (article 42 of the Law of Commercial Agents).

Moreover, the supplier may only retain payment of commissions as restitution for damages caused when it has cause for termination (article 37 of the Law of Commercial Agents).

Please note that if the supplier alters the agreement in a way that reduces the average commissions earned by the commercial agent, this change could be deemed ineffective due to the provision of paragraph 7, article 32 of the Commercial Agents Law.

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

Under Brazilian law, good faith and fair dealing principles apply to all contractual relationships, including those of distribution (articles 113, 186 and 422 of the BCC).

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

Distribution agreements do not have to be approved by any government agency. Intellectual property licence agreements, on the other hand, must be filed and annotated on the intellectual property register at the INPI, in order for them to have full force and effect toward third parties (articles 61 and 62 of Law No. 9,279/96).

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

It is common for distribution agreements to include an anti-bribery or anti-corruption clause.

Brazilian Law No. 12,846/13 (the Anti-Bribery Law) regulates the civil and administrative liability of legal entities for acts practised against national or foreign public administrations. Foreign legal entities that have a main office, branch or representation office on Brazilian territory, even if temporary, are also subject to to the Brazilian anti-bribery regulations (article 1 of the Anti-Bribery Law).

35 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?

The only mandatory provisions specifically applied to distribution agreements are those of the BCC. Agency agreements can necessarily be subject to either the BCC or the Law Commercial Agents (No. 4,886/65) or both. Under Brazilian law, the BCC will always regulate any and all types of contract, regardless of whether or not the agreement mentions the application of a particular law. Parties to any contract must always also comply with the other laws mentioned herein, such as competition and anti-bribery laws.

Governing law and choice of forum

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

There are no restrictions specific to the distribution contract. As a general rule, parties to an agreement may choose any country's laws to regulate the agreement, as long as an arbitration clause is inserted in the document. Nevertheless, conflicts arising from agency agreements regulated by Law No. 4,886/65 must be resolved in accordance with said law, by the courts of the agent's jurisdiction (article 30). This law, which could be interpreted as being part of Brazilian public policy, will generally be applied as a protective measure of agents.

Brazil's conflict-of-laws rules can be found in Decree-Law No. 4,657/1942 (Law of Introduction to Brazilian Norms (LINDB)). If the contract is silent or does not clearly state the governing law, Brazilian law will mandatorily govern the agreement because its formation and performance will have taken place in Brazil (article 9 of the LINDB). Brazilian courts can apply foreign law when resolving contractual disputes, but the application can vary from court to court in practice, since there is no uniformity in this matter.

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

Parties to any agreement may freely choose the courts or arbitration tribunals that will have jurisdiction to resolve contractual disputes, whether in Brazil or abroad (article 25 of the CPC).

Brazil is a signatory party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and regulates arbitration through Law No. 9,307/1996 (the Arbitration Law). The only restrictions to choice of a foreign law in arbitration proceedings conducted in Brazil are if said law breached Brazilian public policy and good moral values (article 2, paragraph 1 of the Arbitration Law).

Should parties choose arbitration as the sole dispute resolution method, the arbitration clause must be clearly and visibly provided in the contract in order to avoid any doubt. This is especially true in adhesion contracts, where the party that adheres to the other's standard terms and conditions is viewed as a more vulnerable party. Pursuant to article 4 of the Arbitration Law, the arbitration clause will only be effective if said party initiates arbitration or expressly agrees to arbitration, provided that the arbitration agreement included in the contract it is adhering to is written in bold letters and individually signed, independently from the signature page at the end of the agreement. This has been recently confirmed by the Superior Court of Justice in Appeal 1.602.076-SP in 2016, concerning a franchising agreement, deemed an adhesion contract.

38 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 distributors may file lawsuits before civil courts to resolve contractual disputes. The Brazilian judicial system's first-instance state courts can be found in each judicial district in Brazil. Appeals are filed before state appellate courts. There is one in each state's capital.

This would not be a case that would need to be resolved by federal courts, which only deal with limited claims (articles 108 and 109 of the CF).

Foreign legal entities are able to make use of state courts and procedures, as fair treatment is a constitutional right granted to Brazilian citizens, as per article 26, item II, of the CPC.

Foreign legal entities must be represented in civil procedures by the manager, representative, or officer of the company's branch or agency installed in Brazil (article 75, item X, of the CPC).

In addition, a claimant who resides abroad, whether a Brazilian or foreign citizen, must post bond in court in an amount sufficient to cover court costs and attorney fees of the opposing party, if he or she does not possess any real estate in Brazil guaranteeing payment. Some exceptions to this rule exist, due to international treaties, in execution procedures involving instruments enforceable out of court and procedures of court decision enforcement, as well as in counterclaims (article 83 of the CPC).

Please note that agreements signed by two witnesses are considered instruments enforceable out of court, falling under the exceptions to bond mentioned above, even if the contract was signed abroad (article 784, item III and paragraph 2, of the CPC).

As for document disclosure, any of the parties can request the court to order the other to present any document or object in its possession. Such request must be accompanied by a detailed description of the document or object, the purpose of the evidence, indicating the facts that relate to the document or object, as well as the circumstances upon which the party requesting the order is basing his or her belief that the other party does in fact have such document or object in his or her possession. The other party has five calendar days after being subpoenaed to respond to the request, proving that he or she does not have the requested object or document in his or her possession. If he or she does not respond or present the requested document, the facts alleged by the requesting party will be deemed true by the judge (articles 396–404 of the CPC).

Testimony of witnesses is possible. Some witnesses are considered 'impeded', such as spouses, family members and friends of the parties to the claim, and the parties themselves. Others are deemed 'suspected', such as intimate friends or enemies of any of the parties to the claim and third parties who have an interest in the claim. These witnesses will be disqualified due to conflict of interest, but may be heard if the judge considers it important to the case (article 477 of the CPC).

The disadvantage to a foreign business resolving disputes in Brazilian courts lies in the judiciary's lack of legal certainty, due to the chances of divergent decisions given by different courts, which do not necessarily enforce commercial agreements in the way initially

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intended by the parties. Apart from the usual reasons arbitration is chosen instead of judicial courts, arbitration can be a much more advantageous method for conflict resolution in Brazil, partly due to the special understanding an expert arbitrator can have on the commercial context surrounding an agreement. Arbitrators will tend to interpret the agreement based on the specific terms and conditions agreed upon by the parties, with a more commercial view. Arbitration is especially recommended when agreements involve large sums, are international or complex, since it ultimately cuts transaction costs, in comparison to resorting to courts.

On the other hand, the advantage of going to court in our jurisdiction is the fact that the defendant will reside and likely have assets in Brazil, which can be seized in case of default. Bureaucracy is reduced when a foreign court must subpoena a defendant here, and the enforcement of a decision issued in Brazil will be easier than that of a decision given by a foreign court.

39 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 clauses that provide for mediation or arbitration are enforced and respected by courts in Brazil, as well as more advantageous for the parties, as mentioned in question 38, due to a more commercial and reliable interpretation of the contract's terms and conditions, providing a higher level of legal certainty than the judiciary.

There are no limitations as to the arbitration tribunal formation, seat of arbitration, or language in which arbitration will be conducted between private parties.

It is important to note that the STJ has recently confirmed that an arbitration clause providing that disputes arising from the agreement be resolved through 'arbitration or mediation' is valid. This type of clause would only be considered pathological, whereupon courts will usually order parties to go to arbitration and to correct the deficiencies of such clause (ie, fill in the missing information, such as detailed arbitration centre rules that will apply, for example).

It is also possible and common for arbitration clauses to state circumstances in which the parties may exceptionally go to court instead of arbitration, to execute a certain guarantee, such as a promissory note, for instance. As mentioned in question 37, if the agreement is construed as an adhesion agreement and arbitral proceedings have not been initiated by the distributor, the arbitration clause may be considered ineffective and not be enforced (article 4 of the Arbitration Law). Please note that the distributor may also argue that Brazilian law is public policy, therefore, must be applied regardless of the parties' choice of law.

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Canada

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Direct distribution

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

Generally, yes. Other than as described in question 4, there is no specific filing or regulatory review process applicable to foreign suppliers looking to establish a business entity or joint venture in Canada. However, it is important to note that, if a subsidiary is established in Canada, certain corporate statutes set out requirements as to the residency of directors pursuant to which at least one director (or 25 per cent of the directors if there are more than four) must be a Canadian resident.

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

Generally, yes. Please refer to question 1 above, subject to the restrictions described 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?

There are several different vehicles available to foreign suppliers who wish to carry on business in Canada, each with varying tax and corporate consequences. A foreign supplier may:

- choose to contract directly with a Canadian distributor without carrying on business in Canada directly;
- opt to appoint a local agent or representative to sell its products in Canada;
- opt to carry on business in Canada using a Canadian branch or division; or
- choose to carry on business in Canada through a federally or provincially incorporated subsidiary or other affiliate.

The preferred choice of vehicle used for an importer owned by a foreign supplier to enter the Canadian market is the incorporation of a Canadian subsidiary or other affiliate. Corporations may be incorporated under Canadian federal law; provinces have also enacted statutes regulating the formation of corporate and other non-corporate entities including corporations, unlimited liability companies and partnerships. Business entities must usually register with the relevant corporate or business registry of each province in which they wish to conduct business, pay the prescribed fees and file corporate or business registry forms containing basic information about the business and its ownership and management.

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

No substantive restrictions on investment exist, except with respect to very large transactions or investments. Pursuant to the Investment Canada Act, foreign business entities seeking to acquire or establish a Canadian business are required to notify Industry Canada no later than 30 days following such acquisition or establishment. An onerous and thorough review process applies to non-World Trade Organization investors where the asset value of the acquired Canadian business in 2017 is at least C$5 million for direct acquisitions or C$50 million for indirect acquisitions.

In addition, Canada is a federal system of parliamentary government, and the regulation and administration of certain trans-provincial industries fall within the sphere of federal legislative powers. As for those under provincial jurisdiction, various provinces have regulated certain industries viewed as having particular importance or significance. Thus, several federal and provincial statutes place restrictions on foreign ownership in specific industries, such as aviation, collections, engineering, farming, fisheries, banking, trusts and loans, securities, broadcasting, telecommunications, insurance, liquor sales and industries that involve the exploitation of Canada's natural resources. Depending on the products being distributed, these restrictions may affect international distribution arrangements where the foreign supplier has a direct or indirect presence in Canada.

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

Generally, yes. Please refer to questions 1 and 3, subject to the restrictions described in 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?

Depending on the business structure selected by a foreign supplier wishing to sell goods in Canada, different taxes may apply on its income.

Canadian residents are taxed on their worldwide income, whereas non-residents may be taxed in Canada when they sell taxable property or earn employment income in Canada. If the supplier carries on business in Canada through a fixed place of business or permanent establishment, any income derived in respect thereof will generally qualify as 'business income' that is taxable in Canada on a net income basis.

Canada has entered into taxation recognition treaties with a large number of countries; if the foreign supplier is from a treaty country, it will generally be exempt as long as it does not carry on its activities through a 'permanent establishment' in Canada.

The income of a non-resident supplier carrying on business through a 'branch'-type of operation in Canada will typically be subject to a 'branch tax', which is the income tax that applies when a non-resident corporation carries on a business in Canada through a 'branch' (ie, by itself having offices, employees, files or other aspects of a permanent establishment in Canada) as opposed to a Canadian subsidiary. The base rate for branch tax is 25 per cent of Canadian taxable income earned through the branch in Canada, but may be reduced by tax treaties, if applicable.

If a foreign supplier appoints a local agent or representative to sell its products in Canada, income earned by the supplier through sales originating from the agent may, depending on the agent's commission or fee structure, be characterised as passive income and subject in Canada to a withholding tax. If so, the agent would be responsible for withholding the tax and remitting amounts to Canadian tax authorities. The standard withholding tax rate of 25 per cent under Canadian income tax legislation is often reduced to 10 per cent by tax treaties, if applicable.

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Canadian withholding tax on passive income would not be payable if a subsidiary or other affiliate is established in Canada. Nonetheless, dividends paid to its parent would be subject to a withholding tax of 25 per cent – this rate can be reduced to as low as 5 per cent by tax treaties, if applicable.

In conclusion, a thorough review of all relevant Canadian legislation pertaining to each structure and a careful evaluation of the effect of tax treaties entered into and ratified by Canada with the foreign supplier's jurisdiction, on a case-by-case basis, is strongly advised.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

There are several options available to suppliers for establishing a distribution structure. The most common structures and their principal features are outlined below:

- direct distribution, where the foreign supplier uses a Canadian subsidiary or its own employees to sell goods in Canada – see questions 1 to 6;
- independent agents and representatives, where the supplier relies on an agent or representative to originate sales of goods in Canada, and pays them a commission on the goods sold to customers in Canada;
- trademark licensing, where the supplier gives a Canadian entity a licence entitling it to use its intellectual property rights to manufacture and distribute goods for the Canadian market;
- franchises, which give rise to special considerations given that several Canadian provinces (namely, Ontario, British Columbia, Alberta, Prince Edward Island, New Brunswick and Manitoba) have enacted Franchise-specific legislation (the Franchise Acts), under which the term 'franchise' is broadly defined – as a result, a variety of other contractual relationships, including distribution, agency and trademark licensing agreements, may possibly be encompassed;
- prior to formalising any particular distribution, agency or trademark licensing arrangement for Canada, parties should carefully examine provincial legislation and consider whether they would be subject to franchise legislation, which entails a duty of disclosure and fair dealing and may give rise to additional requirements for a supplier that are not generally intended in the context of a distribution, agency or trademark licensing arrangement;
- private label, where a Canadian distributor sells the foreign supplier's products under its own name and trademark. This allows the foreign supplier to sell products in Canada while having the benefit of being recognised under local brand name, but generally provides very little control by the supplier; and
- joint ventures, where the supplier relies on a local distribution partner which is owned in part by the supplier.

Each of the above can be established by a contractual arrangement and the parties are generally free to determine their respective rights and obligations under the agreement, subject to certain restrictions discussed in 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 general, parties to a distribution or agency agreement are free to establish the terms of their relationship by contract, subject to the expansive definition of a 'franchise' under the Franchise Acts. In addition, as mentioned in question 4, certain industries are specifically regulated by federal or provincial law.

As a result, care should be exercised when structuring an arrangement that may fall within the ambit of the Franchise Acts or that, by its nature, may be subject to restrictions in a regulated industry.

Additional restrictions arise as a result of competition laws, as discussed in greater detail in questions 14 to 21.

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 parties to a distribution or agency agreement can provide for termination without cause in the contract. If the contract stipulates that such a termination can occur without notice and with immediate effect, such a stipulation will generally be enforced as long as it is provided for in express and unequivocal terms. If the contract is silent as to the requirement to provide notice in the event of a termination without cause, the length of the notice period will vary according to the factors described in question 10 below.

No specific cause is required to terminate a distribution or agency contract. If the contract is silent as to the possibility of terminating without cause, it is generally possible to terminate the arrangement upon reasonable notice. (The factors for determining what constitutes reasonable notice are discussed in question 10.)

As for termination with cause, the parties may establish, by contract, occurrences that constitute events of default giving rise to termination. Where the contract is silent, Canadian courts have generally required evidence of a fundamental breach (or, in Quebec, a serious or material breach), in order to find cause for termination; short of establishing a cause, the provision of reasonable notice would be necessary in order to lawfully terminate the relationship. In addition, Quebec law requires that termination rights always be exercised in good faith – refer to question 32 for a more fulsome discussion on good faith in Canadian contracts.

If the contract is for a fixed term, it would naturally expire at the end of the term and there would not generally be any compensation payable at that time. However, if the parties choose to continue their relationship after the end of the term, it may constitute an implicit renewal or an extension of the contract for an indeterminate term.

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

There are no statutory provisions governing compensation upon termination for distribution or agency agreements. In general, courts have found that no compensation is due if reasonable notice has been given, and compensation equivalent to reasonable notice is typically granted where a contract is terminated without notice. The amount of the indemnity, which effectively replaces the notice period, would be estimated based on past profits, and would take into account factors such as the length of the relationship, the nature of the relationship (including whether it was exclusive), industry practice, investments made by the distributor for purposes of the agreement, and the time it would take the distributor to obtain a similar source of income from an alternate supplier.

Parties can agree to pre-establish a liquidated damages clause or, under the civil law of Quebec, a termination penalty, and such a contractual provision will be enforceable unless it is deemed unreasonable by the courts.

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?

Generally, yes. If the contract is silent with respect to transfers or changes of control, then it is generally assumed that such an operation is permitted without the supplier's consent unless the arrangement constitutes an intuitu personae contract.

However, in Quebec, if the contract does not provide whether an assignment or transfer may occur without the other party's consent, their consent would generally be required.

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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 normally enforceable under Canadian law, subject to certain exceptions such as being compelled to disclose under law or in the course of legal proceedings. Under Quebec law, disclosure of confidential information is also permitted for public health or safety reasons.

Information that is publicly available or generic cannot be regarded as confidential. Trade secrets that meet the jurisprudential criteria of being known by only a few people within a given business and are treated as such within said business would be protected irrespective of contractual provisions. However, it is generally prudent to include a contractual provision regarding restrictions on the use of information acquired in the course of the distribution or agency agreement, especially where it could be used by one party to the detriment of the other.

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

In general, yes, subject to restrictions established by the Competition Act (Canada), which are outlined in further detail in questions 14 et seq.

Restrictions on distributing competing products during the term of the relationship are generally enforceable. However, restrictions on competition that extend beyond the term of the agreement must be reasonable and coherent with the contract's purpose, and are read restrictively by Canadian courts. Non-competition clauses must be limited with regards to term, geographic area and activities restricted, the whole in accordance with what is necessary to protect the supplier's or principal's legitimate interests, failing which the provision risks not being enforced in any aspect. Moreover, a supplier or principal would not generally be able to rely on such a restriction if the agreement is terminated without cause by them or as a result of their conduct.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Price maintenance is a reviewable trade practice under Canada's Competition Act. The threshold for enforcement authorities to apply sanctions on the basis of price maintenance requires that the supplier's conduct be likely to adversely affect competition. It is common for suppliers to provide suggested retail prices on packaging and labels.

The Competition Tribunal may make orders for a reviewable trade practice to cease, or compel a business to accept a given customer or order on reasonable trade terms. Fines may also be applicable if conduct is found to lessen competition, and compensation may be payable to private parties who have been granted leave by the Tribunal to bring a claim.

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 are common and, while they constitute reviewable trade practices under the Competition Act, they are only viewed as problematic where there is an adverse effect on competition.

Minimum advertised price policies must be established unilaterally by the supplier and must be uniformly enforced. They should also specifically allow products to be sold at prices lower than the minimum advertised price as this provides distributors and agents with the requisite flexibility to offer on-location discounts, coupons and other rebates.

Please see question 19 for a discussion on the rules applicable to refusals to deal.

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?

Generally, yes. The parties are free to establish their agreed terms of sale in their agreement, including pricing preferences, subject to certain restrictions outlined in question 17.

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 and promotional allowances (whether through discounts, rebates, allowances, price concessions or other advantages), are reviewable trade practices under the Competition Act but would generally only be problematic if they significantly lessen 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 the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Providing for an exclusive territory or other market restrictions in a distribution or agency agreement would not be prohibited, but would be subject to oversight by competition authorities. Unless the restrictions substantially lessen competition, they would not be enjoined. For details with respect to the consequences of failing to comply with restrictions in respect of such practices, please refer to question 14.

It is generally permissible for a supplier to reserve the rights to distribute products in certain territories or through certain channels or to specific types of customers (for example, by reserving the rights for online selling), as long as the arrangement does not substantially lessen competition.

The distinction between active and passive sales efforts, as it is understood in Europe, is generally not applicable under Canadian law.

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?

Refusal to deal is a reviewable trade practice under the Competition Act and would give rise to enforcement only where the practice substantially lessens competition. A supplier is otherwise free to decide who it chooses to do business with; restrictions on a distributor's resale rights are generally permissible, as discussed in question 18.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

In practice, absent significant market power or concentration, it is unlikely that a typical distribution arrangement would trigger oversight of this nature.

Mergers and other transactions may be subject to review where they 'prevent or lessen competition substantially' within a given industry. Indicators for reaching this threshold include considering whether an entity holds significant market share, whether there are significant barriers to entry in a given market, the availability of acceptable substitutes, effective remaining competition, and the extent of foreign competition. Competition authorities also consider whether the operation generates efficiencies that offset the anticompetitive effect in order to ascertain the overall effect on competition.

Certain types of joint ventures or strategic alliances may be subject to review if they are likely to substantially lessen or prevent competition. Vertical arrangements between suppliers and their customers are assessed on the same basis.

21 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 restrictions discussed in questions 14 to 19, exclusive dealing is a reviewable trade practice under the Competition Act, but conduct of this nature would not generally be subject to sanctions unless requiring a distributor to purchase its products exclusively from a given supplier is likely to have a significant adverse impact on competition.

Enforcement and remedies are also discussed in questions 14 to 19.

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22 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 sale of grey market products will not generally constitute trademark infringement under Canadian law. However, where a Canadian company is the registered owner of a Canadian trademark, and is distinct from its international supplier or manufacturer, it would be in a position to rely on the provisions of the Trade-marks Act (Canada) in order to contest parallel imports and the distribution of grey goods.

A distributor or agent would not have any recourse where the trademark is owned by a foreign entity from which originates both the legitimately imported 'grey market' goods and the goods destined to be sold by the distributor or agent. A passing off action may occasionally be successful where the grey market goods do not meet Canadian safety or labelling requirements.

As a practical matter, suppliers who sell goods to a wholly-owned subsidiary or other affiliate for distribution in Canada should ensure that the local subsidiary or affiliate is the owner of the trademark in Canada. Ensuring that the product is specifically designed and labelled for the Canadian market will also facilitate the preservation of rights against parallel imports.

Holders of a copyright (for example, in a brand logo) are also afforded a certain level of protection against parallel imports under the Copyright Act (Canada). In order to qualify for this supplemental protection, it is recommended that the Canadian distributor be assigned the copyright in Canada rather than being given an exclusive licence to use it; if the distributor is not an affiliate of the supplier, it may be preferable to allow for the copyright assignment to be reversed at the end of the contract.

23 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 Canada, the federal government generally regulates advertisement through the Competition Act, which prohibits any advertisement that is false or misleading in a material respect. The materiality of the representation is considered in light of whether it may influence a consumer to buy or use the product or service advertised, based on the general impression conveyed by an advertisement, in addition to its literal meaning.

Advertising Standards Canada administers the Canadian Code of Advertising Standards, which sets out criteria for acceptable advertising and guidance on inaccurate, deceptive or otherwise misleading claims, statements or representations, as well as price claims, comparative advertising and testimonials.

Most Canadian provinces also have legislation regarding consumer protection and/or business practices, many of which include prohibitions on false, misleading or deceptive representations made to consumers. Certain such legislation also contains specific prohibitions, such as restrictions on using representations that products confer any particular benefit or standard of quality, and restrictions on inaccurately advertising price advantages. Certain provincial legislation provides for more serious protections with respect to the unfair practice of making unconscionable representations.

As for the responsibility for marketing and advertising in a distribution or agency relationship, the supplier and its contractual counterpart may determine their respective contributions by contract.

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

The types of protections available depend largely on the nature of the intellectual property rights in question, but most types of intellectual property benefit from the same types of safeguards as are commonly recognised internationally, and may be exercised by a supplier against both distribution partners and third parties.

Trademarks

Trademarks are protected under the Trade-marks Act. Distinctiveness is central to the definition and a trademark need not be registered to be valid, or even licensed, in Canada. Registration with the Canadian Intellectual Property Office has the advantage of providing nationwide protection of the registered trademark, as opposed to limited protection in geographical areas where a common law mark (ie, an unregistered mark) is known.

In the distribution and agency context, remedies available to a supplier in respect of its distribution partner (for example, following a breach of exclusive use clauses or the use of a confusing trademark) range from injunctive remedies to passing-off actions. These remedies are also available for infringement or other recognised violations by third parties.

Patents

Innovations that are new, useful and inventive can be protected under the Patent Act (Canada). Patented innovations must be registered with the Canadian Intellectual Property Office in order to be afforded protection.

Unless otherwise contractually stipulated, the Patent Act provides that a person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for acts of infringement. Injunctive relief and damage claims would be available, and may be instituted against distribution partners and third parties who engage in prohibited practices in respect of patented concepts.

Copyright

Copyright is protected under the Copyright Act. Protection is extended, irrespective of registration, for all original works produced in any country that is a signatory of the Berne Convention. However, registration with the Canadian Intellectual Property Office is possible.

Remedies for copyright infringement under the Copyright Act include damages, lost profits, and injunctions prohibiting distribution or ordering the destruction of infringing goods. Actions can be brought by the copyright owner against distribution partners or any third parties.

Know-how and trade secrets

There is no statutory protection of know-how or trade secrets in Canada.

Common law affords protection to trade secrets that are known by only a few people within a given business and are treated as such within said business. Parties must also rely on common law tort and contractual undertakings to protect know-how from unauthorised disclosure or use.

Accordingly, the nature of the confidential information that a supplier wishes to protect, as well as the legal consequences arising as a result of its dissemination, should be clearly identified by the contracting parties in their agreement. In the event that this tort occurs, injunctive relief and damages may be sought by a supplier against a distributor or any third party before the provincial courts with competent authority.

Technology transfer agreements

Technology transfer agreements are not generally used in the distribution and agency context.

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

In addition to the advertising rules provided in the Competition Act (described in question 23) and the requirements of the Consumer Product Safety Act (discussed in question 26), most Canadian provinces have legislation regarding consumer protection or business practices or both, as discussed in question 23.

Additionally, rules relating to warranties and vendor liability may be relevant in the consumer context, as discussed in question 27.

26 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 Product Safety Act (Canada) (CCPSA) grants Health Canada, the federal ministry charged with public health matters, sweeping powers to issue mandatory product recalls and require product safety tests. The CCPSA applies where products are usually obtained by an individual for non-commercial purposes and imposes

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a general threshold of 'danger for human health and safety', which is evaluated on the basis of whether an existing or potential hazard is posed by a product during its normal use and can cause death or have an adverse effect on an individual's health in the short or long term.

In case of an incident, a manufacturer or distributor can either voluntarily issue a product recall, or the recall may be ordered by Health Canada. Incidents include: occurrences that caused or could have caused death or injury; situations where a dangerous defect is noticed; situations where an incorrect, insufficient or non-existent label creates a risk of death or injury; and situations where another domestic or foreign public body initiates a recall. If a product is subject to a recall, the manufacturer (or, if the manufacturer is foreign, the importer) must provide Health Canada with information regarding the incident and file a mandatory incident report.

Specific risks relating to particular classes of products, such as candles, glass items, mattresses, children's jewellery, toys, food, drugs, cosmetics, medical devices, tyres, carriages and strollers, helmets, car seats, residential smoke detectors, firearms and ammunition, are further dealt with in detailed regulations.

The parties to a distribution or agency arrangement may determine contractually who is responsible for the costs associated with recalls and for carrying out any applicable formalities. However, it should be noted that Health Canada also has the power to initiate a recall under the CCPSA; as a result, the allocation of responsibility established by the parties may be overridden in practice, though contractual indemnities would still apply between the parties.

27 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 supplier and distributor may contractually allocate amongst themselves the risks relating to products, including with respect to warranties. Products may usually be sold by a supplier to a distributor without any warranty at all. However, the extent to which implied warranties may be disclaimed varies by province and certain exceptions apply. For example, in Quebec, a seller may not be able to disclaim damages if it has knowledge pertaining to deficiencies relating to the quality of its products, if it commits gross fault or negligence, or where bodily or moral harm occur. In addition, downstream customers other than a first-hand purchaser could have recourse against the manufacturer and other members of the distribution chain if a product suffers from a safety defect.

With respect to consumer warranties, most Canadian provinces have 'sales of goods' legislation that regulate them and prohibit limiting such warranties contractually. In Quebec, strict liability applies to product defects under consumer protection law, and neither the distributor nor the supplier may limit consumer warranties; moreover, the benefit of a consumer warranty cannot be waived by a consumer.

28 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 Canada, the federal Personal Information Protection and Electronic Documents Act (PIPEDA) contains significant protections for individuals whose personal information may be collected, used and shared by people or entities with which they have dealings. PIPEDA requires that individuals provide informed consent before their personal information is processed and shared and the individual concerned must be informed of the projected uses of the data in advance. In Canada, the law also requires disclosure where data may be processed or stored in other countries or by entities other than the one collecting the data, whether domestically or abroad, even if such processing or storage is done on behalf of the entity collecting the data.

One of the purposes of PIPEDA's adoption was to align Canadian legislation with the European Union's strict privacy requirements. However, the federal government has since passed the Anti-terrorism Act, 2015, which grants the government broad access to personal information for national security reasons. As such, in the aftermath of the *Maximillian Shrems v Data Commissioner* (C-362/14, 2015) decision, it may be unwise to assume that Canadian legislation continues to satisfy the EU's highly protective privacy standards, and the transfer of data between the EU and Canada remains unaffected. The same attitude should be adopted in light of the new Privacy Shield regime between the EU and the US. While Canadian privacy legislation has not been directly affected by its implementation, Canadian businesses that store or process personal information about EU citizens should be mindful of how the principles in the Privacy Shield agreement may affect their practices.

The Provinces of Quebec, Alberta and British Columbia have enacted privacy legislation that extends similar protections to individuals and applies to private-sector entities under provincial jurisdiction. Under Quebec law, persons who collect personal information must refrain from transferring this information to jurisdictions where it would not be afforded the same protections as those required under Quebec privacy law.

The parties to a distribution or agency agreement may determine who 'owns' the information collected from customers and end users (although Canadian privacy law does not consider that data is in fact owned by those who collect, transmit or use it), but the restrictions described above will apply to all of those who collect, use, share and store such information.

29 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 general, the parties are free to govern their relationship by contract, including granting the supplier approval rights over the individuals who manage the distribution partner's business or termination rights as a result of reasonably objective management failures to comply with the stated objectives or obligations of the distribution relationship. However, this may not be the case with distribution arrangements subject to Franchise Acts or in industries that are subject to certain specific regulations and legislation – see questions 7 and 8.

Absent specific contractual provisions producing the desired effect, a supplier's dissatisfaction with the distributor's management would generally not be considered sufficient cause to terminate a distribution relationship without notice.

30 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?

Each Canadian province has enacted its own health and safety, employment standards and labour relations legislation. Accordingly, provincial laws and regulations govern most matters relating to labour law.

Depending on the nature of the relationship, there is a risk that a distributor or agent may be considered an employee, in which case the supplier would be subject to mandatory rules applicable to minimum wage rates, overtime wages, vacation and leave compensation, hours of work, severance and notice periods, as well as union certification and collective bargaining laws, all of which vary greatly by province and industry.

In order to mitigate these risks, the parties may specify by contract that they are independent contractors and cannot be responsible for each other's actions, including in connection with labour and employment matters.

In order to avoid any unintended characterisations, care must be taken in order to ensure that each distribution partner operates as a distinct and truly independent entity from a supplier (ie, no common control or direction emanating from the supplier that is greater than that which typically characterises the distribution or principal–agent relationship) so as to be considered a separate employer for labour union certification and collective bargaining purposes.

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

The parties are generally free to establish the agent's compensation by contract. As noted in question 6, to the extent that commissions attract withholding tax, the agent will be responsible for withholding the applicable amounts and remitting them to the tax authorities in Canada on behalf of the principal.

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Update and trends

While subjecting the resolution of contractual disputes to arbitration may appear to be advantageous in certain circumstances, it should be noted that an arbitral tribunal may have a narrower jurisdiction with respect to granting relief than our courts. For example, it is unclear whether arbitral tribunals have jurisdiction to award security for costs. While the award of security for costs has been recognised in Canada, such a grant often has a fact-specific justification, is considered to be part of the arbitral tribunal's inherent authority to control its process or, alternatively, must be expressly provided for in the contract or in the arbitral tribunal's applicable procedural law. However, in light of the Canadian courts' and legislature's current endorsement of the arbitration process, demands for security for costs in arbitration may have better chances of being successful. Nevertheless, given the uncertainty of such awards, it remains advisable for parties to an agreement to expressly provide in the dispute resolution clause for the possibility of an arbitrator to grant security for costs, and for the parties to attorn to a jurisdiction of arbitration where applicable procedural laws provide the arbitral tribunal with the power to issue such awards.

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

The Supreme Court of Canada has recently found that there is an inherent duty for parties to honestly perform their contractual obligations, and many common law courts have historically held that an implicit obligation of good faith exists in contractual dealings. A perhaps more fulsome obligation exists under articles 6, 7 and 1375 of the Civil Code of Quebec, which imposes a duty on all parties to conduct themselves in good faith in all contractual dealings, including at the precontractual stage.

Additionally, the Franchise Acts, which may apply to certain types of distribution agreements (see question 7), include an explicit duty of good faith and fair dealing during the term of the contractual relationship.

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

No legislation directly governs international distribution agreements or expressly requires the registration of a distribution agreement with a foreign national with any authorities in Canada, subject to the observations in question 7.

There is no requirement to register a trademark licence and there is no clear adverse effect of failing to do so in a timely manner.

Under the Copyright Act, a copyright licence must be granted in writing and must be signed by the owner of the right in respect of which the licence is granted, or by its duly authorised agent. The grant of a copyright licence may be registered, and the rights of any registered licensee will take priority, without notice, over any prior unregistered licensees.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Bribery and corruption of public officials are crimes in Canada under the Criminal Code (Canada), for both the corruptor and the corrupted official. In addition, the Corruption of Foreign Public Officials Act (Canada) applies to acts of corruption or bribery committed by Canadian persons outside of Canada. Charges may also extend to those who aid or abet offenders.

35 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?

Most of the restrictions and prohibited practices in respect of distribution and agency relationships have been addressed in specific questions above. There are no mandatory provisions or automatic inclusions in contracts and the parties are generally free to set out the terms of their agreement by contract.

In certain cases, courts enforcing an agreement in Canada will be required to apply mandatory provisions of local law. Overriding a contract by reason of mandatory local law would generally apply only where either the contract or the parties' conduct is inconsistent with public policy, for which the threshold is no lower in Canada than in other jurisdictions with sophisticated legal systems. Many of the rules that could be considered mandatory in Canada have been discussed in detail previously, such as limitations on restrictive covenants, competition issues, limitations of liability, privacy laws and criminal matters.

Governing law and choice of forum

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

The parties are free to choose the laws that will govern their relationship. All Canadian provinces permit the selection of a foreign governing law as long as doing so is not considered to be in fraud of the domestic law, subject to the application of laws or provisions of public order in Canada as mentioned in question 35.

Canada is party to numerous international treaties such as the Vienna Convention on the International Sale of Goods; where the selected or applicable law is that of Canada, the foregoing Convention finds automatic application unless expressly set aside by the parties in their contract.

37 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 may elect to submit to the courts or arbitration tribunals of any jurisdiction, subject to the observations in question 7.

Choice of forum clauses are generally enforced by Canadian courts, thus making it possible for the parties to select a non-Canadian court to resolve disputes or claims arising from their agreement, even where they are related to occurrences in Canada. In addition, mediation and arbitration are viable and recognised mechanisms of dispute resolution across Canada.

A final monetary and conclusive judgment on the merits from a foreign court is usually enforced by Canadian courts. Certain provinces, such as British Columbia and Ontario, have enacted legislation that provides a simplified procedure for registering and enforcing foreign judgments and arbitration awards. Arbitration awards are readily recognised throughout the country as Canada is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

38 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 civil matters, provincial courts generally have jurisdiction except for those matters that are specifically reserved to the federal judiciary (such as intellectual property, bankruptcy, trade and commerce). Injunctive relief is available in all provinces and may be granted on an interim, interlocutory or permanent basis. The right to seek such relief is always within the discretion of the court and cannot be waived.

There is no legal discrimination or heightened level of legal requirements for foreign businesses to adjudicate disputes before courts in Canada. Nevertheless, foreign businesses may be subject to different mandatory costs than would domestic businesses.

The discovery process is an integral part of litigation in Canada and is subject to comprehensive rules of procedure that generally require disclosure of documents and provide for compulsory verbal testimony, each to the extent required to establish the allegations and defences put forth in a given case. There are certain exceptions, such as documents or other information that is subject to attorney-client privilege; however, judicial authorities tend to otherwise allow and encourage submissions and fulsome disclosures with a view to seeking transparency and avoiding any loss of rights to the parties involved in a dispute.

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39 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 parties may expressly and contractually agree to arbitrate their disputes in the venue of their choosing to the exclusion of Canadian courts. Even in the presence of an unequivocal arbitration clause, certain remedies (such as injunctive relief and other extraordinary recourses) may nonetheless be sought before the courts.

The principal advantages and disadvantages of arbitration for foreign suppliers in Canada are essentially the same as for local suppliers. Arbitration has the main advantage of being confidential. Disputes between suppliers and distributors, or agents, do not become a matter of public record as would be the case with litigation in the judicial system. In addition, arbitration gives the parties a level of control that they may not otherwise have over some aspects of the dispute, such as choice of venue and forum and the selection of an arbitrator with expertise in distribution and agency issues or the relevant technical or specialised fields. Arbitration agreements are final, reliable and not open to appeal; Canadian courts have generally refrained from intervening in such decisions. Finally, arbitration tends to be faster and cheaper than litigation, at least in theory.

As for its disadvantages, arbitration, like litigation, can become bogged down procedurally, diminishing the cost and time savings which often motivate its use. The lack of ability to appeal heightens risk for the parties that have no recourse against an unfavourable decision. Some also argue that arbitration clauses that preclude access to the judicial system will prevent the use of proceedings such as injunctive or other equitable relief that can be obtained quickly to effectively end a breach of contract.

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China

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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 audiovisual 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: joint ventures in China and limited liability companies invested by the parties in China. For a joint venture in China, the choice of its types may be equity joint ventures and contractual joint ventures. For an equity joint venture, each party must make a cash or permitted contribution and share the profits in proportion to its subscribed percentage of the venture's registered capital. For a contractual joint venture, the parties may agree in the joint venture contract that profits will not be distributed in proportion to the subscribed percentage of the venture's registered capital. Limited liability companies can be invested in by the parties and direct shareholding structure to set up holding companies outside China (using locations such as Hong Kong owing to certain tax considerations) and then place the Chinese entity under such offshore holding structure.

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 (PRC) and the Law of the PRC on Foreign-invested Enterprises. There are different local approval procedures for certain businesses.

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 the regulation of business than on the 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. In the Catalogue all industries are divided into three groups:

- encouraged industries;
- restricted industries; and
- prohibited industries.

Foreign investors are not allowed to conduct business, 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 customs duties. China also follows the Organisation for Economic Co-operation and Development 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. 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, tax issues 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 China Food and Drug Administration, 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 PRC governs the relationship. 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 released a series of national standards for different sectors stipulating

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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 PRC 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 in other jurisdictions, such as time sensitivity, do not exist under Chinese law.

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 PRC 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 prohibiting 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 PRC. 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 the 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, 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 PRC, price-fixing arrangements, to monopolise the market, between the supplier and distributors 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 PRC 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. However, the Anti-Monopoly Law of the PRC 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 PRC, 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 of the same background', and the court has wide discretion to determine who may be in breach of this 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 the limitations on such conduct 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, but 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 PRC prohibits businesses that are in a dominant position in the market from refusing to deal with particular customers, 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 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Under the Anti-Monopoly Law of the PRC, a merger or common control of shareholdings of different competitors, entering into arrangements for control of different competitors, may lead to a concentration situation, and such a situation is subject to reporting and approval

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requirements. There are further rules defining what reportable situations are, some examples of which are as follows:
- if the annual global sales figure for the concentration is more than 10 billion yuan, when annual sales figures of two operators in China exceed 400 million yuan; or
- if the annual Chinese sales figure for the concentration is more than 2 billion yuan, when annual sales figures of two operators in China exceed 400 million yuan.

There are a number of relevant standards to be examined, such as:
- the market share and the relative power of control by the operators in such an environment;
- the level of concentration of the market;
- the level of influence of the operator on the entry by others into the market and on technological development;
- the level of influence of the operator on customers and other competitors; and
- the level of influence of the operator on national economic development.

The above is not an exhaustive list.

21 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 PRC and the Anti-Monopoly Law of the PRC are the primary relevant legislation in this respect. Apart from the points discussed in other questions, under the Anti-Monopoly Law, a supplier abusing its dominant position in the market and requiring its distributors to purchase products from the suppliers designated by it for the purpose of excluding fair competition is prohibited.

The regulatory authority under the Anti-Unfair Competition Law is the administration for industry and commerce and the regulatory authority under the Anti-Monopoly Law 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 or the Anti-Monopoly Law for damages, loss of profits and reasonable investigation costs.

22 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, but there are cases where the 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 difficulty in monitoring this due to lack of technical capability.

23 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 PRC at its own cost, or pass all or part of its costs on to its distributors, or share in its costs upon mutual agreement.

24 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 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 PRC. Information that is not a trade secret or confidential relies heavily 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 and technology-transfer agreements with local parties.

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

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

A distributor is not protected by the Consumer Interests Protection Law of the PRC, as, defined by this law, a distributor is not a consumer. However, under chapter 3 of the law, the supplier or distributor shall fulfil its statutory obligations 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 PRC, the Tort Law and the Product Liability Law of the PRC set out the general obligations and liabilities of suppliers and distributors.

26 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 cooperate. 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 liability and financial exposure in such product recall situations.

27 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 for the mandatory warranties as set out in the Product Quality Law of the PRC, 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 to agree on the warranties to be offered to their downstream customers.

28 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 PRC, 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 the exchange of personal data between a supplier and its distributor. 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.

The first Cyber Security Law of the PRC was passed in 2016, and will be implemented from 1 June 2017. Under the Cyber Security Law,

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critical infrastructure providers (ie, companies running infrastructure critical to the economy such as public communications, energy, traffic, finance, etc) shall store all users' data on Chinese servers and go through a security check if they want to transfer data out of the country.

29 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.

30 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, each business in China has 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. Furthermore, it is common to adopt provisions in the distribution agreement stating that the distributor is an independent contractor rather than employee of the supplier, and the distributor shall be responsible for its own actions.

In the event that the distributor or agent is an individual and a dispute arises on whether there has been an employment relationship, 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.

Having said that, practically, a properly set up distribution network should not give rise to such concern. As mentioned above, the existence of a business licence is the crucial factor in the determination in practice, as once such business relationship has been established, a distributor or agent with a business licence would not be deemed an employee of the supplier.

31 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.

32 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 law. There is a 'fair and reasonable' principle under the Contract Law of the PRC but this 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.

33 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. Although such recordal is not mandatory, without it the licensing arrangement will not bind other third parties. 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. A copyright licence agreement should be recorded with the Copyright Protection Centre and is voluntary.

Update and trends

A series of new rules regulating internet and online shopping platforms was issued in 2016. These rules are mainly related to internet advertising, and pricing.

There have been substantial anti-corruption efforts in the past few years, and brand owners are reminded to implement sufficient measures to avoid corruptive practices within the organisation or at the distributor level.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The Criminal Law of the PRC provides two categories of corruptive practices offences. The first one is against bribes offered to civil servants, and the other is against commercial bribery. There are different thresholds under the current prosecution policy, for example, in individual bribery situations, for bribes offered to non-public officials, the threshold of prosecution is 20,000 yuan. On the other hand, under the PRC Anti-unfair Competition Law, as long as gifts or invitations may give the subject company or employees an advantage which is unfair to other competitors, any amount (whether provided in cash or in any other form) offered to non-public officials in exchange for business opportunities or interests will be subject to confiscation of illegal gains and a fine.

35 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?

Apart from the issues covered above, the Contract Law of the PRC does not impose any specific restrictions or mandatory provisions on distribution contracts. The general contractual principles apply.

Governing law and choice of forum

36 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 applied.

37 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.

38 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 approximately 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

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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 preparation stage).

39 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 them as CIETAC sub-commissions 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.

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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) TFEU 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 the 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 requirement (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 of employees 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?

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

For the tax years starting from 1 January 2017, the profit tax rate amounts to 12 per cent where the realised income amounts to 3 million kune or less and 18 per cent where the realised income amounts to more than 3 million kune, and the standard withholding tax rate is 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 is 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. In the case of other services not listed in the Profit Tax Act and paid to entities located in countries which are considered to be tax havens or financial centres, excluding EU countries and countries that have concluded a tax treaty 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).

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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, but are governed by general provisions of the Code 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, 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 on trade agency (which transposed the Council Directive of 18 December 1986 on the coordination of the laws of the member states 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 Competition 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 any guidance as to the termination of distribution agreements with or without cause. Thereby under the general provisions of the Code 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 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 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 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.

As far as agency agreements are concerned, special provisions of the Code 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 succeeds in finding new clients for the principal or in increasing the volume of the principal's business with the existing clients and the principal realises 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 its payment within one year as from expiry or termination of the agreement. The principal is not required to pay the special compensation where:

- 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;
- the principal terminated the agreement due to the fault of the agent; or
- 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 governing sales contracts. Namely, the seller may retain 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 of 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 Movables 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.

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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 any guidance as to the confidentiality provisions of a distribution agreement.

In case of an agency agreement, special provisions of the Code 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 the 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 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 a special compensation to the agent 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, 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 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 the case of an agency agreement, special provisions of the Code 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 material.

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.

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 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?

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 the limitations on such conduct 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 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?

See question 18.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

The Competition Act does not provide any specific guidance for distribution or agency agreements in particular, however, inter alia, the creation of a joint venture by two or more independent undertakings, which acts on a lasting basis as an independent economic entity, shall constitute a concentration within the meaning of the Competition Act.

The Competition Agency should be notified of any merger intention if the following thresholds, based upon the financial year preceding the transaction, are cumulatively met:

- the total annual consolidated turnover of all undertakings concerned, realised through sale of goods or services on the global market is at least 1 billion kune, provided at least one undertaking has its registered office or branch office in Croatia; and
- the turnover of at least two undertakings concerned, realised in Croatia, according to financial reports, is at least 100,000 kune each.

Where the object or effect of a joint venture is alignment of the competitive behaviour of undertakings that remain independent, such joint venture shall also constitute a concentration within the meaning of the Competition Act, but shall be assessed by applying the standards for prohibited agreements.

Prohibited agreements are all agreements between two or more independent undertakings or decisions by associations of undertakings and concerted actions, which have the distortion of competition in the relevant market as their object or effect and in particular those which:

- 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;

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- apply unequal conditions to equivalent transactions with different undertakings, thereby placing them at a disadvantage compared to the competition; and
- make entering into a contract subject to acceptance by the counterparty of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such a contract.

Notwithstanding the aforementioned, certain agreements shall not be deemed prohibited, and thus shall be exempt from the general prohibition, provided that, during their lifetime, they cumulatively meet the following conditions:
- contribute to improving the production or distribution of goods or services or promotion of technical or economic progress;
- provide a reasonable benefit to consumers;
- do not impose restrictions to undertakings which are not indispensable for achieving the said objectives; and
- do not allow for the exclusion of a substantial part of competition from the market for goods or services that are the subject of the agreement.

21 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 in question 8, the Competition Agency is competent, inter alia, for infringements of the Competition Act (or article 101 TFEU). The initiative for commencement of proceedings falling within the competence of the Competition Agency (eg, a request, proposal, notice or complaint) may be submitted in writing by any legal or natural person, professional association, economic interest group, association of undertakings, consumer association, the government of Croatia, central administration authorities or 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 Competition 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.

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

See question 18.

23 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 any guidance regarding advertising costs, so the Commission's Guidelines on Vertical Restraints and other sector-specific supplementary guidelines as well as the practice of the European Court of Justice need to be consulted on a case-by-case basis.

24 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 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.

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

Consumer protection is regulated by the Consumer Protection Act 2014 (as amended) 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 in 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.

26 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, informing the public and obligations of manufacturers and distributors 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. Either of these can be liable for undertaking the relevant actions (including product recall) in case of safety hazards. The General Product Safety Act does not provide 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.

27 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 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 this warranty from the seller.

28 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 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.

29 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 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

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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.

30 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:

- 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); and
- payment of taxes and mandatory contributions in accordance with the laws and regulations governing taxes and mandatory contributions payable in cases of employment, etc.

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

Yes. Under special provisions of the Code 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 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.

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.

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

According to the general provisions of the Code, 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.

33 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.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The Croatian Criminal Code 2011 (as amended) (the Criminal Code) deals with bribery and corruption. General provisions of the Criminal Code define bribery as any award, gift or other illicit material or immaterial gain irrespective of its value. Furthermore, the Criminal Code defines criminal acts of accepting a bribe in the conduct of business and offering a bribe in the conduct of business, whereby each person can commit and be liable for the said criminal acts.

Any person who, within the conduct of business, requests or accepts a bribe or accepts an offer or promise of a bribe for him or herself or another in order to favour another to the detriment of the person he or she represents or works for, or who mediates in such bribery, shall be punishable by imprisonment of between one and eight years. If the bribe serves as consideration merely for entering into or performance of a transaction or provision of a service, the penalty of imprisonment ranges from between six months and five years.

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 transposition of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

The Competition Act and its implementing regulations are aligned with EU competition rules, which provides a firm basis for their local implementation. In terms of enforcement, the Competition 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 Competition 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).

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Any person who, within the conduct of business, offers, promises or gives a bribe to another so that the other favours him or her or another person in relation to the conclusion or performance of a transaction or provision of service, thereby causing damage to the person he or she represents or works for, or who mediates in such bribery, shall be punished with imprisonment of between six months and five years. If the bribe serves as consideration merely for entering into or the performance of a transaction or provision of service, the perpetrator may be punished with imprisonment of up to three years.

35 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 32, the parties to an agreement are in principle free to regulate their relations. Accordingly, the relevant general or special provisions of the Code shall apply to agreements to the extent that these provisions are mandatory or, in the case of non-mandatory provisions, to the extent that the parties have not agreed otherwise.

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

Governing law and choice of forum

36 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.

37 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 the 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 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 the case of arbitrable disputes, the parties may agree upon a domestic arbitration or, in disputes with an international element, upon a foreign arbitration.

38 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.

39 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 2001 governs all domestic arbitral proceedings and 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.

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Denmark

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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 as a general rule there are no restrictions as to the permanent address and nationality of the supplier. However, certain restrictions apply with respect to foreign suppliers that wish to carry on business activities in Denmark through a Danish branch office.

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 or a public limited company. Private and public limited companies are business enterprises with limited liability on the part of all participants. 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 must have a minimum share capital corresponding to 50,000 kroner and public limited companies must have a minimum share capital of 500,000 kroner. An amount equal to 25 per cent of the share capital, but at least 50,000 kroner, must be paid up. Where all or part of the share capital is paid up by way of non-cash contributions, the entire share capital must be paid up. 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 objects, 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.

It is also possible to set up a business in the form of an entrepreneurial company, a variation on the private limited company. The minimum capital requirement is one 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, except that certain foreign businesses may be restricted from carrying on business activities in Denmark through a Danish branch office.

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, however, 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

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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 22 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 as amended) or the Interest and Royalty Directive (Council Directive 2003/49/EC as amended).

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 22 per cent (2017).

Individuals are taxed at progressive rates of up to 56.4 per cent (2017), 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 (2017).

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. 869 of 8 July 2015) 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 that have the object restricting competition, either directly or indirectly. The prohibition against anticompetitive 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

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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?

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 anticompetitive 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 anticompetitive, 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

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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 that 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, 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 imposed on the company, the distributor and any relevant directors.

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, suppliers are not permitted 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 anticompetitive 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 the limitations on such conduct 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 customer's 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 passive sales will, as a general rule, be in contravention with the prohibition against anticompetitive 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. Contraventions may be punished by fines imposed on the company, the distributor and any relevant directors.

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, 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; and 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.

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20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

The question is particularly relevant in connection with the establishment of a joint venture. If a distribution or agency agreement may be presumed to constitute the establishment of a joint venture, which on a lasting basis performs all the functions of an independent business, this may constitute a merger under the Danish Competition Act. A joint venture does not operate independently if it merely assumes a single function of the parent company without itself having access to the market or otherwise operating in the market. A classic scenario would be when a joint venture only engages in research and development or manufacturing. Such joint ventures are merely handling an internal service for the parent company. The same applies in situations where a joint venture merely handles the distribution of the parent company's products and thus performs as a sales agency.

Moreover, the provisions of the Danish Competition Act, including the rules regarding the duty to notify, only apply if:

- the accumulated annual revenue in Denmark for the undertakings involved comes to at least 900 million kroner and at least two of the participating undertakings each have total annual revenues in Denmark of at least 100 million kroner;
- at least one of the participating undertakings have total annual revenues in Denmark of at least 3.8 billion kroner and at least one of the other participating undertakings have total annual revenues worldwide of at least 3.8 billion kroner; or
- the Danish Business Authority pursuant to the Danish Act on Electronic Communications Networks and Services has referred a merger between two or more commercial providers of electronic communications networks in Denmark for consideration by the Danish Competition and Consumer Authority.

When filed, the Competition and Consumer Authority decides whether a merger is approved or denied, see also Section 12c(1) of the Competition Act.

The decision regarding whether a merger is approved or denied follows the practices of the Commission and Community courts. The Commission has issued guidelines for the evaluation of horizontal mergers (EUT 2004 C 31/5) and non-horizontal mergers (EUT 2008 C 265/6), respectively.

21 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 anticompetitive 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.

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.

22 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 that 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.

23 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.

24 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);

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- the Danish Consolidated Patents Act (Consolidated Act No. 191 of 1 March 2016);
- the Danish Consolidated Utility Models Act (Consolidated Act No. 190 of 1 March 2016);
- the Danish Designs Act (Consolidated Act No. 189 of 1 March 2016); and
- the Danish Trademarks Act (Consolidated Act No. 192 of 1 March 2016).

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.

25 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.

26 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 that, under the agreement, must bear the costs.

27 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 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 for purchases made through distance selling.

28 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 or her. The distributor becomes the data controller, if the consumer has given their data to him or her. 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.

Following the EU *Schrems* decision, the EU entered into the Privacy Shield Agreement with the US. In order to rely on the Privacy Shield to effectuate transfers of personal data from the EU, US companies importing personal data must certify their compliance with the principles comprising the Privacy Shield.

29 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 or she 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 or she is not satisfied with the management, the supplier has no right to do so.

30 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 or her 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).

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31 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.

32 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.

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

No.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Anti-bribery and anti-corruption laws apply in general to all natural and legal persons.

The rules prohibiting bribery are taken from the Danish Criminal Code. Anti-corruption rules are taken from several international conventions on anti-corruption that Denmark has ratified, including the United Nations Convention against Corruption and OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Furthermore, as a member state, Denmark has implemented the directives and protocols against corruption issued by the European Union.

35 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

36 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.

37 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 whether 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.

38 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

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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.

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.

39 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, an efficient process compared to other institutes.

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Finland

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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 limitations 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 that rarely fills more than one sheet of paper, and file the notification with the Companies' Registry: the Trade Registry, operated by the Finnish Patent and Registration Office. However, a person must be careful not to encroach upon anyone else's trade name or trademark, and be able to bring forth evidence to the effect that the subscribed amount of shares has been fully paid for 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 for the incorporation procedure the Trade Registry Act (129/1979) and Ordinance (208/1979) 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 defence, banking, financing and insurance. In general, there are no restrictions in respect of title to shares or business assets. However, a business operating in a narrow business sectors, perceived as putting at risk an important national interest, such as in the business of banned dual-use goods requiring a licence for 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 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 a registered agent for service of process in Finland.

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?

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, with regard to 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, sales 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 company change hands.

Dividends are generally totally tax-exempt both domestically and under either the EU Parent-Subsidiary Directive, subject to the 10 per cent minimum shareholding requirement, or tax-exempt to a quarter subject to a 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 deductibility of interests paid in excess of €500,000.

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 Parent-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 income of non-residents derived from Finland, other 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 treaties for avoidance of double taxation and tax evasion, some of which are multilateral and take prevalence over domestic tax

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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 withhold 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 when 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 and with or without a consignment stock, comes in handy. However, frequently, best suited for products requiring local storage or modification is the variety of available open or closed distributorship arrangements , 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 regardless of whether the following apply:

- the franchisee also carries products of suppliers other 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 to promote, continuously, 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). Of particular importance are the EU competition rules (see question 13).

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 International Criminal Court (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 business-to-business 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 period of time within which the opposite party may adapt themselves 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 a 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 42 (1987).) 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 on 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

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a contract provision found unconscionable has been applied in court practice on a number of occasions. The main thrust of the rule 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 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 or for one year after termination, except where by derogation permitted pursuant to the applicable competition rules (Commission Regulation (EU) No. 330/2010, article 5, paragraphs 2 and 3, on the application of article 101(3) of the Treaty on the Functioning of the European Union (TFEU) 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, 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 supplier 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 anticompetitive. 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?

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, however, always provided the criteria are not arbitrary and are applied consistently.

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 the limitations on such conduct 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, and only if these geographic areas or categories of customers are exclusively reserved for the distributor, agent or the principal him- or herself. 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 (Commission Regulation (EU) No. 330/2010, article 4b, section iii on the application of article 101(3) TFEU 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 customer, 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 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

At least in principle, under the merger control rules, a distribution contract may be deemed a reportable transaction if the supplier exploits market power in trading relationships with distributors in order to earn excessive profits or gain other advantages. The contract can also require clearance if it amounts to the supplier exerting exclusionary or predatory abuses, such as imposition of unfair selling prices or conditions not falling within the sphere of the vertical restraints generally applied to distribution contracts. Such practices eventually result in concentrations increasingly deteriorating the conditions for competition which may be fateful in a small market, such as the Finnish market. Under the merger control rules, a distribution contract is a reportable transaction requiring clearance by the competition authorities where the combined turnover of the parties exceeds €350 million and the Finnish turnover of at least two of the parties exceeds €20 million each.

The standard used for evaluating the transaction, as to the calculation of the turnover, is the government decree on the calculation of turnover of parties to the concentration (1011/2011), and the standards and practices described in the Guidelines on Merger Control issued by the FCCA. If the concentration falls within the scope of Council

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Regulation (EEC) No. 139/2004 on the control of concentrations between undertakings, the acquisition shall be notified to the European Commission, which has the sole right to examine the concentrations having a Community dimension.

Unless it is about an untrue or non-genuine agency agreement, the agent as an auxiliary of his or her principal remains beyond the antitrust rules.

21 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 can also 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 as well as the price of the products.

Suppliers and their distribution partners must comply with section 5 of the Competition Act (948/2011) and articles 101 and 102 TFEU. The competent agency to enforce such laws is the 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 sections 5 or 7 of the Competition Act, or articles 101 or 102 TFEU.

The available remedies are damages for economic loss, whether direct or indirect, including but not limited to expenses, price difference, and lost profit. Any losses because of price discrimination, excessive pricing due to a cartel or the refusal by a party in a dominant position to supply are deemed as direct losses to be compensated.

22 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 (Commission Regulation (EU) No. 330/2010, article 1(e) on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices).

23 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.

24 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 contractually and by means of registration. 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.

25 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 Consumer Safety Act (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 (Criminal Code, Chapter 30, section 3), charter trip company violation and charter trip company offence (Criminal Code, chapter 30, section 3a), health offence (Criminal Code, Chapter 44, section 1)).

26 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 a person's health or property where 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 (Consumer Safety Act (920/2011), Chapter 6).

Freedom of contract provides that there are no restrictions on the agreement delineating which party shall be responsible for carrying out and absorbing the cost of a recall.

27 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, the principles of freedom of contract 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.

However, the Consumer Protection Act period of six months' defect assumption from passing of the risk to the consumer cannot be validly limited to the disadvantage of a consumer. In terms of Finnish consumer law, a warranty always refers to the assumption of liability by the seller for the fitness or other characteristics of the goods or services, for a fixed period of time, and is, accordingly, to qualify as an advantage to the consumer. It is also noteworthy that any goods or services, whether consumer or not, must always meet the specifications set out in any guarantee statement or relevant advertising under pain of the consumer being eligible to claim cancellation of the purchase or alternatively price reduction, and in either case compensation for their loss.

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28 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 (Personal Data Act (523/1999), sections 3 and 8). On transfer of personal data to a third country, the Personal Data Act states that such transfer may take place only if that third country ensures an adequate level of protection, or if the European Commission pursuant to its competence under the Data Protection Directive finds that a third country ensures an adequate level of protection by reason of its domestic law or its international commitments. In addition, the statute states, expressly, that insofar as the Commission has declared that some a third country does not afford an adequate level of protection of personal data, transfer of personal data is not permitted to such country. Thus, Finland is to comply with the *Maximilian Schrems* decision of 6 October 2015. However, there is a host of exemptions providing for subterfuges. Such is the dubious permitting transfer of data 'for the conclusion or enforcement of a contract', considered to the benefit of the data subject, between the processor or controller and a recipient or third party.

The title to data protected under the Personal Data Protection Act is not regulated statutorily. Therefore it must be deemed as being the property of the one who has collected it, their successor or assignee.

29 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.

30 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. It may appear 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 and 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 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.

31 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, the commercial agent is still 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.

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32 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 also underlies the Contracts Act, which is the basis of each and every distributorship founded on Finnish law. Accordingly, the principle of culpa in contrahendo is also emphasised. The carrying force is loyalty between the parties and each party ought to deal loyally, also paying attention to the advantage of the other party. Therefore, when interpreting a contract, weight is primarily given to the following issues:
- in a like situation, how do parties normally act;
- what is to be assumed from the parties;
- what prudence and due diligence require in any particular trade;
- 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 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 Contracts for the International Sale of Goods, 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 Agents Act requires that regard be paid 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).

33 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.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The anti-bribery and anti-corruption laws, from the most simple to the more refined, are, indeed, applicable to suppliers and their distribution partners. Pursuant to Chapter 30 of the 1889 Penal Code, there is a wide range of acts containing taking or offering of bribes being encompassed by the punishable offence of bribery in business. Moreover, there is a host of other wrongful acts and corruptive behaviour being punishable and applicable to all conceivable arrangements concerning distribution of goods or services.

35 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

36 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 accompanied by the choice of a foreign tribunal or not, such choice must 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.

37 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 said 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 purported 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.

38 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, first, the quality and quantity of evidence to be presented and, second, the fact 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 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

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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 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 (Code of Judicial Procedure (AAD/1734), Chapter 17, section 10).

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 (Code of Judicial Procedure (AAD/1734), Chapter 5, section 20, paragraph 2). 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 (Code of Judicial Procedure (AAD/1734), Chapter 17, sections 10 to 17).

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 to Finnish, one more advantage is that should you wish to have your case tried completely in Swedish, 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 rendered timely, and effectively handled by able judges and service-minded court clerks. However, 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.

39 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 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 emails, 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 advantages for a foreign business resolving a dispute with a business partner by arbitration in Finland are 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, lastly, 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, compensating the arbitrator or arbitrators for their work and expenses, and for the defeated party, the lack of any way of seeking redress.

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Direct distribution

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

The freedom of private enterprise, which has a constitutional value, is one of the most important principles that govern French business law. Thus, except for cases where the law has determined otherwise, business relationships between a French and a foreign company are free. As a consequence, a foreign supplier is entitled to establish its own entity to import and distribute its products in French territory.

The restrictions that can be imposed by the domestic laws are particularly limited within EU borders, where the freedom of establishment is guaranteed by articles 49 to 55 of the Treaty on the Functioning of the European Union (TFEU).

However, some investments linked to public authority exercise, activities that could infringe public order, public safety or national defence interest, or activities involving research, producing or trading of weapons, munitions, powder and explosive substances, are subject to prior authorisation, granted by the Minister of Economic Industrial and Numeric Affairs.

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

This matter is governed by contractual freedom. Therefore, a foreign supplier and a local company can together run the import of the former's products, as long as it does not distort competition.

They can go further, and enter into a shareholders' agreement. This document will govern their relationships (drag or tag along rights, preferred dividend, joint right of transfer, etc), in addition to the company's articles of association, which they will both already have signed.

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?

French law makes a distinction between limited and non-limited liability companies. The former is safer than the latter, limiting shareholders' liability to the money they invested in capital, in case of bankruptcy.

Thus, a commercial limited liability company is the best suited entity for an importer owned by a foreign supplier. Among the most widespread are the following:

- the limited liability company with quite standardised articles of association and low operating cost;
- the public limited company with high business structure cost, but permitting raising of funds by initial public offering; and
- the simplified joint-stock company, one of whose main advantages is flexibility and extensive freedom to arrange the articles of association and to set the governance body rules with less mandatory rules than other forms of company.

To set up such entities, the commercial registry of the competent commercial court and the business formality centre of the Chamber of Commerce and Industry have to be supplied with the articles of association, administrative information and occasionally other specific documents (eg, for regulated professions) of the company. Then, the company is registered, and ready to initiate business activity.

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

In domestic law, there is no general principle providing for such restrictions, or making arbitrary distinctions between national and foreign operators. Most particularly, inside EU borders, free movements of goods, persons, services and capital are fundamental values guaranteed by the TFEU.

Nevertheless, a few sectors are regulated (insurance, banking, transportation, agribusiness, health, catering, etc). Suppliers operating in these sectors have to meet certain requirements (diplomas, minimum social capital, administrative declaration, etc).

Moreover, statistical or administrative declarations are necessary before the Bank of France or the Ministry of Economy when a foreign entity creates a company or initiates a takeover in France when the transaction exceeds a certain amount (€1.5 million for the administrative declaration).

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

There is no limit to the equity interest a foreign supplier can own in the local entity that distributes its products. The distributor could even be the supplier's subsidiary and a distribution network could be organised within a group of companies.

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?

Except for custom duties (see question 4), foreign businesses that operate in France are ruled by the same tax obligations as domestic operators. As a consequence, VAT has to be paid on all goods purchased or services consumed in France (the usual rate is 20 per cent, except catering which is 10 per cent), and one-third of the profit realised by a local company is perceived as corporation tax (33.33 per cent).

If French subsidiaries of a foreign company distribute dividends to such foreign company, the tax administration would perceive a withholding tax on the amount distributed (usually 25 per cent, but up to 75 per cent for certain non-cooperative states). However, if the foreign company is established in the EU and meets several requirements, there would be no withholding tax.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Several techniques are available to integrate an operator into the supplier's network. The commercial agent is mandated by a supplier to buy or sell products, on its behalf. He or she is entitled to negotiate with suppliers' customers.

Commercial agency is an attractive structure considering that it is not a heavily legislated system, as the labour law for employees is, for example (see question 30). However, the commercial agent is specifically protected by article L134-1 et seq of the Commercial Code (see question 8) and the contract termination is often expensive for the supplier (see question 10).

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Franchising is used by a franchisor to put its knowledge at the disposal of a franchisee. The two parties remain independent along the relationship. In particular, the franchisor can impose selling standards (store layout, items presentation and advertising, use of commercial sign, etc).

The exclusive distribution allows a supplier to grant a distributor the exclusivity in a territorial area. This cannot be an absolute exclusivity, for it can only concern active sales (see question 18).

The selective distribution is suited to specific products (high-tech, luxury, automotive, etc). It enables a supplier to select its distributors according to objective and non-discriminatory criteria.

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?

For the main points of distribution relationships regulation is provided by the French General Directorate for Competition, Consumer Affairs and Fraud Control (DGCCRF), the Competition Authority and the European Commission.

The DGCCRF is responsible of the competitive markets' regulation, and can fine operators that infringe rules above, whether the victim is a professional or a consumer. The Competition Authority struggles against anticompetitive practices (illicit cartels and concerted practices and abuse of a dominant position). It also controls companies' concentration on a domestic level. The European Commission controls the most important companies' concentration and anticompetitive practices if they have a potential effect on member states' trading.

Distribution relationships are mainly governed by three important pieces of legislation:

- the European Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices, which regulates vertical agreements;
- article L134-1 et seq of the Commercial Code on the commerce agency; and
- Books III and IV of the Commercial Code, and most particularly article L442-6 of the Code, stating requirements of equity, fairness and loyalty between commercial partners.

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?

A supplier is entitled to terminate a distribution relationship without any cause. However, in a fixed-term contract, the parties cannot terminate the relationship before the term expiry date, unless its partner commits a serious misconduct, or unless a specific clause provides otherwise.

Moreover, if there is an established commercial relationship between two operators, a mandatory notice has to be respected in case of termination, pursuant to article L442-6 II 5° of the Commercial Code. This disposition applies notwithstanding any contrary clause.

The duration of this notice depends on various factors. The legal criteria are the duration of relationship and professional uses. Case law also examines other factors, such as retail revenue, percentage of the turnover, specificity of the product and the economic dependency of the operator pushed out.

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

Four hypotheses can be discussed:

- when an established relationship is suddenly terminated, the victim can claim damages equal to gross margin which would have been perceived during the notice period not complied with (see question 9);
- in non fixed-term relationships that are not concerned with the former case, parties can terminate the relationship freely. However, the motivation of the termination must not be abusive. In such a case, the operator pushed out can be indemnified, when the contract is breached owing to unfairness, vexatious reason, bad faith or malicious intent. Only compensative damages (often difficult to assess) can be awarded;
- when a fixed-term contract is terminated before its stipulated end date without reasonable cause (serious breach or misconduct of the other party or specific clause), the victim can claim in court the gross margin he or she would have perceived had the contract been executed until its expiry date; and
- in a commercial agency, when the partner of the commercial agent terminates the contract, he or she automatically has to pay a two-year commissions indemnity to the commercial agent, unless the latter committed a serious misconduct or unless the agent assigns, in agreement with its partner, its rights and obligations under the contract.

In any case, punitive damages cannot be awarded, for these are not admitted in French law.

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 identity of the distributor is often determinant of the supplier's consent, which is called an 'intuitu personae' relationship. Then, a provision preventing the distributor from transmitting its contractual position (by assignment or subcontracting) could be considered a standard clause, which is easily enforceable.

The drafting of the provision can be more flexible, only requesting prior authorisation to assignment or subcontracting.

It is even possible to provide that management or control changes justify a contract's termination (intuitu personae provision).

Regulation of the distribution relationship

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

Business secrets are not protected by French regulation and legislation. As a consequence, confidentiality provisions should be drafted so that its scope is as wide as possible. A fixed-term obligation is strongly recommended.

Information revealed to the public or known by the contractor prior to the contract cannot be considered as 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 relationship, non-compete provisions are admitted in distribution contracts, to a certain extent. Most of time, they are stipulated to protect knowledge (franchise), the distribution network's identity (exclusive distribution) or the interests of the producer (commercial agency).

These provisions are more seldom in selective distribution, for such a contract's goal is to provide a suitable framework to a specific product. Then, there is usually no impediment to the selling of competing products by the same distributor.

In a commercial agency, even when no specific non-compete clause during the relationship is stipulated, this commitment results from the agent's fairness legal duty (article L134-3 of the Commercial Code).

After the end of the agent contract, the clause must not exceed two years, and its scope is necessarily limited to an agent's geographic sector, clients and kinds of goods and services he or she was mandated to buy or sell (article L134-14 of the Commercial Code).

A post-contractual non-compete provision has to meet several requirements:

- the provision scope has to be limited in time and space (maximum one year to be exempted by the Commission Regulation (EC) No. 330/2010;
- the provision has to concern competing goods or services;
- the provision's scope has to be limited to lots and premises from where the former affiliate operated;
- the provision must not restrict too widely the professional activities the former distributor could undertake; and

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- the provision's stipulation has to be strictly necessary to the protection of supplier's legitimate interest (protection of a knowledge, confidentiality of sensible information or network's identity).

Moreover, article 31 of the 2015 Macron Act introduces a specific rule that will enter into force from 6 August 2016. Legal doctrine considers this rule applies to franchise, related trade and exclusive supply. However, selective and exclusive distributions seem not to be concerned, even if the question is not yet settled by case law.

This rule provides that in any contracts above, a clause restricting the freedom of commercial activity after term expiry or contract termination is considered unwritten, unless four requirements are met:
- the provision term does not exceed one year;
- the provision has to concern competing goods or services;
- the provision's scope has to be limited to lots and premises from where the former affiliate operated; and
- the provision's stipulation has to be strictly necessary to the protection of substantial, specific and secret knowledge transmitted by the contract.

Contrary to labour law, a financial counterpart is never required for the validity of a post-contractual non-compete provision.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

In distribution networks, the supplier can fix maximum resale prices to its distributors. However, minimum resale prices must not be imposed, directly or indirectly. This restriction is controlled by the DGCCRF, which is entitled to fine infringers.

The Competition Authority and the European Commission, at the domestic and EU levels respectively, are working to combat price-fixing agreements pursuant to article L430-1 2° of the Commercial Code and article 101 TFEU sanctioning illegal cartels. The maximum penalty that can be imposed is 10 per cent of the infringers' turnover, in addition to ordering the cessation of the illicit activity.

However, in a commercial agency, prices can be fixed by the supplier as the agent is not a reseller and acts on behalf of its partner.

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 free to fix maximum prices (see question 14), and to adopt all kinds of price guidelines, as long as they are not a disguised way of imposing minimum resale prices on its distributors. Therefore, suggested resale prices or minimum advertised price campaigns are licit.

However, refusing to deal with customers who do not follow the supplier's pricing policy is forbidden, as the resell prices cannot be fixed by the supplier (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?

Under article L442-6 II d of the Commercial Code, provisions specifying that the supplier's price to the distributor will be no higher than its lowest price to other customers (most-favoured customer clauses) are void.

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 prohibition of the refusal to sell was abolished in France in 1996.

Moreover, the French Law on the Modernisation of the Economy (LME) Act of 2008 put an end to the formal prohibition of the discrimination between operators, commercial partners and clients provided by former article L442-6 I 1° of the Commercial Code.

As a consequence, a supplier can charge different prices to different customers, as long as it cannot be condemned through abuse of a dominant position, prohibited concerted practice aimed to exclude a competitor, civil misconduct or abuse of right.

In addition, the same LME Act introduced the prohibition of 'significant imbalance', or 'imposing manifestly unfair and excessive terms' between professionals, which can be a way to punish discriminatory refusals to deal.

Nevertheless, to avoid any risk, it is always better to base a refusal on an objective criterion (transporting distance, sold quantities, 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 the limitations on such conduct 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 concede an exclusive territory to one of its distributors. However, within the European Economic Area, this exclusivity is never absolute, for it is limited to active sales. On the contrary, restrictions of passive sales, defined as the satisfaction of unsolicited requests from individual customers (European Regulation (EC) No. 330/ 2010), are forbidden.

The supplier must not prevent a distributor from selling products online, although they could impose the existence of a physical sales outlet (prohibition of 'pure players').

Moreover, territorial exclusivity is incompatible with selective distribution.

These rules are usually enforced by the Competition Authority, the European Commission or the DGCCRF. Private operators, either professionals or consumers, could also sue the infringer if its misconduct causes them a prejudice.

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?

Since the abolition of discriminatory practice prohibition by the 2008 LME Act, a supplier can refuse to deal with a particular customer, as long as this refusal cannot be qualified as an abuse of a dominant position, a prohibited concerted practice aimed to exclude a competitor, a civil misconduct or an abuse of right (see question 17).

In a selective distribution network, the supplier is also free to ban sales to unauthorised resellers (see question 18).

Such restrictions are the very essence of selective distribution, where it is fundamental to protect the network's common identity. However, cross-supplies between members of the same network cannot be prohibited.

A supplier must not restrict its distributor's ability to deal with customers, except in the case of an active sale in another distributor's exclusive area.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

The European Commission and the Competition Authority are entitled to control important concentrations, widely defined as mergers or acquisitions, their powers being distributed regarding the size of the operation.

On a domestic level, the Competition Authority is usually competent when the operation is qualified as a concentration as well as the following:
- the combined aggregate worldwide turnover exclusive of tax of all of the companies involved in the merger is greater than €150 million;
- the combined aggregate turnover exclusive of tax achieved in France by at least two of the companies concerned is greater than €50 million; and
- the operation does not come within the scope of Council Regulation (EEC) No. 139/2004 (ie, the operation does not have a European dimension).

The European Commission is competent when a series of alternative turnover thresholds are exceeded, pursuant to Council Regulation (EC) No. 139/2004 (mainly, a worldwide turnover of all the companies

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involved exceeds €5 billion, and an aggregate turnover in the EU of each of at least two of the companies involved exceeds €250 million).

The control consists in a series of notifications and investigations, and aims to ensure that the pending operation would not create an infringement of competition rules. This is the reason why competent authorities are entitled, when they consider the competition could be distorted, to ban the foreseen operation, which is very rare, or to require certain guarantees (eg, commitments).

21 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?

Domestic and EU laws sanction anticompetitive practices, which are mainly illegal cartels (agreement on prices, collusion on allocation markets, impediments to market access, etc) and abuse of a dominant position (predatory pricing, turnover-related discounts, etc), pursuant to articles 101 and 102 of TFEU and European Regulation No. 330/2010, and articles L 420-1 and L420-2 of the Commercial Code.

There is a distribution of powers between the Competition Authority on a domestic level and the European Commission on an EU level, depending on the impact of anticompetitive practice on the community trade.

In domestic law, numerous other practices (particularly stigmatised by article L442-6 of the Commercial Code 'restrictive practices') are also condemned (eg, abuse of an economic dependency, obtention of an unjustified earning, creation of a significant imbalance in parties' rights and duties, price imposing, etc).

The DGCCRF is usually competent to fine companies responsible of such infringements. If these misconducts cause a prejudice to a private operator, he can sue the infringer and obtain compensative damages.

Recently, with the adoption of the Hamon Act dated 17 March 2014, consumers also had access to an 'opt-in system' of class action that has to be led by an association of consumers to obtain compensation of damages incurred by a same or similar prejudice (article L423-1 of the Consumer Code). The situation has to have been caused by a professional's breach of legal and contractual obligations, occurred within goods or services sales or anticompetitive practices.

Finally, European Directive No. 2014/104/EU aims to support and facilitate anticompetitive lawsuit implementation by specific limitation and presumptions in favour of the plaintiff. So far, the success of this approach has been fairly limited.

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

In selective distribution, the supplier has a duty of care to protect the network's common identity. Therefore, any distributor noticing that another operator is selling contractual products can request that their supplier find out where the infringing items were purchased.

Generally, the perpetrator is a network operator that does not respect the non-member resales prohibition. They can be sued by the supplier and distributor, who would claim compensative damages for the prejudice suffered. Resale to non-member networks can also be a cause of contract termination.

With regard to outsiders taking most of the parallel distribution, they are accomplice to network violation, and perpetrator of a counterfeit, since they are selling trademarked products without being licensed to do so. It would be easy to prove this misconduct (unfair competition, participation in a violation of parallel distribution), and to obtain compensative damages for the prejudice suffered.

In exclusive distribution if one of the operators realises active sales in another's territory, the latter can sue the former to obtain compensative damages.

23 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 brand licence provision can be stipulated in franchise, concession and selective distribution contracts to allow the franchisee or the distributor to advertise directly. If the supplier keeps all the advertising for itself, it will not concede a brand licence and will only allow its distributor to use the commercial name, logo and signs.

Moreover, the supplier can impose marketing standards on its distributors (advertisement, presentation of the products, etc), in order to protect network common identity (see question 7 concerning franchise and selective distribution).

Distributors have to comply with mandatory marketing rules, prohibiting deceptive or misleading advertising towards consumers, pursuant to article L121-1 of the Consumer Code.

A supplier's advertising costs can be transferred to its distributors, or shared with them, since their relationships are governed by the freedom of contract principle.

Nonetheless, such a stipulation could create a significant imbalance between supplier and distributor rights, for which the supplier could be liable under article L442-6 I 2° of the Commercial Code.

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

French law has specific legal frameworks to protect patents and trademarks. When they have been registered at the National Industrial Property Institute by the supplier, they are protected for a limited duration (20 years non-renewable for a patent, and 10 years indefinitely renewable for a trademark).

Registered and patent trademarks must not be used by a distributor, unless the latter has a licence entitling it to do so (see question 23).

In case of infringement, patent or trademark owners can seize all the products illegally sold, and obtain compensative damages for the prejudice caused by that misconduct.

Business secrets and knowledge are economic notions, not legally defined in French law. Therefore a confidentiality provision has to be stipulated in each distribution contract, making sensible material or intelligence at a distributor's disposal (see question 12).

Such a term could be completed with post-contractual non-compete provisions (see question 13).

Technology transfer agreements, regulated by the European Commission, pursuant to article 101 of TFEU and European Regulation No. 316/2014, are usual in important financial operations, such as joint ventures or concentration, whereas they are less common in simple distribution relationships.

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

Since Law No. 2014-344 of 17 March 2014 (the Hamon Law) came into effect, the preliminary article of the Consumer Code defines consumers as a natural person acting for purposes that are primarily outside their trade, business, craft or profession.

Consumer protection in France has been strongly reinforced by the LME Act of 2008 and the Hamon Law. Article L111-1 dedicates a strong duty of information for the professionals, before and during the contractual relationship with the consumer (providing accurate and complete information, not making misleading or deceptive advertisements, etc) (see question 23).

The obligation for the professional to inform consumers about their rights by drafting them in its general terms, pursuant to article L133-3 is one of the most important parts of that duty.

In the contract itself, article L132-1 prohibits unfair terms, which create a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Pursuant to article L121-20-12, a consumer benefits from a withdrawal right, unless an execution has been initiated (the duration of this right is usually 14 days). In case of a product malfunctioning, the consumer is protected by numerous legal guarantees.

Compliance guarantee (article L212-1 et seq of the Consumer Code), legal guarantee of latent defects (article 1641 et seq of the Civil Code) and legal defective products liability (article 1386-1 et seq of the Civil Code).

The Hamon Law introduced the opt-in system class action in the Consumer Code, allowing consumers to be awarded damages when they suffered prejudice caused by a professional's misconduct. Only consumers' associations can bring the action.

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26 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?

One of the DGCCRF's responsibilities is to protect consumers. For this purpose, it is entitled to organise recalls or withdrawals of products being defective or presenting a risk to human health. A list of recalled products is freely available on the DGCCRF's website.

Suppliers, who have a mandatory obligation of security, have to warn consumers, as soon as they are informed of a product's malfunction. Suppliers are liable for damages caused by their products' defects. They can sue the manufacturer. If a provision delineating which party is responsible for carrying out the cost of a recall can be stipulated, it must not create a significant imbalance between parties' rights (see question 23).

27 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 business-to-business relationships, it is possible for a supplier to limit the warranties it provides to its distribution partners. The responsibility is a subjective warranty, based on the existence of misconduct that causes a damage to the victim.

The supplier can limit or exclude its responsibility, unless that limitation of liability denies the supplier's essential obligations, or in case of a very serious misconduct of the supplier, or personal injury of the victim. In these cases, the limitation or exclusion of liability clause is considered unwritten.

The guarantee is an objective warranty, which can be activated regardless of any misconduct, if the required conditions are fulfilled.

Guarantee of the latent defects (article 1641 of the Civil Code: the seller is bound to guarantee on account of goods sold, latent defects, which make it unfit for the intended use, or which so impair that the buyer would not have acquired it, or would only have given a lesser price, if he had known of them) is the most common warranty in business-to-business relationships. It cannot be limited or excluded, even between two professionals, unless they are the same specialised operators.

An additional contractual guarantee for a specific period of time can always be awarded by the supplier to its client.

In business-to-consumer relationships, rules of responsibility are mandatory. Then, the professional must not restrict its responsibility, nor its legal guarantees. Infringing provisions are considered void or unwritten.

28 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?

Being independent from the supplier, each distributor owns the data they have gathered about final consumers or customers whom products were resold to.

Since 1978, files or automated processing systems containing personal information must be declared to the National Commission of Informatics and Liberties (CNIL). The CNIL also has to be informed about any exchange concerning this data, otherwise the contract is void.

29 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?

If the supplier owns a sufficient equity interest in the local entity that distributes its products (see question 5), they can impose their own strategic view. However when distributors are independent, suppliers cannot directly influence management decisions. Then, disapproving strategic decisions cannot reasonably justify a contract's termination.

However, it is possible to stipulate a 'key person' clause, providing the contract could be terminated in case of a manager or shareholder's departure.

To some extent, it is also admitted to indirectly control a distributor's management, by appreciating their efficiency. For instance, in selective or exclusive distribution, the supplier can impose thresholds of purchases, sales or a minimum turnover on their contractual products. Then, it can be provided that the incapability to reach the objectives justifies a contract termination.

30 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 French law, an employment contract is defined through three criteria:

- the existence of a subordinate relationship;
- the realisation of a task; and
- the existence of a remunerate counterpart.

An employment contract is considered as a protector status. If these three conditions are fulfilled, parties have no choice but to conclude an employment contract.

The only difference with the distribution contract is the subordinate relationship as a distributor has to be independent from its supplier. If the distributor proves that it has no independence to organise its own business and to fix resale prices (except for commercial agents), it could obtain requalification of its status, in court, in order to benefit from an employment contract's advantages.

The supplier will be condemned to pay retroactive gross earnings the distributor should have received as an employee regarding their function, including holiday and overtime pay and social contribution.

On a criminal plan, the infringer can be fined for undeclared work. The penalties incurred are high (three years' imprisonment, a fine of up to €45,000 and administrative penalties).

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

Commission is defined by article L134-5 of the Commercial Code as the remuneration's part that varies depending on a deal's number or value.

Commissions paid to an agent are generally assessed on the turnover realised. The commission rate is variable, and the parties have a wide margin of discretion.

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

The general duty of good faith provided by article 1134 of the Civil Code applies to distribution relationships. Even in pre-contractual relationships, case law imposes an obligation of loyalty, which prohibits an operator from terminating an advanced negotiation without reasonable reason.

In addition to this, Book III of the Commercial Code enacts a series of transparency and fairness obligations:

- the publication of an annual unique document which informs partners of general conditions of prices;
- the deliverance by a franchisor of a precontractual document that informs a potential franchisee (article L330-1 of the Commercial Code);
- the prohibition of a significant imbalance between parties' rights; and
- the respect of a prior notice in case of contract termination, so that a commercial partner is able to reorganise its activity.

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

In principle, intellectual property licences and distribution agreements do not have to be communicated to any government agency, and even less registered with or approved by them.

However, under concentration procedures, the Competition Authority or the European Commission has to approve joint ventures reaching certain thresholds (see question 20). Thus, if these joint ventures involve distribution agreements or intellectual property licences, they must be transmitted to the competent authority, which indirectly approves them, by controlling the whole operation.

Moreover, since the 2015 Macron Act (Law No. 2015/990 of 6 August 2015), joint buying and purchasing agreements between companies carrying on a business of retail stores of widely consumed products

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and purchase and referencing companies have to be communicated, for information, to the Competition Authority, at least two months before an agreement enters into force (article L462-10 of the Commercial Code).

This procedure only concerns the most significant distribution agreements:

- the aggregated worldwide turnover of all companies and groups of companies which are party to the agreement has to exceed €10 billion; and
- the aggregated domestic turnover realised by these companies, due to all agreements passed within the previous two years, has to exceed €3 billion.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

French criminal law condemns both active and passive bribery, even if all infringers are private parties. A natural or legal person purposing or bringing any kind of advantage to another, so that the latter acts or abstains from doing something, in contravention of his or her legal and contractual obligations or professional duties, can be sentenced to a five-year term of imprisonment and a €500,000 fine pursuant to article 445-1 of the Criminal Code.

A natural or legal person soliciting or obtaining, for itself or someone else, any kind of advantage from another, to act on, or abstain from, something, in contravention of their legal and contractual obligations, or professional duties, is subject to the same above-mentioned penalties, pursuant to article 445-2 of the Criminal Code.

If a passive or active corrupter is a legal person, the fine that can be imposed has been increased to €2.5 million, or ten times the offence's proceeds.

Managers using their company's funds to corrupt another person could also be condemned for misappropriation of corporate assets, pursuant to article L241-1, 4° of the Commercial Code. Not only are infringers subject to a five-year term of imprisonment and a €375,000 fine, but they could also be banned from managing or administrating companies in the future.

35 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 business-to-consumer relationships, a wide information duty is deemed included in the contract, whether it had been provided or not (see question 25). Moreover, the supplier owes a mandatory security obligation to consumers (see question 26).

Finally, case law considers unfair provisions (see question 25) and limitation of liability and guarantee clauses (see question 27) unwritten, if they are stipulated between a professional and a consumer.

In business-to-business relationships, we quote numerous clauses that case law considers unwritten or void:

- any limited liability clause in contradiction to an essential obligation (see question 27), in case of very serious misconduct of the supplier, or in case of personal injury;
- any clause limiting prior notice rights provided by article L442-6 I 5° of the Commercial Code (see question 9); and
- a penalty clause efficiency can always be reduced by a tribunal, for judges are entitled to modulate its amount, if it is manifestly excessive (article 1152 of the Civil Code).

In addition, article L442-6, II of the Commercial Code considers the following clauses void:

- the provision allowing to retroactively beneficiate of discounts or commercial cooperation agreements;
- the provision allowing, preliminary to any purchase, to be paid in counterpart of a referencing access right;
- the provision that forbids a partner to assign debt obligations to third parties; and
- the most-favoured customer provision (see question 16).

Governing law and choice of forum

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

When jurisdiction is within EU borders, conflicts of law are governed by European Regulation No. 593/2008 dated 17 June 2008 (also called Rome I) or French international law, unless an international convention is applicable (eg, the Hague Convention of 14 March 1978 for commercial agency).

Each of these sources recognises freedom of foreign selection, within the limit of international law fraud, defined by case law as manoeuvring to avoid normally applicable law. Nevertheless, mandatory rules, the compliance of which is necessary to preserve the economic, political and social organisation of the enacting country, cannot be overcome by any selection law provision.

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

A clause conferring jurisdiction is drafted freely, as long as it is provided between two professionals (as a supplier and a distributor), and mentioned very visibly in the contract.

Forum selection or arbitration provisions are therefore widely valid. However, forum selection provisions cannot apply when the legal action is made in emergency directed before the French *juge des référés* (the emergency and 'obvious legal claim' judge).

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38 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?

Eight specialised commercial courts (Marseilles, Bordeaux, Lille, Fort-de-France, Lyons, Nancy, Paris and Rennes) have an exclusive jurisdiction to hear cases based on the application of article L442-6 of the Commercial Code's infringements (see question 8). For appeals, the Paris Court of Appeal has exclusive jurisdiction.

All fair trial requirements regarding the European Convention of Human Rights have to be respected in French law (fair hearing, due process, adversarial principle, etc).

Then, a foreign operator has the same defence rights as a domestic operator. During proceedings, if a party requests the deliverance of documents, the judge can order their production, unless they present no interest to the case. However, this type of injunction has no binding force.

Before any proceedings, under article 145 of the Code of Civil Procedure, a party can request the judge acquires the authorisation to enter the premises of another party to collect evidence.

The main advantages of French justice are weak costs and high quality, despite certain courts' slowness.

39 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 arbitration clause has to be distinguished from an arbitration agreement. The arbitration clause provides that a possible future dispute would be ruled by an arbitrator. It can only be provided in a business-to-business relationship. An arbitration clause is easily enforced by French courts as long as it respects certain formalities (written provision appointing the arbitrators or the terms of their designation).

An arbitration agreement is concluded where the dispute arose prior to arbitration and is then settled by an arbitrator. It is valid in a business-to-business or a business-to-consumer relationship, but only for certain matters.

Arbitration's main disadvantage is its cost, which could be prohibitive but it has the advantage of being fast and confidential.

* *This chapter is accurate as of March 2016.*

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Germany

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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 entities are formed by one or more founding shareholders, adopting the articles of association and appointing their 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 for the GmbH and UG;
- the Stock Corporation Act 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 (together: EEA) or Switzerland. Preconditions to this are:
- 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). 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 taxable earnings. As a 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:

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- 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 the 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 (see 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: see 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 the 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

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, like the employee, strongly protected, for example, by mandatory rules on:

- minimum notice periods (see question 9);
- commission payments (see question 31); and
- goodwill indemnity (see question 10).

Distributorship contracts

Distributorship contracts are – as in most EU member states – not explicitly governed by statutory law. However, there is extensive case law, for example, on 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

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(2) 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 principal 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 (see question 8). The distributor's indemnity can amount to the distributor's average annual net margin. For a long time, it was disputed whether the distributor's goodwill indemnity could be excluded under German law in advance when the distributor operates outside Germany, but within the EEA. The BGH has recently denied such exclusion, provided the preconditions for analogue application of agency law are given, arguing that agency law restrictions applied here as well by way of analogy, hence in the distributor's favour (BGH, decision of 25 February 2016, *Convection-reflow Soldering Systems*).

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

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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 If not, 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 (see question 15). As regards enforcement, see question 21.

Suppliers can control the price at which they sell the products or services via agents because the antitrust law restrictions do not apply (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?

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 (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?

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).

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 the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Whether measures restrict competition and are prohibited is to be determined by the antitrust law of the country in which the measures have an effect ('effects doctrine'). Within the European Union or the

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EEA, a supplier may generally not restrict the territories in which or the customers to whom its distribution partner sells; such restrictions are generally prohibited and void (article 101(1)b, (2) TFEU; article 53 EEA Agreement). 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, email, 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 that 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). The European Court of Justice will shed further light on highly discussed details of internet resale restrictions within selective distribution systems because the Higher Regional Court of Frankfurt has requested the court to give a preliminary ruling on how to interpret European antitrust rules, namely article 101 TFEU and article 4 lit. b and c VBER (decision of 19 April 2016, *Coty*). The European Court of Justice has filed the case as *Coty Germany* (reference No. C-230/16).

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 (see question 17).

A supplier may restrict its distributor's ability to deal with particular customers only if an exemption from antitrust law is given (see question 18).

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Typically, German or European rules on merger control do not apply to the conclusion of a distribution agreement because such agreement is a form of cooperation between companies different from merger or acquisition. By way of exception, the conclusion of a distribution agreement may be subject to merger control under:

- German law if it is considered a 'combination of undertakings enabling one or several undertakings to exercise directly or indirectly a material competitive influence on another undertaking' (section 37 et seq GWB). Such combination shall, however, only exist if the parties are somehow affiliated; mere economic influence shall not suffice; and
- European law if it results in gaining direct or indirect control of the whole or parts of one or more other undertakings, including by contract (article 3(1b) EC Merger Regulation 139/2004). Such control may also exist because of mere economic dependencies (which is to be measured on all circumstances of the case).

21 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 (see question 13). Certain hard-core restrictions are generally prohibited, regardless of the parties' market shares, for example, price fixing (see question 14), or restricting the geographic areas or categories of customers (see 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 (see 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).

22 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.

23 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, avoid misleading advertising, adhere to the Ordinance obliging sellers to mark goods with prices, 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.

24 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.

25 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) Introductory Act to the Civil Code);
- 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,

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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.

26 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 healthcare products), 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).

27 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 (see question 25) 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 (see question 25).

28 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 EU Directive 95/46/EC. The collection, processing and use of information on customers are only allowed if permitted by law (eg, due to the performance of a contract) or by the customer's consent (section 4 BDSG). Details on commercial collection and data storage for the purpose of transfer are laid down in section 28 et seq 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).

As regards data transfer from the EEA to the US, the Safe Harbour privacy principles for the protection of personal data transferred from a member state to the United States (Safe Harbour) do not apply anymore. Safe Harbour is invalid due to the European Court of Justice's *Schrems* decision (6 October 2015). Subsequently, the European Commission and the US government agreed on a new framework for the transatlantic transfer of personal data for commercial purposes. On 12 July 2016, the European Commission adopted the EU-US Privacy Shield. In practice, US companies have to (i) self-certify annually that they meet the requirements, (ii) display privacy policy in their e-stores, and (iii) reply promptly to complaints. If US companies are handling human resources data, they also have to cooperate and comply with European Data Protection Authorities. Details can be found, for example, on www.privacyshield.gov.

29 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 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 (see 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.

30 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.

31 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).

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Update and trends

E-commerce
Within the EU's Digital Single Market strategy, the EU intends to remove barriers, for example by an initiative to simplify contractual rules in e-commerce throughout the EU to open up markets especially for small and medium-sized enterprises (see also the European Commission's press release from 9 December 2015). In May 2016, the European Commission has now published a whole e-commerce package, composed of three legislative proposals:

- to address unjustified geoblocking and other forms of discrimination on the grounds of nationality, residence or establishment;
- to increase the transparency of prices and improve regulatory oversight on cross-border parcel delivery services; and
- to strengthen enforcement of consumers' rights and guidance to clarify, among others, what qualifies as an unfair commercial practice in the digital world.

Franchising
There have been discussions about whether to set up statutory rules on franchising in Germany (starting with a petition to the German parliament in 2011). The discussion appears to be petering out; in December 2015, the Federal Office of Justice announced a one-year research project which shall provide a comparative study of disclosure requirements in countries such as the United States, France, Spain, Sweden and Belgium. Results are still pending.

Cross- and omni-channel distribution
There is an ongoing trend in distribution from single or multichannel distribution to cross- or even omni-channel distribution. The trend is combining all channels to provide customers with a seamless shopping experience, integrating services such as:

- click and collect;
- click and reserve;
- click and deliver; and
- in-store touchpoints.

To avoid friction within the distribution system, such omni-channel distribution strategy requires clear communication as well as stipulation between the supplier and its distribution partners regarding the use of online stores, social media, local mobile marketing and the coordination and integration of all these services (especially because restrictions on online sales have been under scrutiny by the antitrust authorities in recent times).

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.

32 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.

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

No.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

German anti-bribery or anti-corruption laws may also apply to the relationship between a supplier and its distribution partner, especially to practices such as:

- taking and giving bribes in commercial practice;
- restricting competition in the context of public invitations to tender; or
- taking or giving bribes to public officials – including inducing or assisting to such acts (section 298 et seq, 333 et seq German Criminal Code).

Any underlying agreement to such practice can and typically will be declared void as a breach of law (section 138 BGB), for example, an agency agreement that aims at bringing about a bribe agreement with public officials (Higher Regional Court of Stuttgart, decision of 10 February 2010).

35 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 31). The respective statutory law (question 8) will apply, even if the contract remains silent.

Governing law and choice of forum

36 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.

37 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)).

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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 can hardly avoid overriding mandatory provisions (question 36), as ruled by the Higher Regional Court in Munich (decision of 17 May 2006) and confirmed by the BGH (decision of 5 September 2012).

38 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 37). 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).

39 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).

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Japan

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Direct distribution

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

Generally, yes. There are two exceptions where a foreign supplier is prohibited from establishing a branch office or subsidiary in Japan: (i) where the country of the foreign supplier or the foreign supplier itself is subject to economic sanctions imposed by the Japanese government, it is necessary to obtain permission from the Minister of Finance to establish a branch office or subsidiary; and (ii) where the foreign supplier purchases shares in a Japanese corporation that conducts business in certain industries, such as broadcasting or airlines, there is a certain threshold that the foreign supplier's shareholding in such a Japanese company cannot exceed.

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

Generally, yes. See question 1 for restrictions on certain industries and those under the import/export regulations of Japan.

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?

A foreign supplier may use a branch office or subsidiary as a business entity in Japan. A partnership is not a common business entity for a foreign supplier.

While the most traditional and common vehicle for an importer owned by a foreign supplier has been the stock company (*Kabushiki Kaisha*, 'KK'), the limited liability company (*Godo Kaisha*, 'GK') is also gaining popularity as such a vehicle. Under the Japanese Companies Act, the registration procedure for the establishment of a KK in Japan requires the following:

- drafting of the articles of incorporation;
- obtaining the registration certificates and other necessary documentation for the incorporator;
- preparation of affidavits regarding the incorporator's profile and affidavits regarding the signatures of the incorporator's representatives;
- notarisation of the articles of incorporation by a Japanese notary public;
- payment of the full amount of capital;
- appointment of directors. The directors must investigate the legality of the company's formation; and
- application to the Legal Affairs Bureau for registration of establishment of the company. There is a registration tax of 0.7 per cent of the amount of capital (minimum ¥150,000).

In the case of establishment of a GK, appointment of representative members and/or managing members is required instead of appointment of directors, however, the rest of the process is similar to the establishment of a KK.

The liability of GK members, like that of shareholders in a KK, is limited to the value of a member's investment in the GK. However, compared with a KK, the housekeeping matters (corporate governance structure, commercial registration, etc) for a GK are simpler, and incorporation fees (including registration fees) are less expensive. Moreover, a GK can be a pass-through entity under a 'check-the-box regulation' for US tax purposes.

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

Subject to what we explained in question 1, there are generally no restrictions on non-resident individuals or foreign corporations from conducting business in Japan. However, if a foreign corporation continuously engages in business there, it at least needs to appoint a Japanese resident individual as its representative in Japan and have him or her registered with the competent legal affairs bureau.

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

Generally, yes. See question 1.

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?

Non-resident individual

Income derived from business activities conducted by a non-resident individual will be taxable Japanese source income only, if the individual has a permanent establishment (PE) in Japan and the income is attributable to the PE.

Therefore, if a non-resident individual with no PE in Japan distributes his or her products directly to Japanese customers, the income derived from the distribution will not be taxable income for the purpose of the Japanese individual income tax.

Facilities used 'solely for the purpose of storage, display or delivery of goods' are excluded from the PE concept under most tax treaties between Japan and other countries (which are based on the OECD Model Tax Convention). However, in a case regarding a US-resident individual e-commerce distributor who distributes auto parts to Japanese customers and leases a small office and a warehouse in Japan for his or her business (*X v Japan, Gyosai Reishu* (Tokyo High Court, 28 January 2016)), a Japanese court held that the activities conducted through the office and warehouse were not 'preparatory or auxiliary' activities but established a PE in Japan under the Japan-US tax treaty.

Foreign corporation

Direct distribution from overseas

Income derived from business activities conducted by a foreign corporation with no PE in Japan will not be taxable Japanese source income for the purpose of the Japanese corporation tax. A foreign corporation with no PE in Japan is not subject to local inhabitants' tax and local enterprise tax.

Branch office

If the foreign corporate distributor has a branch office in Japan, income derived from its business activities there and attributable to the branch office will be taxable Japanese source income. In such a case, the foreign corporation needs to submit an 'application form of foreign

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ordinary corporation' within two months from the date of establishment of the branch office, and file a tax return with the competent local tax office every year within three months of the date following the end of the foreign corporation's fiscal year.

Subsidiary

Where the distributor establishes a Japanese subsidiary to import products, the Japanese subsidiary's worldwide income (not only Japanese source income) will be taxable income for the purposes of the Japanese corporation tax, local inhabitants' tax and local enterprise tax.

On the other hand, a parent foreign supplier's income derived from selling products to its Japanese subsidiary shall not be subject to Japanese corporation tax.

If the transfer price of the products from the foreign supplier to its Japanese subsidiary is higher than the arm's-length price, the transfer price of the distribution transaction shall be deemed reduced to the arm's-length price for the Japanese corporation tax, and the Japanese subsidiary will be subject to additional Japanese corporation tax for the difference between the nominal transfer price and the arm's-length price. However, in the *Adobe* case, the Tokyo High Court held that the method to determine an arm's-length price adopted by the National Tax Agency of Japan was not a proper method under the Japanese transfer pricing regulations and, since there was insufficient evidence to determine the arm's-length price for the transaction between Adobe and its Japanese subsidiary, the Court did not allow the National Tax Agency to reallocate income.

Furthermore, if the Japanese subsidiary is considered to be a 'dependent agent' of the foreign supplier, the foreign supplier is likely to be considered to have an 'agent PE' in Japan and will be subject to Japanese corporation tax on income from business in the Japanese market. (Note that the PE definition under the tax treaty will be extended by a multilateral instrument under Base Erosion and Profit Shifting Action Plan 15.)

Distributions from a Japanese subsidiary to the foreign supplier are subject to Japanese withholding tax.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Various options are available for distribution structures in Japan. The most common are discussed below.

Direct distribution

Distribution by the foreign supplier through a subsidiary or branch (see questions 1–6).

Commercial agents

Agents in Japan for a foreign supplier can be categorised into (i) a 'lawful agent' who is authorised by the foreign supplier to enter into sales agreements with customers in Japan, and (ii) a pure 'commission agent' who is not authorised to do so, but is only authorised to act as an intermediary between the foreign supplier and those customers for the former's sale of goods to the latter. In either of these cases, an agent in Japan does not purchase or acquire title to the products, but rather sells them on the foreign supplier's behalf and receives a commission. Generally, it is the foreign supplier (rather than the agent) who owns rights and owes duties under sales contracts with customers, unless the supplier authorises or delegates the agent to exercise or perform some of them on its behalf in the agency agreement.

Independent distributors

The foreign supplier may also contract with an independent distributor that buys products from the supplier, acquiring title to those products, and resells them at a profit (ie, a margin) to its own customers. This may be the most common structure for distribution in Japan.

Franchising

Typically, franchising equates to the use of independent distributors who are licensed to use the supplier's trademarks, either in their business name or in their products, are required to follow a prescribed marketing plan or method of operation, and pay a franchise fee to the supplier. Under Japanese law, there are no specific formal requirements to create a valid and binding franchise agreement. A franchise agreement is generally considered a combination of a licence agreement and a services agreement.

However, the franchisor must provide disclosure documents before entering into a franchise agreement, if the franchise business falls under the definition of a specified chain business under the Small and Medium-sized Retail Business Promotion Act. As this Act is designed to protect small and medium-sized retail businesses, the disclosure obligations will not be imposed if the majority of the franchisees are large and sophisticated.

Joint ventures

A joint venture can be established by a foreign supplier with its distribution partner in Japan, 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 manufacturer in Japan to use its intellectual property, such as patent, copyright, trademark or trade secrets, to manufacture its products locally and have them sold in Japan. Care must be taken by the licensor to maintain quality control over the finished products and the licensee's use of the intellectual property. Failure to do so can not only put the brand equity at risk, but can also risk the loss of trademark protection.

Private label (original equipment manufacturer)

Distribution of products under a private label amounts to a reverse licensing arrangement, where a distributor or retailer in Japan distributes the foreign supplier's products under the Japanese distribution partner's own trademark. In essence, the supplier gives up its own brand name in exchange for the distribution strength of its partner in Japan, 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 in the hands of the supplier, save for sales and performance benchmarks in the contract, with benefits to the supplier limited to its profits on sales of the products.

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?

Agency and distribution agreements in Japan, as contracts, are generally governed by the Civil Code. There are no special laws governing agents and distributors.

However, as you will see below, in reviewing the legality of some provisions in an agency or distribution agreement, the Antimonopoly Act and the regulations promulgated thereunder (collectively, the AM Act) (and the 'Guidelines Concerning Distribution Systems and Business Practices' issued by the Japanese Fair Trade Commission – the Guidelines) should especially be taken into account. The governmental agency that is primarily in charge of enforcement of the AM Act is the Japanese Fair Trade Commission (JFTC). Some industries have also adopted their commercial associations' voluntary rules concerning the above national laws and regulations.

In addition, transactions involving the movement of goods, services or capital between Japan and foreign countries concerning an international agency or distribution agreement are subject to the Foreign Exchange and Foreign Trade Act and the regulations promulgated thereunder (collectively, the FEFT 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?

Japanese courts, through past decisions, have established a doctrine for protecting a party to a 'continuous transaction agreement'

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from illegal or unlawful termination thereof by the other party (the Continuous Transaction Agreement Doctrine). An agency, distribution or franchise agreement can fall within the meaning of such a 'continuous transaction agreement' if it has continued for a certain period of time. Under the Continuous Transaction Agreement Doctrine, if a commercial agreement has lasted for a long time, such an agreement may be unilaterally terminated by one of the parties thereto only if either (i) there is a 'justifiable reason' for the termination, or (ii) the terminating party gives reasonable notice to the other party.

The application of the Continuous Transaction Agreement Doctrine by Japanese courts is generally made, taking into account numerous factors surrounding each specific case. Such factors include the length, term and type of the agreement in question, the nature of the 'justifiable reason' asserted by the terminating party, the degree and reasonableness of the terminated party's reliance on the continuation of the agreement, and the difference in bargaining power between the parties involved. Courts also consider the length of prior notice (if any), and the amount of compensation (if offered).

The Continuous Transaction Agreement Doctrine applies regardless of whether the agreement at issue has a specific term, or whether it is terminated at the end of or in the middle of its term. However, courts generally review the legality of a termination of the agreement in the middle of its term with more scrutiny, compared to non-renewal thereof at the end of its term.

If the attempted termination of a continuous transaction agreement is deemed illegal and unlawful due to application of the Continuous Transaction Agreement Doctrine, the terminated party may (i) seek the court's declaration that the agreement remain in force, (ii) demand the terminating party's performance of the agreement, (iii) seek an injunction against the terminating party's breach of the agreement, and/or (iv) claim for damages incurred by it due to the terminating party's breach or illegal termination of the agreement.

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

As explained in question 9, if a party's attempted termination of an agency, distribution or franchise agreement (especially when it is attempted without cause) is deemed illegal due to application of the Continuous Transaction Agreement Doctrine, the terminating party may be required to compensate for damages incurred by the terminated party due to the illegal termination.

In such cases in the past, Japanese courts determined that the terminating party should pay, as compensation for such damages, an amount equivalent to the gross (or net) profit which the terminated party could earn for the remainder of the term of the agreement or for a period from six months to two years.

Furthermore, if the termination of a continuous transaction agreement causes other 'special loss', and if such special loss is reasonably foreseeable at the time of the termination, the terminating party would be liable for such special loss (eg, costs related to those employees of the terminated party who were exclusively engaged in the business under the continuous transaction agreement in question). If, due to the termination of the agreement, those employees were dismissed compelling the terminated party to incur costs, such as the payment of severance in accordance with the relevant Japanese practices, and if such dismissal of the employees was reasonably foreseeable by the terminating party when it terminated the agreement, the court could determine that such loss would also be required to be compensated.

On the other hand, if a termination of a continuous transaction agreement is considered permissible despite the possible application of the Continuous Transaction Agreement Doctrine, the terminating party will in principle not be required to compensate the terminated 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?

Under Japanese law, contract provisions prohibiting the transfer of distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor's or agent's business to a third party, will generally be enforceable; however:

- the supplier shall not be able to assert, as against a bona fide third party, that a transfer made by the distributor or agent violating the applicable contractual provision be void; and
- the contractual provision in a distribution agreement prohibiting the distributor's assignment of the agreement may not work, as intended, to limit such assignment in the case of a corporate merger (where Corporation A and Corporation B merge into and form one Corporation A + B) or a corporate split (where Corporation A splits into two corporations: Corporation A' and Corporation B). This is because the agreement will, by operation of law, be automatically assigned to the surviving corporation (in the case of a corporate merger) or the corporation that is to assume the agreement according to the relevant corporate split agreement (in the case of a corporate split).

Regulation of the distribution relationship

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

Under Japanese law, there is generally no limitation on the extent to which confidentiality provisions in distribution agreements will be enforced.

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

Under Japanese law, during the term of an exclusive distribution agreement, restrictions on a distributor's handling of competing products are not illegal from the viewpoint of antitrust regulations, unless such restrictions prohibit the distributor from handling competing products it had been dealing with before the conclusion of the agreement. Where such restrictions prohibit the distributor from handling even competing products it had been dealing with before the conclusion of the agreement, the legality of such restrictions will be examined by the JFTC according to the case, taking various factors into consideration, to determine whether the restrictions have the effect of excluding competitors from the market.

Regarding the non-exclusive distribution agreement, restrictions on handling competing products during the term of the agreement are examined by the JFTC from the viewpoint of whether such restrictions are imposed by an 'influential manufacturer in a market' (defined as a manufacturer which has a market share of 10 per cent or more, or is ranked in the top three in the market) and whether they may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels. If the JFTC finds such effect in the restrictions, they will be determined illegal as an unfair trade practice.

A prohibition on handling competing products after the term of a distribution agreement has expired is generally considered illegal, except where (i) such distribution agreement is exclusive, (ii) the term of such extended prohibition is less than two years after the expiry of the agreement, and (iii) there is a reasonable rationale for the prohibition, such as the necessity to protect confidential trade secrets.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Under the AM Act, so far as distribution of products in the Japanese market is concerned, a supplier in principle cannot control the prices at which its distribution partner resells its products, as such resale price maintenance is illegal as an unfair trade practice.

However, under the Guidelines, the supplier's provision of its instructions regarding resale price to the distributor will not be deemed illegal in cases where the distributor, as a direct purchaser from a supplier, only functions as a commission agent for the supplier so that the supplier is substantially deemed to be selling its products to the ultimate purchasers.

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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?

Under the AM Act (and the Guidelines), in cases where a supplier's 'suggested' retail price or quotation is indicated to its distributor as a mere reference price, it would not be a problem. However, if the supplier substantially seeks to restrict the resale price of the distributor by causing it to maintain the reference price by some means (eg, by announcing that it will not deal with distributors who do not follow its pricing policy), it will in principle be illegal.

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?

Under Japanese law, the distribution contract may, generally, specify that the supplier's price to the distributor will be no higher than its lowest price to other customers.

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?

Under the AM Act, discriminatory pricing defined as 'unjustly supplying or accepting a commodity or service at prices which discriminate between regions or between the other parties' is prohibited as an unfair trade practice. Accordingly, if there is a justifiable reason for a difference in prices, it would not be deemed illegal. However, it is generally said that in cases such as the following, a difference in prices is likely deemed to be illegal in view of its anticompetitive effect:

- where the seller sells its products at lower prices only in a territory in which the seller is competing with another seller of the same or similar products, in order to exclude the competitor from the market; or
- where the seller sells its products at lower prices only to customers of its competitor, in order to exclude the competitor from the market.

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 the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Under the AM Act and the regulations promulgated thereunder (and the Guidelines), it is not illegal for a supplier to adopt the system for designating a geographic area of its distributor's sales responsibility or for the location of its business premises for the purpose of developing an effective network for sales or securing a system for good after-sales services, unless the restriction falls under an 'exclusive territory' (meaning a restriction on the distributor from actively selling outside the designated area) or a 'restriction on sales to outside customers' (meaning a restriction on the distributor from even passively selling to customers outside the designated area upon their request).

However, in the case where a supplier requires its exclusive distributor not to actively market the product covered by the distribution contract in areas outside the territory for which the exclusive distributor is granted the exclusive distributorship for the product, it would in principle present no problem under the AM Act.

On the other hand, even in the case of an exclusive distributorship agreement under which a supplier grants its distributor the 'exclusive' right to sell a product in a territory, it is generally possible for the parties to agree that the supplier will reserve the right to sell the product to certain customers in the territory.

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?

Under the AM Act (and the Guidelines), it is generally not illegal for a supplier, as a single firm, to refuse to deal with particular customers in view of the general freedom it should have in choosing which customers it will do business with, unless such a refusal to deal is made in order to secure the effectiveness of its illegal conduct under the AM Act (eg, resale price maintenance) or to achieve unjust purposes thereunder (eg, exclusion of its competitors from a market).

On the other hand, if a supplier restricts its distributor's ability to deal with certain customers, it will be illegal as an unfair trade practice if the price level of the product covered by the restriction is likely to be maintained thereby.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

A distribution or agency agreement per se will not be deemed a reportable transaction under Japanese merger control rules or require advance clearance by the competition authority (ie, the JFTC).

21 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 the case where a supplier restricts its distributor's sales methods for the product covered by the distribution contract or causes the distributor to restrict its sub-distributors' sales methods, it may pose a problem under the AM Act unless there is a good reason for the purpose of ensuring proper sales of the product (eg, assurance of safety of the product, preservation of its qualities or maintenance of credibility of its trademark) and the same restrictions are applied to its other distributors on equal terms.

The agency in charge of enforcing the regulations under the AM Act is primarily the JFTC. When it finds that there is a violation of those regulations, it can (i) issue a warning, (ii) issue a caution, (iii) issue a cease-and-desist order, (iv) order the payment of a surcharge, or (v) seek an injunction at the Tokyo High Court.

Any (private) person who suffers damages caused by an act violating the AM Act can claim for damages based on the general theory of tort under the Civil Code or under a special provision in the AM Act. Further, under the AM Act, a person whose interests are infringed or likely to be infringed by an act constituting an unfair trade practice and who is thereby suffering or likely to suffer serious damages, is entitled to demand the suspension or prevention of such infringements from an entrepreneur or a trade association that infringes or is likely to infringe such interests.

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

Under Japanese law, there is no way for a distributor or agent to legally prevent parallel or 'grey market' imports into its territory of the supplier's products, except:

- where products being sold as parallel or 'grey market' import goods are not genuine products but are counterfeit products;
- when it is necessary for maintaining the credibility of a trademark in the case where consumers may have been led to understand that parallel or 'grey market' import goods with a different specification or quality are identical to the product handled by a distributor or agent due to misrepresentation of origin or other reasons; or
- when it is necessary for maintaining credibility of a trademark in the case where credibility of the product handled by a distributor or agent may be damaged due to threats to consumers' health or safety caused by deterioration of the parallel or 'grey market' import goods.

23 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?

Under the AM Act (and the Guidelines), in the case where a distributor in a dominant bargaining position, for its own convenience, causes the supplier to pay monetary contributions or inflict other financial

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burdens for the cost of advertising, it is most likely to unjustly favour the distributor and present a problem as an abuse of dominant bargaining position.

On the other hand, a supplier may generally pass all or part of its cost of advertising on to its distribution partner or share in its cost of advertising, by agreement to that effect with its distribution partner.

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

Trademarks

Under Japanese law, trademarks are generally protected only upon registrations through the Japan Patent Office (JPO). Japanese 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 Japanese registration. Accordingly, in general the supplier, rather than the local distributor, will be the applicant. Contracts typically forbid the distributor from registering the trademark, in order to protect the supplier from infringement by its distribution partner. Some contracts allow the distribution partner to register itself as a licensee of the trademarks in Japan, but it is risky for the supplier. Especially so if the distribution partner is registered as the exclusive licensee of the trademarks in Japan, when even the supplier cannot use its own trademarks there unless the registration of the distribution partner as such is abolished, resulting in the greater bargaining power of the distribution partner when the supplier attempts to terminate the distribution agreement.

Patents and utility models

Under Japanese law, patents and utility models are generally protected upon registrations through the JPO. Japanese patent and utility model registration can also be obtained under the Patent Cooperation Treaty, if the supplier's home country is a signatory to the treaty.

The distribution partner's unauthorised sale of products protected by a patent or utility model is usually regulated by contract, but can also be remedied through an infringement suit.

Registered designs

Under Japanese law, designs can also be protected upon registrations through the JPO.

The distribution partner's unauthorised sale of products protected by a registered design is usually regulated by contract, but can also be remedied through an infringement suit.

Copyright

Under Japanese law, the copyright in a copyrightable work is protected without registration from the moment the work is created. While the copyright as an economic right is transferable (and the transfer can be asserted against a third party upon registration), the moral right in a copyrightable work is not transferable.

The distribution partner's unauthorised use of materials protected by copyright is usually regulated by contract, but can also be remedied through an infringement suit.

Trade secrets and know-how

The supplier's trade secrets and know-how are generally protected in accordance with confidentiality provisions in the distribution agreement.

In addition, the Unfair Competition Prevention Act (UCPA) provides for some 'act of unfair competition' categories regarding misuse or improper disclosure of trade secrets. A trade secret is protected under the UCPA if it consists of technical or business information that is useful for commercial activities, and it is kept secret and not publicly known. Remedies for such an act of unfair competition are an injunction and compensation for damages.

Technology-transfer agreements

Technology-transfer agreements are not commonly used to structure the relationships between commercial suppliers and their distribution partners, where a license agreement is more common.

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

Under Japanese law, so long as neither the supplier nor its distributor is an individual, no consumer protection law will apply to regulate the relationship between them.

However, inasmuch as the products to be supplied by the supplier to its distributor for distribution in Japan are sold to general consumers, consumer protection laws may apply to the sales or the products sold. Such laws include the Product Liability Act, the Consumer Product Safety Act and the Consumer Contract Act, in addition to the statutory warranty and other relevant provisions in the Civil Code. The Act Against Unjustifiable Premiums and Misleading Representations may also apply to regulate the contents of the supplier's and distributor's advertisements.

26 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?

Under the Consumer Product Safety Act, in cases where 'serious product accidents' have occurred due to a defect in the consumer products or where serious danger has occurred to the lives or safety of general consumers or the occurrence of such danger is considered to be imminent, when the competent minister finds it particularly necessary to prevent the occurrence of and increase in this danger, to the extent necessary the minister may generally order the person engaging in the manufacture or import of the consumer products to recall the products in question and otherwise take measures necessary to prevent the occurrence of and increase in serious danger to the lives or safety of general consumers due to the products. (In addition, a 'voluntary' recall may be made by the manufacturer or importer.)

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 credit that customers may require for recalled products. Without such defining provisions in the contract, it is likely under Japanese law that the supplier (rather than the distributor) will eventually be responsible for all of the costs reasonably required to be incurred for a recall.

27 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 Japanese law, so long as neither the supplier nor its distributor is an individual, any limitations on the supplier's warranties to be provided to its distribution partner will generally be valid and effective, except that the supplier cannot deny its liability for a loss of a person's life or his or her bodily injury or its liability for damages caused by its intentional act, due to reasons of Japanese public policy.

However, inasmuch as the products to be supplied by the supplier to its distributor for distribution in Japan are sold to general consumers, certain provisions in the sales agreements limiting the seller's warranties provided to general consumers may be deemed void under the applicable provisions in the Consumer Contract Act.

28 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 Japanese law, companies collecting personal information regarding individual customers must generally describe, as specifically as possible, the purposes of their use of personal information to be collected from them; and they cannot exceed the scope of such purposes of use or transfer the personal information to any third party without the prior consent of the relevant individual customers, except in certain prescribed circumstances. Within those constraints, and subject to any specifically regulated areas (and further subject to any applicable regulations of a foreign country), the distribution partner may generally exchange its customer information with the supplier.

Parties should clearly define in their distribution contract who will own the customer information that will be collected, who will have

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access to it, and the applicable confidentiality obligations to be respectively owed by them. In the absence of such a definition, customer information is likely to belong to the party that collected it; and any transfer thereof by that party to the other party will be subject to applicable data protection or privacy regulations.

29 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 that is recognised under Japanese law, the parties may generally provide as they wish with respect to the supplier's control over those who manage the distributor. Accordingly, the distribution contract can grant authority to a supplier to approve or reject the individuals who manage the distribution partner's business, or to terminate the contract if not satisfied with the management.

30 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 Japanese law, a distributor cannot be treated as an employee of the supplier.

On the other hand, an agent, especially when it is an individual or a single-employee company or sole proprietorship, might be deemed an employee of the supplier. The principal test for distinguishing an independent contractor from an employee is whether the supplier allows the agent their own discretion in performing their services rather than having them perform their services under the complete direction and supervision of the supplier.

Misclassification may result in substantial employment and tax liabilities for the supplier, including retroactive pay and benefits. Employees are generally entitled, among other benefits, to minimum wage and overtime compensation, unemployment benefits, and workers' compensation.

The supplier should include a provision for indemnification in its contract with the distribution partner, in order to protect itself against any responsibility for potential violations of labour and employment laws by its distribution partner.

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

Under Japanese law, there are generally no regulations on the payment of commission to a commercial agent.

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

Under Japanese law, there is a general principle requiring good faith and fair dealing from parties to a contract when they perform it. This general principle may apply to the parties to a distribution contract. In particular, the Continuous Transaction Agreement Doctrine referred to in question 9 can be interpreted as being based on this general principle of law.

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

Under current Japanese law, there is no legal requirement for the registration of a distribution agreement with any Japanese governmental agency.

On the other hand, under the FEFT Act, there is a filing requirement for an agreement under which industrial property or know-how is licensed by a foreign licensor to a Japanese licensee. However, this requirement applies only when the licensed industrial property or know-how relates to any of the following five designated categories: (i) aircraft; (ii) weapons; (iii) manufacture of explosives; (iv) nuclear power; or (v) development in outer space. If the licensed industrial property or know-how falls under any of the above-designated categories, a prior notification on conclusion of the licence agreement must generally be filed with the competent minister(s) through the Bank of Japan unless the amount of consideration for the licence is ¥100 million or less (in which case, an ex post facto report thereon will suffice). Accordingly, a foreign supplier's grant to its distribution partner of the right to use a trademark, made with regard to a distribution right for Japan, will generally not be subject to the filing requirement as we cannot think of a situation where such a trademark falls under any of the above-designated categories.

Update and trends

An Amended Act on the Protection of Personal Information that was enacted in September 2015 will come into force as of 30 May 2017. See the following website for a tentative English translation thereof made as of February 2016: www.ppc.go.jp/files/pdf/280222_amendedlaw.pdf#search=%27amendment+to+the+Personal+Information+Protection+Act%27.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Japanese law encompasses certain anti-bribery and anti-corruption regulations. Most notable for an international distribution relationship are the provisions under the UCPA that address bribery of foreign public officials. The UCPA applies to: (i) an individual of any nationality, if all or part of the violating act is committed in Japan; and (ii) a Japanese national who offers a bribe to any foreign official regardless of where such conduct occurs. The UCPA may also apply to an entity whose representative, agent or employee has engaged in the above types of conduct.

Of course, a foreign supplier should be cautious about any risks related to any possible misconduct by its distribution partner in Japan, to which not only the anti-bribery or anti-corruption law of Japan, but also that of a foreign country, may apply.

35 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 or franchise regulations and the restrictions under the AM Act (as discussed above), the parties are generally free to structure their distribution relationship as they desire.

Governing law and choice of forum

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

Japanese courts will generally recognise the parties' contractual choice of law to govern a distribution contract.

However, when the distribution contract is concluded for the purpose of distribution in the Japanese market, there are certain mandatory local regulations that apply to a distribution agreement, despite the parties' contractual choice of a foreign law. Such mandatory local regulations include those under the AM Act and the Continuous Transaction Agreement Doctrine established by judicial precedents that may apply to an attempted termination of the distribution contract (see questions 9 and 10). In this connection, the Guidelines include a section entitled 'Major Restrictive Provisions in Exclusive Distributorship Contracts'.

In addition, it should be noted that since Japan is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (1980), the provisions of an international distribution contract to be concluded by a Japanese party may be superseded by those of the Convention, unless the contract contains the parties' agreement to exclude the application of the Convention.

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

Japanese courts will generally recognise the parties' contractual choice of courts or arbitration tribunals, whether within or outside Japan, to resolve contractual disputes.

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38 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?

When a dispute arising under an international distribution agreement is brought before a Japanese court, such a dispute will be presided over by a regular court so long as the court has jurisdiction over the dispute, and the legal action will proceed in accordance with the Code of Civil Procedures and the regulations promulgated thereunder. In such a legal action, a Japanese court may issue a decision ordering the losing party to pay monetary compensation for damages incurred by the winning party and/or declaring restoration of the contract based on the grounds that attempted termination thereof should be deemed void.

Even foreign businesses are not restricted in their ability to make use of a Japanese court and the procedures for a legal action before such a court, so long as the court has jurisdiction over the relevant dispute; and they can generally expect fair treatment by a Japanese court.

Under Japanese civil procedure law, no extensive 'discovery' system which allows one party to request that another party disclose and produce documents and other materials outside the proceedings before the court, is in place for a legal action before a Japanese court. What is available instead is the more limited scope of a court order to produce documents and other materials that may be issued upon a party's request made through the proceedings before the court. The system of 'deposition' to be made by a party outside the court is also not in place for a legal action in Japan. Testimony from an adverse party will only be given in the trial before the court, after the court admits a party's request for such a testimony.

The advantages to a foreign business of resolving a dispute in Japan in a legal action before a court may include: (i) less likelihood that a Japanese court would deny its jurisdiction over the legal action brought against a Japanese party; (ii) no need to prove Japanese law when it is the law governing the dispute; and (iii) the ease in enforcing the Japanese court's judgment to be rendered in favour of the foreign business by a court's order of attachment to an asset of the Japanese party located in Japan. On the other hand, the disadvantages may include: (i) costs associated with the action (including translation costs, as the legal proceedings and submission of a document therein, in principle, need to be carried out or made in Japanese); and (ii) the foreign business's unfamiliarity with the Japanese system.

39 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 Japanese law, the parties' agreement to arbitrate disputes arising under a contract will generally be effective and enforceable. There is no particular limitation on the terms of their agreement to arbitrate, so long as they are consistent with the arbitration rules (such as those established by an arbitration association) chosen by them to apply to an arbitration for such disputes.

The advantages to a foreign business of resolving a dispute with its business partner in Japan by arbitration may include: (i) the principle that once a final award is rendered by the arbitrator(s), it will become final and binding without the need to go through any appellate proceedings, resulting in less time until the dispute is resolved; (ii) the principle that the arbitration proceedings will not need to be carried out in a manner open to the public, which may be more suitable depending upon the subject of the dispute and the need to avoid the dispute negatively affecting the party or parties in public; (iii) the flexibility in defining some practical rules for arbitration; and (iv) the relative ease in enforcing in Japan an arbitrary award to be rendered in favour of the foreign business, due to the fact that Japan is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention). On the other hand, the disadvantages may include: (i) costs associated with arbitration (including fees for arbitrator(s) that may be substantial); and (ii) potential difficulty in finding good arbitrator(s) suitable for and capable of resolving the dispute, using the language selected by the parties for the arbitration.

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Korea

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Direct distribution

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

Yes, except in regard to certain types of business in which foreign investment is restricted under the Foreign Investment Promotion Act (restricted businesses). For example, a foreign investment in a meat wholesale business is permitted only when the amount of foreign investment is less than 50 per cent.

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

Yes, a foreign supplier may be a partial owner with a local company, except if it is a restricted business (see 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?

The two most popular forms of entity used by foreign investors (as well as Korean citizens) are the joint-stock company and the limited company whose liability is limited at the entity level. Due to procedural convenience for business operation, such as increase of capital, a larger number of foreign-invested enterprises have adopted the joint-stock company form. However, since joint-stock companies whose total assets exceed 12 billion won are required under the Act on External Audit of Stock Companies (the Act) to receive an external audit and to publicly disclose their balance sheets to the Securities and Futures Commission, many foreign investors have adopted the limited company form.

However, the Financial Service Commission proposed an amendment, which would expand the reach of the Act to limited companies. The proposed amendment was passed by the Cabinet on 3 January 2017 and will soon be submitted to the National Assembly for its review.

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

Except in regard to investment in 'restricted businesses' (see question 1), there are no laws and regulations which restrict foreign investment in Korea. Rather, the Foreign Investment Promotion Act has adopted various measures to encourage more foreign investment, such as guaranteeing overseas remittance between the foreign investor and the foreign-invested company, ensuring the foreign investor is treated in the same way as a Korean national or domestic entity unless specifically stipulated otherwise, and providing certain benefits (eg, tax benefits and assistance in securing a business site).

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

Yes, by way of either establishing a joint venture in Korea or acquiring the local entity's shares except in regard to investment in 'restricted business' in question 1.

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, foreign investors and foreign-invested companies are treated in the same way as local companies in terms of tax benefits. However, under the Restriction of Special Taxation Act, certain types of business run using foreign investment, such as high-technology businesses, or those moving into a free economic zone, are eligible for reduction of, or exemption from, corporate tax and income tax.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Foreign suppliers may distribute their products in Korea through various distribution structures, for example, direct distribution, use of independent distributors, commercial agents and sales representatives, franchising, and licensing trademark and manufacturing rights. In particular, the most popular approach has been the use of distributors or sales agents.

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 Korean Commercial Code (KCC) applies to the basic contractual relationship between a supplier and its distributor. Contractual disputes arising out of the distribution agreement are usually brought before the courts or arbitration tribunal depending the parties' agreement regarding dispute resolution.

The Monopoly Regulation and Fair Trade Law (FTL), which is Korea's competition Act, applies to supplier-distributor relationships as mandatory law. FTL regulates anticompetitive activities and abuse of superior bargaining position. The Korea Fair Trade Commission (KFTC) is the primary regulatory agency that enforces the FTL.

With the purpose of preventing unfair trade practices in supplier-distributor transactions and fostering fairness in supplier-distributor relationships, the Korean National Assembly has passed the Fairness in Distributor Transactions Act (FDTA) as a special law accompanying the FTL, which became effective as of 23 December 2016. The FDTA provides the detailed types of abuse of superior bargaining position prohibited in a supplier-distributor 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?

In principle, contractual terms that the parties have agreed, including termination without cause, are valid and therefore enforceable in Korea. However, if the distribution agreement is executed in a standardised contact form prepared by supplier in advance to be entered into by multiple parties, the Standardised Contracts Act (SCA) applies.

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Under the SCA, any clause which runs contrary to the principle of trust and good faith shall be null and void. Therefore, it is possible that the contract provision which allows termination without good cause can be made null and void. The SCA does not specifically provide for any permissible causes of termination, so whether the contract provision which allows termination without good cause is valid should be determined depending on whether the cause is unreasonably unfavourable to distributor.

In addition, it is not uncommon for the terminated party to raise the issue in case of termination by filing a complaint with the KFTC, arguing that the supplier unreasonably refused to transact in violation of the FTL. In order to determine whether a particular case constitutes unfair refusal to deal, the KFTC will consider various factors, including whether the negatively affected party will be deprived of a business opportunity such that its very existence may be threatened and thus competition in the relevant market will be impeded.

In regard to the difference between termination and expiry (ie, non-renewal of the distribution relationship), even though there is no specific law which differentiate the foregoing, it is generally understood that exposure to legal risks is lower in the case of expiry than in that of termination.

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

The KCC provides for reasonable compensation to an 'agent' upon termination of an agency relationship if the following conditions are met: the agent brought in new business or the transaction amount of the principal's business has increased significantly; the principal will be able to enjoy the results of the agent's contributions following the termination; and the termination is not due to the agent's wrongdoing. The maximum compensation an agent can receive under the KCC is the average annual commissions of the agent over the preceding five years, or the period of the relevant agreement, if it is less than five years.

While this statutory compensation provision appears to apply only to agents, there is a possibility that it applies to distributors following a Supreme Court decision in 2013 which held that the KCC statutory compensation provision is applicable to a distributor if the distributor's sales activities were substantially influenced by the supplier similarly to an principal-agent relationship (Supreme Court Decision 2011 Da 28342 of 14 February 2013).

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, contractual terms that the parties have agreed are valid and therefore enforceable in Korea. There are many cases in Korea where the parties agree to grant one party the right to unilaterally terminate the contract in the event that the other party transfers its business in whole or in part to a third party or merges with another enterprise, or there is a change in the shareholding status of the largest shareholder. However, there is a risk that the prohibition may constitute 'imposing disadvantages', one of the types of unfair trade practices under the FTL and FDTA. If a supplier unilaterally sets the transaction terms prohibiting the distributor's transfer of distribution right or its business, and there is no reasonable ground for that prohibition, it can constitute an unfair trade practice.

Regulation of the distribution relationship

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

The confidentiality provisions agreed by the parties are generally enforceable, and there is no specific limitation under the law.

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

The FTL prohibits companies from unreasonably requiring the transaction counterparty not to transact with its or its affiliates' competitors (exclusive dealing arrangement). The KFTC and the courts will determine whether this type of exclusive dealing arrangement constitutes an unfair trade practice with anticompetitive effect, considering various factors including whether it will prevent the transaction counterparty from using other purchase or distribution channels, and thus there would be a risk of excluding existing or potential competitors from the market. However, in cases where there is a justifiable reason for a business to employ an exclusive dealing arrangement (eg, where advanced technology and in-depth expertise are required for after-sales services), it may be permitted.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

In the context of consignment relationships, principals are permitted to designate a resale price and require the consignee to comply with such price restriction.

In the distributorship context, however, the FTL prohibits suppliers from engaging in resale price maintenance (RPM), which is defined as conduct designating a resale price and using coercion to maintain such resale price. In addition to the designation of a specific resale price, RPM can be further classified into 'minimum RPM' and 'maximum RPM', depending on whether the price restriction sets a minimum or maximum for the product price. Both types of RPM may be allowed if there is a justifiable reason, such as improvement of consumers' welfare or enhancement of efficiency; however, in practice it is very difficult to meet the threshold of the justifiable reason. Suppliers unfairly enforcing a price policy in violation of the FTL are subject to sanctions including corrective orders, administrative fines and criminal sanctions. (Criminal sanctions are applicable to serious violations only.)

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?

Coercion in the RPM context is defined very broadly; by way of example, the Supreme Court has opined that enforcement of resale price and, thus, coercion, may be found not only in the case of actual or threatened sanctions (eg, refusal to supply or increase of supply price if the distributor refuses to resell at set prices) but also where contractual obligations to observe the resale price are imposed (the breach of which would result in termination or damages). On the other hand, giving notice of a reference price or recommending a price without enforcing such price does not constitute RPM and is generally deemed acceptable under the FTL.

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, a distribution contract which requires the supplier to sell the products to the distributor at its lowest price to other customers is permitted under Korean law. However, the FTL prohibits suppliers from restraining competition in the relevant market by implementing considerably different price policies based on location or type of transacting counterparty as discussed in question 17.

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 FTL prohibits suppliers from restraining competition in the relevant market by implementing considerably different price policies based on location or type of transacting counterparty. However, such an arrangement is permitted when there is a justifiable ground – namely the different price policy reflects the market situation and differences in marginal costs based on various factors such as quantities purchased, transportation expenses, responsibilities of the transacting counterparty and perishable goods; the anticompetitive effect is considerably outweighed by efficiency and customer welfare improved through the implementation of a different price policy; or there are other justifiable reasons.

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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 the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

The FTL prohibits suppliers from unfairly restricting counterparties' sales territory, allocating exclusive territories, or restricting categories of customers. The illegality of such restriction is determined under the rule of reason analysis that balances between the restraint from intra-brand competition and the promotion of inter-brand competition. Suppliers unfairly restricting counterparties' sales territory or allocating exclusive territories or categories of customers in violation of the FTL are subject to sanctions including corrective orders, administrative fines and criminal sanctions. (The criminal sanctions are applicable to serious violations only.)

While a supplier is permitted under the FTL to reserve certain customers to itself, the act of requiring its distributors not to transact with the supplier's direct customers could be viewed as a type of unfair restriction on customers unless there is a justifiable reason. Finally, there is no law or precedent which specifically differentiates between active sales and 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?

In principle, a supplier is free to choose its distributor. However, the FTL prohibits unreasonable refusal to deal. In order to determine whether a particular case constitutes unfair refusal to deal, the KFTC will consider various factors, including whether the negatively affected party will be deprived of a business opportunity such that its very existence may be threatened and thus competition in the relevant market will be impeded.

The act of requiring distributors not to transact with particular customers could be viewed as an unfair restriction on customers prohibited under the FTL. Illegality is determined depending on, among others, whether the restriction restrains competition in the relevant market as discussed in question 18.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

In general, a distribution or agency agreement does not trigger the KFTC filing obligation. However, when, among other things, a foreign entity acquires 20 per cent or more of the domestic target's voting shares or establishes a joint venture (JV) and becomes the largest participant of the JV, the KFTC filing obligation is triggered if:

- either the foreign entity or the domestic target (or the JV) has total consolidated worldwide assets or turnover during the most recent complete fiscal year of 200 billion won or more and the other party has such assets or turnover of 20 billion won or more; and
- turnover in Korea of each of the foreign entity and the domestic target (or the JV) is 20 billion won or more in each case.

21 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 FTL and FDTA govern matters between suppliers and their distribution partners. The KFTC, which is the primary regulatory agency that enforces the FTL and FDTA, has authority to investigate when a distributor files a complaint with it alleging the FTL or FDTA violations by a supplier. When the KFTC concludes that the supplier has violated the FTL or FDTA, it may issue a corrective order, impose administrative fines or refer the case to the prosecutors' office. Separately from the KFTC proceedings, distributors can file a complaint with the court on the same ground of the FTL or FDTA violations for damages compensation.

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

Parallel importation is allowed in Korea. Therefore it is, in principle, not permitted for a distributor or agent to prevent parallel imports into Korea. Rather, the FTL prohibits as an unfair trade practice distributors or agents of a supplier unreasonably restricting parallel importers' business.

23 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 and distributor who advertise the product should comply with the Act on Fair Labelling and Advertising, which prohibits false and exaggerated labelling and advertising that is likely to be deceptive or misleading to consumers.

A supplier may pass its cost of advertising on to its distribution partner to a reasonable extent and is prohibited under the FDTA from passing on the cost of promotional activities engaged in by the supplier due to its own necessity to a distributor.

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

The abuse of intellectual property rights is, generally speaking, one of the hot issues under the FTL nowadays. Having said that, in respect of the supplier-distributor relationship, it is not uncommon for a distribution agreement to include a clause imposing an obligation on the distribution partner not to infringe the supplier's intellectual property rights. Technology-transfer agreements are not usually used in the context of a supplier-distributor relationship.

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

The Framework Act on Consumers outlines primary rules and standards for consumer protection. In addition, the FTL (which prohibits unfair trade practices), the SCA, the Instalment Transactions Act, the Act on Door-to-Door Sales and the Act on Consumer Protection in Electronic Commerce aim to enhance consumer protection and fairness in transactions. Also, the Product Liability Act protects consumer rights when a product defect causes death or injury.

26 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?

Product recall is regulated by the laws governing the relevant product (eg, the Framework Act on Product Safety, the Pharmaceutical Affairs Act, the Food Sanitation Act, etc). Such laws generally require companies (manufacturers, importers, distributors and service providers) to recall products supplied to the market if the products are likely to cause death or injury to customers or damage to customers' property.

As mentioned above, distributors also bear the responsibility of recall. Therefore, it is permissible to require the distributor to fulfil its recall obligation if the defect has been caused during the distribution process. However, if a defect has been caused at the design stage or during the manufacturing process, the manufacturer should, in principle, bear the relevant costs necessary for the recall. In this regard, certain arrangements transferring the costs of recall (for a defect attributable to the manufacturer) to the distributor without reasonable cause could be found to be an act of imposing disadvantages, which is prohibited under the FTL and FDTA.

27 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?

Parties to a contract are permitted to freely determine the contents of warranties by mutual agreement. Therefore, as long as the distribution partner agrees, a supplier may limit the warranties it provides to the distribution partner. However, if the supplier provides different types of warranties to different distribution partners without reasonable

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Update and trends

As discussed in question 8, the FDTA, a special law accompanying the FTL, has been in force since 23 December 2016. With the purpose of preventing unfair trade practices in supplier-distributor transactions and fostering fairness in supplier-distributor relationships, the FDTA, among others (i) requires the parties to enter into written distributorship contracts; (ii) expressly sets forth the types of unfair trade practices prohibited in supplier-distributor transactions; (iii) imposes administrative fines on suppliers that have engaged in unfair trade practices; and (iv) in certain cases, imposes treble damages on parties engaging in unfair trade practice at the maximum.

cause, it may be found to be in violation of the FTL, which prohibits acts that discriminate against certain transacting partners (discriminatory treatment).

On the other hand, an agreement between the supplier and the distribution partner to limit the warranties that will be provided to customers can be subject to the SCA, if such an arrangement is specified in the standardised contract and is prepared in a specific form for repeated use with multiple customers, without modification. Under the SCA, it is forbidden to include a clause in the standard terms and conditions which excludes or limits the warranty liability of a company or tightens the requirements for customers in exercising their rights under a warranty. In addition, if the supplier and the distribution partner agree to limit the warranties to some customers only without reasonable cause, this could be viewed as discriminatory treatment prohibited under the FTL.

28 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 Personal Information Protection Act allows a person to transfer another's personal information to a third party only where the information principal's consent is obtained or otherwise such transfer is specifically required under the applicable laws. In addition, a customer's information can be stored and kept only by a person or entity who has obtained the customer's consent. In this regard, a distributor must obtain customers' and end-users' consent before sharing their personal information with the supplier. In addition, a requirement by the supplier for the distributor to provide customers' information unilaterally without any reasonable compensation or reasonable cause, whether it is personal information or not, could constitute unfair interference with another's business activities, which is prohibited under the FDTA.

29 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 FDTA prohibits, as a type of unfair interference in another's business activities, a supplier requiring the transaction counterparty to obtain its approval or instructions when appointing or dismissing employees, directors or officers. In this regard, a supplier is not permitted to approve or reject the distributor's employees, directors or officers, and any agreement granting the supplier the right to terminate the distribution contract if not satisfied with the distributor's management may not be enforceable unless there is a justifiable reason. However, it may not be prohibited for the supplier to request the distributor to change certain individuals when there is certain reasonable cause.

30 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 Korean courts determine whether a person is an employee by considering various factors, such as (i) whether the company supervises or controls the person's work; (ii) whether the person can independently operate the business on his or her own account; (iii) whether remuneration provided to the person is performance-based compensation paid irregularly or fixed salary regularly paid; (iv) how long the relationship has existed and will be continued; and (v) whether the person exclusively works for the company. In light of the foregoing standards, it is generally understood that a distributor or agent is not an employee of the supplier. However, if there are exceptional circumstances under which it can be deemed that a distributor or agent receives compensation for the labour he or she provides and is under supervision of the supplier as in an employer-employee relationship, the distributor or agent could be viewed as an employee of the supplier.

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

In principle, the payment of commission to a commercial agent is not regulated in Korea.

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

There are no standardised levels of good-faith and fair-dealing requirements under Korean law and the KFTC and the courts tend to review the totality of the circumstances as to whether a supplier has treated a distributor fairly. Having said that, when good faith and fair dealing is reviewed, it is usually considered, for example, whether there have been sufficient mutual discussions on certain issues, if any, and whether profits and losses or advantages and disadvantages are generally fairly shared between the parties under the agreed terms and conditions, etc.

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

There are no laws or regulations in Korea which require distributors to register with or obtain approval from the government in respect of their distribution agreements or intellectual property licence agreements. However, there are certain industries, such as the medical devices or cosmetics industries, which require distributors to register their distribution business with, make a declaration to, or obtain approval from the government before distributing the products.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The FDTA prohibits, as an unfair trade practice, an act by a party of coercing another to provide economic benefits (eg, money, goods or services) to itself or a designated third party for its own benefit. In addition, if an employee of the supplier receives economic benefits from a distributor in the work-related context, this could constitute a crime of bribery or commercial bribery by breach of trust, which is punishable under the Criminal Code.

35 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, sales targets are not prohibited in Korea. However, the FTL and FDTA prohibit, among others, a supplier from unreasonably establishing a minimum sales target and coercing the distributor to meet the sales target by way of, for example, imposing penalties or a disadvantage such as termination of the distributorship or forfeiture of sales commission when the distributor fails to meet the sales target. While coercion is not found when the sales target has been set to provide certain benefits or incentives when the distributor meets it, the arrangement can be deemed coercive if such incentives in fact serve as a replacement for the actual distribution margin and can be exploited by the supplier as a means to enforce the sales target.

Governing law and choice of forum

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

Parties to a contract are free to choose the governing law by mutual agreement. However, the FTL and FDTA, as mandatory law of Korea, apply regardless of the parties' agreement on the foreign governing law.

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

Parties to a contract may agree to resolve disputes before a foreign court or arbitration tribunal if:

- the Korean courts do not have exclusive jurisdiction over the subject matter in dispute;
- the foreign court or the arbitration tribunal designated under the contract has appropriate international jurisdiction;
- the matter in dispute is reasonably related to the designated foreign jurisdiction; and
- the parties' agreement to the exclusive jurisdiction is not substantially unreasonable or unfair in light of public order and good morals.

In addition, the foreign judgment or arbitral award can be enforced in Korea after obtaining an order from the Korean court.

38 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?

To the extent jurisdictional grounds exist, a foreign national (including a foreign entity) can bring a lawsuit before a Korean court. For all court procedures, the foreign national shall be treated in the same way as a Korean national. One critical difference is that in Korea the US-type discovery process is not put in place, making it hard for a litigant to require disclosure of materials from an adverse party. Instead, the Korean Civil Procedure Act requires a document holder to produce the requested document without objection in certain circumstances when the requested party holds a document quoted in a lawsuit; the party asking for document production has a legal right to request the document holder to transfer or show it to him or her; or the document has been prepared for the benefit of the requesting party or prepared under a legal relationship between the requesting party and the document holder.

39 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 or arbitrate disputes is valid and enforceable in Korea as long as the parties' intention to mediate or arbitrate is clearly stated. Since Korean nationals and foreign nationals (including foreign entities) are treated equally before the law in Korea in terms of dispute resolution, other than general differences between litigation and arbitration there is no advantage or disadvantage specific to a foreign business.

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Netherlands

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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/.

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.

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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.

According to article 7:428 of the Dutch Civil Code, an agency relationship exists when:

- the agent is self-employed;
- the relationship between agent and principal is not of an incidental nature;
- the agent does not act on his own behalf but acts for the account of and in the name of his principal; or
- the agent acts as intermediary in the conclusion of contracts between the principal and third parties, or concludes contracts himself for the account of and in the name of his principal.

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 for the 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 supports the franchisee with some continuous commercial and technical support. Part of a franchise contract may be a distribution/resale agreement for products or services.

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 party's private label. Such sales are on the third party's own account and in its 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). Furthermore, a Dutch Franchise Code was presented to the Minister of Economic Affairs by the Drafting Committee on 17 February 2016. The Minister stated he is in favour of transforming the current Dutch Franchise Code into franchise law in the Dutch Civil Code. According to the Minister this should be effectuated as soon as possible. As the definition of 'franchise' in the Dutch Franchise Code is rather broad, those developments could, besides franchise relationships, also affect distribution and licence relationships in the Netherlands.

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 question 21).

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 employment 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 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.

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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 the 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 notice 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 agency agreement automatically becomes an agreement for an indefinite term. 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 agreement

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 a 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.

Under Dutch law, an agent is entitled to a client compensation (also well known as goodwill compensation) upon the end of the agency agreement if certain requirements have been met. These requirements are:

- the agent has brought the principal new customers or an increasing number of agreements with existing clients;
- the agreements with such customers still provide the principal a substantial advantage; and
- and such payment is reasonable given the circumstances of the case (article 7:442 1 DCC).

The amount of this compensation cannot, unless otherwise agreed, exceed the equivalent of one year's compensation, based on the average earnings over the previous five years, or, if less than five years, over the actual duration of the contractual relationship (article 7:442 2 DCC).

According to article 7:442 paragraph 4 DCC, no goodwill compensation is due if:

- the agreement was terminated by the principal and the reasons for termination can be attributed to the agent;
- the agreement was terminated by the agent, unless the agent terminated for reasons that can be attributed to the principal; or
- if the termination is justified by age or illness of the agent, with a view to which the agent cannot reasonably be expected to continue his or her work as an agent.

Goodwill compensation is also not due if the agent transfers the rights and obligations related to the agency agreement to a third party following an agreement relating thereto with the principal.

It should be noted that the right to receive goodwill compensation expires if the commercial agent fails to invoke the rule within one year after termination of the agency agreement (article 7:442 paragraph 3 DCC).

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 agreement

Following Dutch and European competition rules, it is not permitted 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-compete 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 agency

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, how are these restrictions enforced?

Distributor

No; a supplier may not control the prices at which its distribution partner resells its products. As in all other EU member states, Commission

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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

Yes, a principal may control the prices at which its sells its products to its customers. When the agent promotes the products it can be obliged to adhere to the principal's price list and conditions. However a principal may not control the resale prices the customers use in their (re) sales channel.

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 may be allowed to give its distributor or reseller a 'lowest price guarantee'. Please note, however, that such 'across platform parity agreements' (also referred to as APPA clauses), clauses between suppliers and retailers that specify a relative relationship between prices of competing products or prices charged by competing retailers, have recently been scrutinised by the European Commission as clauses such as this can have an anticompetitive effect, especially with large, dominant, players in the market. APPAs are characterised by two elements: (i) a vertical element, because they involve firms at different levels in the value chain, and (ii) a horizontal element, because they link prices of competing goods and/or of competing retailers. Another peculiarity is that the parties to such agreement are suppliers and retailers, while buyers are not and are often not even informed of their existence, even though these agreements concern the prices the buyers are paying. As those clauses may be anticompetitive and therefore prohibited, it is advisable a lawyer is consulted before inserting clauses like this.

Commercial agent

The principal may control the sales prices to its customers and is also allowed to offer its customers a 'lowest price guarantee'. However a principal should be careful when it implements APPAs; see also under 'Distributor'.

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 the limitations on such conduct 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 emails, visits, or by advertisements on its website specifically targeted at a group customers outside its territory) (active sales).

Commercial agent

A principal may in general restrict the geographic areas or categories of customers to which its commercial agent offers the products on behalf of the principal.

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 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Acquiring rights of distribution in itself is unlikely to constitute a merger but where an entity, rights plus a brand name plus assets and contracts – and possibly employees who transfer too – are acquired this may constitute the transfer of a business (and the so-called transfer of undertaking rules may apply).

21 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. 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.

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There are no additional Dutch competition laws relating to distribution agreements.

The ACM is charged with competition oversight, sector-specific regulation of several sectors, and enforcement of consumer protection laws. The ultimate goal of the ACM is to create a level playing field, where all businesses play by the rules, and where consumers exercise their rights.

For the ACM, fines are an important way to sanction violators. Fines can be as high as €450,000 or 10 per cent of the relevant turnover. However, the ACM has many other instruments at its disposal, including:

- Orders subject to periodic penalty payments. In order to end violations, the ACM has the ability to impose orders subject to periodic penalty payments on companies. A company is given a deadline before which it must have adjusted its practices. If it fails to do so, it will have to pay the penalty payments until it has made the necessary adjustments.
- Binding instructions. If a company violates a statutory standard, the ACM has the option of giving it a binding instruction. In the instruction, the ACM explains how the law should be interpreted in practice.
- Commitments. Companies can make commitments to the ACM, promising to adjust their practices in order to avoid further enforcement actions.
- Education. Education is an important instrument to make sure that businesses and other organisations comply with the rules. That is why the ACM publishes its decisions, vision documents and interpretations of the rules on its website. The ACM additionally published studies and advisory papers such as market scans and informal opinions (see www.acm.nl/en). Furthermore, consumers themselves can take action. With consumer awareness' campaigns on ConsuWijzer, the ACM seeks to influence consumer behaviour. ConsuWijzer is a portal for consumers in the Netherlands. For more information about ConsuWijzer (in Dutch), see: www.consuwijzer.nl.

The powers of the ACM have been laid down in laws and regulations. These rules determine what the ACM can and cannot do. In several procedures and policy rules, the ACM has clarified how it exercises its powers in practice.

Many investigations launched by the ACM have been prompted by solid leads (tip-offs). These tip-offs may have been submitted by businesses or to ConsuWijzer, but they may have also been submitted by anonymous informers. ACM officials have the authority to enter premises, to request information, to demand access to documents, and to take along data. Such authority does not only apply to business premises, but also to homes. Furthermore, everyone is required to cooperate with ACM investigations. If the ACM comes across correspondence between lawyers and their clients, the ACM will leave such correspondence outside the investigation (legal professional privilege). This applies to both correspondence found at a law firm as well as at the company under investigation.

On 20 April 2015, the ACM published a paper on vertical agreements. With this publication, the ACM provides insight into its strategy and enforcement priorities with regard to vertical agreements. In its enforcement actions, the ACM particularly focuses on those agreements that negatively affect consumers. The paper can be found via: www.acm.nl/en/publications/publication/14226/ACMs-strategy-and-enforcement-priorities-with-regard-to-vertical-agreements.

22 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.

23 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 emails, visits or by advertisements on its website specifically targeted at a group of customers outside its territory) (active sales). A supplier may pass (part of) its cost of advertising on to its distribution partner.

24 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 be helpful as a warning to 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.

25 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).

The following rules apply for consumers in the Netherlands in relation to the purchase of products or services (summarised):

Conclusion of agreements

Since June 2014, consumers are better protected. They need to confirm in writing or digitally an agreement concluded by telephone.

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Cool-off period of 14 days
When a consumer purchases something online or at the door or by telephone, a mandatory cool-off period exists of 14 days instead of the previous seven days. A consumer can return something within this period without any reason or motivation and is entitled to be reimbursed.

Guarantee on products
Consumers are entitled to a statutory guarantee when they purchase a product. The product needs to be in conformity of what one can expect. When a product is faulty, the consumer is entitled to a repair without charge, a new product or be reimbursed.

Rights when one is being sent a product without asking for it
When a company sends a consumer a product without the consumer asking for it, the consumer may keep the product without paying for it. When a consumer chooses to return the product to the company, the company will have to bear the costs for returning the product.

Rights when loaning money
Consumers have rights in relation to loaning money, among others they may terminate a loan agreement within 14 days after conclusion thereof. Furthermore the lender, like a bank, needs to give the consumer clear information up front.

Misleading trade practices
A misleading trade practice means when a seller provides wrong, insufficient or misleading information or uses aggressive sales techniques. According to the law, misleading and aggressive sales are prohibited. Consumers can nullify such transaction or file a complaint with ConsuWijzer.

Help and advice for consumers
At ConsuWijzer (part of the ACM) consumers receive free advice and information about their rights.

26 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.

27 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.

28 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, there are indeed restrictions on the exchange of information on customers and end-users. 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 (DPA) is applicable.

The DPA defines personal data in line with the standard definition of personal data as any information relating to an identified or identifiable natural person. The DPA primarily applies to and imposes restrictions and obligations on data controllers. Nevertheless, the DPA provides that the data processor is liable as regards the data subject where its activities result in infringements of the DPA and damages, and requires the data processor to ensure the confidentiality of the data. A data controller must provide the fair processing information to data subjects prior to obtaining the personal data from them or from third parties, unless this information is already known to the data subject. If the personal data has been obtained from a third party and providing the fair processing information would be impossible or take a disproportionate effort or is required by law, this obligation does not apply. The DPA requires the data controller to implement the general data security obligations. The data controller may, in deciding the appropriate level of security, take into account not only the state of the art but also the costs of implementation.

The processing of personal data by a data processor must be in accordance with a written contract containing the standard processor obligations and the data controller is required to supervise compliance with these obligations, eg, via contractually agreed audits.

Additional obligations arise under the Breach Notification Law from 1 January 2016. This imposes a general obligation to notify the Data Protection Authority and data subjects of data security breaches that are reasonably likely to result in serious adverse consequences for the protection of personal data. The Data Protection Authority will provide further detail of what constitutes 'serious adverse consequences'.

The notification to data subjects must include the nature of the infringement, the institutions that can provide more information concerning the breach and recommend measures to mitigate the negative effects of the security breach. The notification to the Data Protection Authority must include the information above and also include the technical details and background of the breach, a description of the probable consequences of the infringement on the processing of personal data and the measures taken or proposed by the data controller in order to remedy the consequences.

The obligation to notify the data subjects does not apply if the data controller has taken the appropriate technical protection measures to protect the data. However, the Data Protection Authority can still request the data controller to notify the data subject, if the Data Protection Authority has reasons to believe that the breach may have adverse consequence for their privacy. Failure to comply with the Breach Notification Law can lead to with administrative fines of up to €810,000 or 10 per cent of the annual net turnover of the company.

Under the DPA transborder dataflows may take place where they satisfy the standard conditions for transborder dataflow. Where consent of the data subject is relied on, this consent should be unambiguous. There is no obligation to notify the Data Protection Authority of any transborder dataflow that satisfies the standard conditions for transborder dataflow. Where these conditions are not met, an individual licence must be obtained. Binding corporate rules are accepted in the Netherlands and it is a member of the mutual recognition club. There is no specific procedure for mutual recognition. Binding corporate rules must be submitted with an application for a licence for transborder dataflow.

In the Netherlands the Data Protection Authority is the authority charged with supervising compliance with the DPA and related legislation. In order to promote compliance, the Data Protection Authority deploys a variety of instruments in the area of supervision, enforcement and communication.

Supervision
The Data Protection Authority is not in a position to investigate every alleged violation of the law. It has therefore developed a set of criteria to determine whether to conduct an investigation. The Data Protection Authority will conduct an investigation when there is a suspicion of serious and structural violations that affect a lot of people, that can be addressed by using its competences and if the issue at stake falls within the priorities it sets annually.

The Data Protection Authority may also choose, for example, to send a warning letter to an organisation or to speak with it on the matter at hand. This will mainly be done with regard to possible violations that do not meet the criteria mentioned above. Such a letter or conversation

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Update and trends

At the beginning of 2015, the Ministry of Economic Affairs appointed a drafting committee for a Dutch franchise code, consisting of two members representing franchisee interests, two members representing the interests of franchisors, and assisted in this by two members provided by the Ministry of Economic Affairs. The activities of the Drafting Committee initially led to the presentation on 16 June 2015 of a consultation version of the Franchise Code, after which stakeholders were given a period of (only) six weeks to submit their input to this code. This procedure has led to a great deal of criticism on the part of franchisors, who felt they were not consulted and who had given no mandate for the far-reaching obligations contained in the particular code. Other parties too, such as branch associations and similar organisations, objected to the draft code. The Minister then decided work on the Franchise Code should be continued, with greater support from the Ministry. This has led to the present version of the Franchise Code, presented to the Minister by the Drafting Committee on 17 February 2016. In October 2016, the Minister stated he is in favour of transforming the current Franchise Code into franchise law in the Dutch Civil Code. According to the Minister this should be effectuated as soon as possible. As the definition of 'franchise' in the Franchise Code is rather broad, those developments could, besides franchise relationships, also affect distribution and licence relationships in the Netherlands.

may already be enough to bring the violation to an end. If an organisation refuses to cooperate or if the Data Protection Authority receives further complaints against this organisation, it may decide to investigate.

Enforcement

When the Data Protection Authority has, in an investigation, established violations that are still continuing, it can start enforcement action. The Data Protection Authority is competent to impose a conditional fine on organisations, subject to a penalty for non-compliance. They will be given a certain period to terminate the violations. When the organisation fails to do so, it will have to pay the financial penalty set, which can amount to up to (currently) €820,000.

Communications

External communication is also an important instrument in reaching compliance with the law. The Data Protection Authority maintains contact with the media, it meets with branch organisations and other stakeholders and gives presentations on a regular basis. In addition, the Data Protection Authority provides information by telephone and on its website: www.autoriteitpersoonsgegevens.nl/en.

29 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.

30 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.

31 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).

32 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, a (very) large supplier should be especially 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 on 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.

33 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.

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34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Unlike the UK Bribery Act, the Netherlands does not have specific anti-bribery laws, except for the general obligation for companies to do business in a responsible manner.

35 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?

Distribution agreements

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 32.

Commercial agency agreement

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

36 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.

37 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.

38 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 it has a legitimate interest in disclosure; the request is made for 'certain documents'; and 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.

39 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

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of law clause, under applicable Liechtenstein laws, was too burdensome on the side of the franchisee, especially because the franchisee is economically a much smaller party.

The main 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 main 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.

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Puerto Rico

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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 US$150 government filing fee for corporations and US$250 for LLCs. To maintain their registrations, corporations must file corporate annual reports along with a US$150 filing fee. These reports must include a balance sheet. LLCs only have to file a US$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), as amended, which has been drafted in its majority 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?

Income taxes

Companies organised in Puerto Rico are subject to Puerto Rican income tax on their worldwide income. Foreign companies engaged in trade or business in Puerto Rico are taxable only on the income generated from sources within Puerto Rico and certain types of income effectively connected with operations in Puerto Rico. Partnerships and limited liability companies electing to be taxed as partnerships are not subject to tax, but net income is assigned to the partner or member who is responsible for the payment of the applicable income taxes. Puerto Rican companies that are subject to taxation outside Puerto Rico may claim a tax credit for income taxes paid to a foreign jurisdiction. Similarly, foreign companies subject to tax in Puerto Rico may claim a credit for the taxes paid to Puerto Rico depending of the law of the jurisdiction of their organisation.

The corporate income tax rate ranges from 20 to 39 per cent of the net income of the entity. The alternative minimum tax (AMT) is intended to prevent taxpayers from reducing their income tax liability by benefiting from substantial tax preferences. The AMT is the amount by which the tentative alternative minimum taxable net income for the taxable year exceeds the regular tax for the taxable year.

Generally, dividends paid by Puerto Rican companies, or by certain foreign companies engaged in trade or business in Puerto Rico, to residents and non-resident persons are subject to a 15 per cent withholding tax. A dividend received deduction of 85 per cent is allowed on dividends received by a company engaged in trade or business in Puerto Rico from a domestic (Puerto Rican) corporation (100 per cent in the case of a controlled Puerto Rican company).

Net long-term capital gains upon the exchange or sale of investment and business assets held for more than one year by a company are subject to a 20 per cent tax (15 per cent for individuals). Inventory is not considered a capital asset. Capital losses are allowed up to 80 per cent of the net capital gain generated in the taxable year. Unused capital losses can be carried forward until exhausted, subject to the 80 per cent limitation.

The determination of net income is made under US generally accepted accounting principles. The net income of the company is computed to reflect the tax treatment of items of income and deductions. In general, financial statements audited by a certified public accountant authorised to practice in Puerto Rico must be attached to the company's income tax return if the volume of business of the company reaches US$3 million during the taxable year. Certain supplementary information must also be included.

Puerto Rican source income derived by foreign companies not engaged in trade or business in Puerto Rico is subject to a 29 per cent

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withholding tax. This tax also applies to interest paid from sources in Puerto Rico to a related foreign company not engaged in business in Puerto Rico (interest paid to unrelated persons is not subject to withholding taxes).

Sales and use tax

Puerto Rico imposes a sales and use tax (SUT) upon the introduction, sale, consumption or use of a taxable item (eg, tangible personal property, taxable services, etc). The SUT rates are 10.5 per cent (4 per cent SUT applies on certain services) for the state and 1 per cent for the municipalities.

The SUT applies to services rendered by a non-resident person or company to a company engaged in trade or business as well as to management fees and inter-company transactions within a controlled group. A company cannot commence operations in Puerto Rico unless it is registered as a merchant for SUT purposes. The declaration and payment of the SUT must be made online through the portal established by the tax agency.

Other important taxes

Municipal licence tax (gross volume of business tax) is 1.5 per cent for financial businesses and 0.5 per cent for others and must be declared and paid to each municipality in which the business maintains a commercial location.

Property taxes range from 6.08 to 8.83 per cent and real property tax ranges from 8.08 to 10.83 per cent depending on the municipality in which the property is located. These rates are for fiscal year 2016–2017 (rates for fiscal year 2017–2018 were not available at the time of writing).

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 Federal Trade Commission 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 representation that is 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 that shall not be greater than 5 per

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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, although 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?

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 the general contracts law in the 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, how are these restrictions enforced?

Federal antitrust law applies in Puerto 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, although the latter continues to be the subject of diverse positions among state enforcement authorities in the continental United States.

Federal and local enforcement of, or opinion on, the prohibition of either of the forms of RPM is not pervasive in Puerto Rico, unless part of a nationwide US effort that is 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.

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. 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?

See questions 14 and 15. 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?

See 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 the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

See 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.

Exclusive territories are permitted but a supplier may just as well restrict the geographic areas or categories to which its distribution partner resells, although in smaller countries or markets 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. A supplier may also, in the case of non-exclusive contracts, reserve the right to sell the products in the territory along with the distributor.

Unless specified by contract, we know of no statutory restrictions related to active as opposed to passive sales efforts.

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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 customers 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 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

A distribution or agency agreement may be deemed a reportable transaction under merger control rules if its effect is to substantially reduce competition or create a monopoly. The standards used by the Puerto Rican courts to evaluate such a transaction include the following:

- proof that the company (unilaterally or in combination with others) had a specific intent to monopolise the market by controlling prices or lessening competition;
- anticompetitive or predatory conduct was carried out to fulfil such intent; or
- that there exists the probability that such intent be successful.

21 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.

22 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 'grey market' products if they are genuine, non-counterfeit goods. A supplier, by itself or with the assistance of the distributor, may be able 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 and should request legal advice on how to achieve the best possible result in that endeavour and to define their respective contractual obligations towards each other in case of situations with parallel or diverted products.

23 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.

24 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.

25 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.

26 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.

27 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

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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 in which 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.

28 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, for example, 16 CFR sections 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. The distributor must also notify the consumer of security breaches of personal information.

Under the EU *Schrems* decision, if suppliers or distributors collect personal identifiable information of an EU person, the supplier or distributor should protect such information in accordance with EU data protection laws. If the supplier is self-certified under the Privacy Shield regime, it must comply with the privacy principles under such regime.

29 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 Law 21 to apply, but a distribution agreement may require a distributor to maintain a certain type of management structure, ownership or standards of quality. 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. The supplier's vetting, approval or disapproval of employees of the distributor, or of their actions, could potentially subject the supplier to employer liability alongside the distributor.

30 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, the distributor and the distributor's employees, as a whole, will be analysed to determine whether an employment relationship exists. Various factors will be taken into consideration to determine the existence of an employment 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, the distributor's, or the distributor's employees' work not only as to the end result, but also as to the manner and means by which the result is accomplished. Examples of control include, but are not limited to, the ability to approve or deny overtime, payment of bonuses and designation of employees to work in specific capacities.

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 have an employer social security identification number;
- the distributor should obtain its own workmen's compensation insurance policies;
- the distributor should determine his or her own schedule of work and that of its employees;
- 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.

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

No, but general tax withholding obligations will apply to such payments.

32 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.

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

No.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Anti-bribery or anti-corruption laws apply to relationships between suppliers and their distribution partners in the event that they involve making payments or providing anything of value to government officials to assist in obtaining or retaining business.

35 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 36, 37 and 39.

Governing law and choice of forum

36 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.

37 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.

Under Law 21, however, the courts are more likely to uphold forum selection clauses and arbitration outside Puerto Rico is similarly not prohibited.

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38 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 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.

39 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 either by courts or arbitration tribunals.

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Spain

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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 the 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 Auditing Act 22/2015 of 20 July), which lays down the standards governing capital companies. The Commercial Register Regulation 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.

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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, the premises chosen, etc).

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, rights or obligations 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 principal and the final client (either directly or represented by the agent on the principal'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 supplier, or in joint ventures with a foreign 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 these kinds of agreements.

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 (unless a longer period was agreed) of one month for every year in which the agency contract was in force (with a maximum of six months for agreements lasting for more than six years and a minimum of one month if the agreement had lasted less than one year). No termination notice is legally 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 'intuitu 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.

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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 produce 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 as 'remuneration' to calculate the compensation 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 on the enforcement of confidentiality provisions in distribution agreements before, during or after the expiry 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, 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 reselling prices. In cases where the supplier fixes the reselling prices the National Commission for Markets and Competition is the state authority to pursue the restrictions and may impose fines.

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 must be freely established. Therefore suppliers could charge different prices to different customers based on different circumstances. A limitation could nevertheless exist in cases where the supplier abuses the financial dependency of its distributors when they have no equivalent alternative for their activity in the market.

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 the limitations on such conduct 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 customers 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. In a distribution contract the supplier will not usually refuse to deal with particular customers unless it is restricted from doing so, for instance, in an exclusive distribution contract. Nevertheless, the supplier can restrict its distributors' ability to deal with particular customers, for instance,

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if these clients are reserved to other distributors or to the supplier itself, and can also restrict the possibility to actively search new customers in a Territory different to the contractual one.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Merger control under the Spanish Competition Act 15/2007 of 3 July requires a merger of companies, the acquisition of an undertaking or the creation of a joint venture or, in general terms, the acquisition of the control over a specific company.

An agency or distribution agreement could only be considered a merger for the purposes of the Competition Act if such agreements permit such control, particularly on the composition, the decisions or the agreements of the other company. In our opinion, agency and distribution agreements will not fall in general terms under merger control regulations.

Nevertheless, if that was the case and such control was obtained, the merger should be notified before its enforcement to the National Commission for Markets and Competition when one of the following circumstances is reached: if a market share of 30 per cent of the national (or defined regional) relevant market is acquired or increased (except if the turnover of the undertaking controlled or if the value of the acquired assets does not reach €10 million provided each one of the affected companies does not have a market share of at least 50 per cent in the relevant market); or when the turnover in Spain of all the participants in the merger exceeds €240 million, provided the combined income of at least two of the participants exceeds, together, €60 million in Spain.

21 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 Competition Act 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 regional competition courts and are usually public (although confidential) procedures. The National Commission or the regional competition courts will pursue those agreements that being prohibited and significant are not authorised by a specific norm or particular authorisation.

Private parties can also bring actions before ordinary courts and under competition laws searching for damages compensation.

22 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 the distributor is the only authorised person to sell the goods within the exclusive territory. In this case the supplier will not usually be authorised to sell directly to final customers in the same territory (except if otherwise foreseen in the agreement). 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.

23 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 to 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 in case of early termination of the agreement with due reason and when calculating the goodwill (clientele) compensation.

24 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 registration of 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.

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

The Consumers General Act (Royal Legislative Decree 1/2007, last amendment by Act 15/2015) is applicable to consumers: those persons (even moral persons or entities without legal personality) 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 for suppliers and distributors in their relationships with consumers as defined by the Consumers General Act.

26 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.

27 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 General Act and in these cases consumers' rights 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, when the product was not manufactured for its sale or distribution, or when the defect was not detectable according to the existing knowledge at that moment in time.

28 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 and the affected persons have been informed.

The exchange of information about customers and end users is governed by the Data Protection Act (DPA) and regulations, and supervised by the Spanish Data Protection Agency. Usually the collection, processing and transmission of data require 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.

According to the Spanish legislation and the Communication of the Data Protection Agency, after the *Schrems* judgment, the United

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States does not provide a similar data protection to the Spanish one and therefore, in case the data will be transferred from Spain to the US, it will be necessary to do it according to European Commission Decisions 2001/497/EC, 2004/915/EC, and 2010/87/EU, and Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 and article 33 of the DPA (authorisation of the Data Protection Agency Director) with the possible exceptions foreseen in article 34 of the DPA (particularly when there is the express authorisation of the affected person, and transfer necessary for the application or enforcement of an agreement). In 2016 the European Commission issued the *Guide to the EU-US Privacy Shield*.

29 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.

30 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 usually be 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 is 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, he or she will be considered as a commercial non-employee agent). But even this is not enough because the Agency Act also foresees its application to agents who do not assume this risk. 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 agents have 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 be considered as an employee. In any case, this is an element to be considered carefully when drafting the agency agreement and also in the carrying out of the relationship.

In general terms, the consequences of being considered as an employee are in the application of the labour law, which usually foresees higher protection for employees than the commercial law (the Agency Act in the case of agents).

31 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:

- 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);
- 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
- possible conflicts between agents in successive agreements.

32 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.

33 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 regarding trademarks and patents should be agreed in writing and are to be registered with the Trademark and Patent Office.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Anti-bribery and anti-corruption laws are applicable to the transactions between suppliers and distributors. An example is the Money Laundering Act (MLA), which is applicable to any transfer of goods from a possible criminal origin or activity, or hiding the real ownership of the goods if the criminal origin was known. The MLA expressly foresees some obligations to persons trading with goods. In particular, these persons will have some obligations in case of payments for more than €15,000: to identify the counterparty, to identify the transaction if there is the risk of money laundering or financing of terrorism, to communicate to the authorities any incidence regarding these risks, refrain from executing any risky activity, avoid giving any information to the counterparty or making it aware of suspicions about its activity, and keep a record of the documents affected by this legislation.

35 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 distribution 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 for agency agreements 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

36 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

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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 law 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.

37 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 1215/2012 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 applies from 10 January 2015. The recent modification in the Judicial Power Organic Act accepts the express submission to a foreign court. In these cases the Spanish court will suspend the proceeding until the foreign courts have declined jurisdiction.

In the case of agency agreements a rule contained in the Agency Act obliges that when Spain has jurisdiction, the competent court to settle disputes will be the court of the domicile of the agent.

38 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 a dispute 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.

39 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 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 UNCITRAL Model Act prepared by the United Nations in 1985.

According to the Arbitration Act 60/2003 (last modification in October 2015), 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 (last modification in July 2015) 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.

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Switzerland

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Direct distribution

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

Generally, yes. However some restrictions may apply in specific regulated areas (eg, banking, insurance, defence, electricity, real estate, etc).

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?

The public limited company (AG) and the limited liability company (GmbH) are the most appropriate legal forms for an importer owned by a foreign supplier. One of the main advantages of these two legal entities is that the shareholders, and therefore the partners, are required only to fulfil the duties specified in the articles of association and are not personally liable for the company's obligations.

An AG and a GmbH may be formed by at least one or more people or legal entities. The minimum share capital is 100,000 Swiss francs for an AG and 20,000 Swiss francs for a GmbH. The company is established when the founder members declare by notarial deed that they are forming an AG or a GmbH, adopt the articles of association and appoint the company's officers (directors or executive officers). The company then acquires legal personality through its entry in the commercial register. AGs and GmbHs are both governed by the Swiss Code of Obligations (CO).

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. In principle, the same rules apply to domestic and foreign business entities. However, some restrictions exist with respect to the residency requirements of the companies' representatives as well as to the acquisition of real estate by persons abroad.

Foreign-owned entities have to consider in particular that an AG or a GmbH must be represented by at least one person with single signature or alternatively by two persons with a joint signature who are resident in Switzerland. Such representatives must be directors or executive officers.

The Federal Act on the acquisition of real estate by persons abroad, also known as 'Lex Koller', generally restricts the acquisition of residential real estate in Switzerland by non-Swiss residents. However, real estate used for permanent commercial purposes (such as offices, retail and manufacturing premises, warehouse facilities, etc) may be acquired by non-Swiss residents without authorisation.

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

Generally, 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?

The Swiss Confederation consists of 26 cantons with approximately 2,300 communes. The cantons are sovereign and may therefore levy taxes to the extent that their sovereignty is limited by the Federal Constitution. In Switzerland, taxes are therefore levied on two levels: the federal and cantonal/communal level. The Confederation levies an income tax on the net profit of legal entities. A capital tax is not levied on the federal level. Cantons and communes levy a corporate income tax as well as a capital tax, the latter being calculated on the company's net equity.

Depending on the canton of residence, corporate profit and income tax rates may vary in the range of 12 to 25 per cent. These rates are the effective tax rates; because the tax itself is deductible from the taxable profit in Switzerland, the rates usually published are higher. The capital tax varies depending on the canton in the range of 0.1 to 5.5 per thousand.

A Swiss resident importer formed as a AG or GmbH, and owned by a foreign supplier, will generally be subject to income taxation on its annual worldwide income with the exception of income from foreign permanent establishments or immoveable property located abroad. Non-resident companies are subject to income tax only on the income derived from their activity in Switzerland (permanent establishment or immoveable property).

Companies are also subject to VAT for deliveries or services, unless their turnover amounts to less than 100,000 Swiss francs per year. The ordinary VAT rate is 8 per cent, but some industries or products (such as hotel services, medicine, water, etc) are subject to a lower rate.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Swiss law relies on the principle of freedom of contract. This principle allows the parties to define at their own discretion the conditions that will govern their contractual relationship. A supplier may therefore choose among a wide range of possible distribution structures. Since private label manufacturing, trademark licensing and joint venture may also be considered valid options, the most common distribution structures chosen by suppliers are the following:

- commercial agents, who act as self-employed intermediaries for the supplier (as principal) in facilitating or concluding transactions on its behalf and for its account without entering into an employment relationship with it. The commercial agent is remunerated by a sales commission based on the transactions that it facilitated or concluded. By opting for such a distribution structure, the supplier may keep a strong and direct relationship to its customers without having to invest in its own sales organisation;
- commission agents, who, in return for a commission, sell the products in their own name but for the account of the supplier (as principal);
- distributors, who purchase the products from the supplier and resell them in their own name and account to the end customers. As property passes from the supplier to the distributors, the latter bear the marketing and sales risk. Distribution contracts may exist in a wide

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range of variations. In its simplest form, the distribution contract may be limited to the buying and reselling of products to the end customers. The contract may also provide that the distributor has to safeguard the supplier's interests and comply with a marketing or service concept. An even higher level of integration may be reached with a selective distribution contract. In such a system, the distributors entitled to resell the products are selected by the supplier based on different quantitative and qualitative criteria. A distribution contract may also be exclusive if a particular geographical area or clientele is allocated to the distributor; and

- franchisees, who, for a fee, resell products or services of a supplier (the franchisor) using its business name and a uniform marketing concept. Franchisees may be qualified as quasi-subsidiaries of the franchisor. Franchisees are self-employed distributors and therefore bear the marketing and sales risks.

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 commercial agency contract is governed by section 418a et seq CO. The other distribution contracts (see question 7) are not explicitly regulated by statutory law. They are considered 'innominate contracts'. If an innominate distribution contract does not address a particular issue, some statutory provisions of other nominate contracts (eg, employment contract, sale, commercial agency, etc) may apply by analogy as default rules. There is no specific government agency for regulating distribution contracts.

Suppliers and distributors must also comply with the Federal Act on Cartels and other Restraints of Competition (the Cartel Act) as well as with the Federal Act on Unfair Competition (UWG).

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?

Generally, no. The freedom of contract also entails the freedom of terminating or non-renewal of a distribution relationship. Where a distribution contract was entered for a fixed term, it ends without notice on expiry of that term. Any distribution relationship may also be terminated at any time upon mutual agreement of the parties. Where no fixed term has been stipulated, the parties may give notice to terminate a distribution contract by observing the contractually prescribed notice periods and termination dates. In this respect, section 418q CO provides specifically that the commercial agency contract may be terminated by either party during the first year of the contract by giving one month's notice, expiring at the end of the following calendar month. Any agreement of a shorter notice period shall be agreed in writing. If the agency contract has lasted for more than one year, it may be terminated by giving two months' notice, expiring at the end of a calendar quarter.

Moreover and according to a general principle prevailing under Swiss contract law, either party may terminate a long-term contract with immediate effect at any time for good cause. That is, for any circumstance which renders the continuation of the contractual relationship in good faith unconscionable and unreasonable for the party giving notice.

The Cartel Act may, under particular circumstances, require a supplier that has a dominant position to continue to supply its distributors.

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

If the commercial agent's activities have resulted in a substantial expansion of the principal's clientele and considerable benefits accrue even after the end of the agency relationship to the principal from its business relations with clients acquired by the agent, the latter may claim for an adequate compensation for clientele provided this is not inequitable (section 418u(1) CO). However, no claim exists where the agency relationship has been dissolved for a reason attributable to the agent (section 418u(3) CO).

The amount of such claim is capped to the agent's net annual earnings from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract (section 418u(2) CO). The compensation for clientele pursuant to section 418u CO is mandatory and thus cannot be validly waived in advance to the detriment of the agent.

In its decision BGE 134 III 497, the Federal Supreme Court held that a distributor may, under certain circumstances, be eligible to receive compensation for clientele in analogous application of section 418u CO. However, this provision may be applicable by analogy only if the situation of the distributor is economically comparable to that of an agent. This might be the case if (i) the distributor is integrated in the sales and distribution organisation of the supplier and (ii) the customers remain faithful to the supplier upon termination of the distribution contract.

The question of a possible analogous application of section 418u CO to the franchising agreement has not yet been resolved by the Federal Supreme Court. However, a majority of authors considers that the franchisee, given its status of quasi-subsidiary of the franchisor, may likely claim a compensation for clientele in analogous application of section 418u CO.

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?

As already mentioned, the principle of freedom of contract prevails under Swiss law. Swiss courts are therefore likely to enforce such provisions. With respect to the transfer of ownership, the distributor or agent may be contractually obliged not to transfer its business to a third party. Frequently the supplier is granted a termination right in case of a '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?

Generally, no. The principle of freedom of contract also prevails in this regard (see question 9).

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 may be enforceable provided they comply with antitrust law. Section 5(1) of the Cartel Act prohibits as a general rule all agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, as well as all agreements that eliminate effective competition. The Swiss Competition Commission (ComCo) issued a Notice regarding the Competition Law Treatment of Vertical Agreements of 28 June 2010 (VN or Vertical Notice) in order to set out the conditions under which agreements affecting competition are, as a general rule, deemed justified on grounds of economic efficiency.

Distribution agreements with non-competition clauses exceeding five years or entered for an indefinite period of time respectively with an automatic renewal mechanism are deemed to significantly restrict competition and are likely to be considered unlawful (section 5(1) Cartel Act, section 12(2) f) VN). The same applies to post-contractual non-competition clauses which have been entered for more than one year (section 12(2) g) VN).

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

As a general rule, any distribution partner shall be free to determine its resale price. Agreements regarding fixed or minimum prices are presumed to lead to the elimination of effective competition ('hard-core restriction') and are thus considered unlawful by Swiss antitrust law (section 5(4) Cartel Act). However, a supplier may influence the resale price to some extent by setting a maximum sale price or by issuing price recommendations (see question 15). These restrictions are generally enforced by a system of administrative sanctions, which may amount to up to 10 per cent of the turnover that the faulty party achieved in

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Switzerland in the preceding three financial years (section 49a of the Cartel 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?

In principle, a supplier may recommend a non-binding resale price to its distributors provided it does not lead de facto to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties (section 15(2) VN). Indicators of an unlawful price agreement may also be seen in the fact that a majority of the supplier's distributors actually follow the price recommendation, if it is not explicitly declared as 'non-binding' (section 15(3) VN) or if a price recommendation is only made available to the distributors but not to the public.

A supplier shall refrain from establishing a minimum advertised price policy and from declaring that it will not deal with customers who do not follow its pricing policy. This may be effectively regarded as an indirect way of setting a fixed or a minimum price. Such practices may therefore fall under section 5(4) of the Cartel Act and thus be considered unlawful.

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, most-favoured-customer clauses are allowed under Swiss antitrust law. However, in a recent provision dated 19 October 2015, the ComCo dealt with a contractual agreement between suppliers of internet booking platforms and hotels that prohibited the latter from making more profitable offers on distribution channels with lower commissions. The ComCo considered such contractual clauses unlawful with respect to the Cartel Act and has prohibited their application.

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?

Swiss antitrust law generally allows the seller to charge different prices. However, dominant undertakings, that is, undertakings that are able, as suppliers or consumers, to behave on a specific market to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market (section 3(2) of the Cartel Act), are subject to restrictions. Pursuant to section 7(2) b) of the Cartel Act, any discrimination between trading partners in relation to prices or other conditions of trade are considered unlawful and may be subject to administrative sanctions (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 the limitations on such conduct 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 may generally restrict active sales into an exclusive geographic territory or to an exclusive customer group reserved to itself or allocated to another distributor, provided that such a restriction does not limit passive sales (section 15(2) b) i) VN).

Active sales efforts and passive sales are both defined in the Vertical Notice. Active sales are referred to as the active approach of individual customers into an exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor. Passive sales are defined as the response to unsolicited requests from individual customers, including the delivery of goods or services to such customers.

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 generally refuse to deal with particular customers by invoking the principle of freedom of contract. The restrictions that a supplier may impose to its distributors are mainly determined by the applicable antitrust rules (see question 18).

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Pursuant to the Cartel Act, the merger of two or more previously independent undertakings or any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof, may have to be notified to the ComCo if the relevant turnover thresholds are cumulatively reached (sections 4(3) and 9 of the Cartel Act). It is therefore rather unlikely, although possible in theory, that the mere conclusion of a distribution or agency agreement may be deemed a reportable transaction under merger control rules.

21 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 already mentioned, Swiss antitrust law generally prohibits all agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, as well as any other agreements that eliminate effective competition (section 5(1) of the Cartel Act). In the case of vertical agreements, the elimination of effective competition is presumed in the case of agreements that set fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted ('hard-core restrictions'). The Vertical Notice specifies the criteria under which vertical agreements may unlawfully restrict or eliminate competition.

Antitrust law is mainly enforced by the ComCo, which may impose administrative sanctions to any undertaking that participates in an unlawful agreement pursuant or that behaves unlawfully. The imposed sanction may amount to up to 10 per cent of the turnover that the faulty undertaking achieved in Switzerland in the preceding three financial years (section 49a of the Cartel Act).

Private parties can bring a civil action if they are hindered by an unlawful restraint of competition from entering or competing in a market (section 12 of the Cartel Act). In such a case, the claimant is entitled to request the elimination of or desistance from the hindrance, damages and satisfaction in accordance with the CO, as well as surrender of unlawfully earned profits. However, considering the burden of proof requirements as well as the substantial prospective court costs – which have usually to be advanced by the claimant – such civil procedures are not frequently used in practice.

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

Parallel or 'grey market' imports are rather difficult to prevent under Swiss law. In a selective distribution system for instance, a supplier may contractually oblige its agreed distributors not to resell its products to unauthorised resellers. However, such clauses have to comply with antitrust law (see question 18).

23 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 UWG and the Ordinance on the Announcement of Prices impose some restrictions on the way products are advertised and brought to the market. As a general rule, any behaviour that may be considered deceptive or that violates the principle of good faith in another way is prohibited (section 2 of the UWG). Section 3 of the UWG concretises this general principle by providing a non-exhaustive list of unfair behaviours. Accordingly, providing incorrect or misleading information about oneself, one's products and services, etc may be considered unfair or deceptive. It is also prohibited to refer to competitors in an unfair way,

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for example by making incorrect, misleading or unnecessarily harming statements on their products and services, their prices, etc.

Based on the principle of freedom of contract, a supplier may contractually pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising.

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

To safeguard its intellectual property, a supplier shall first ensure that its trademarks, designs and patents are (and remain) validly registered. The Swiss Federal Institute of Intellectual Property is the competent federal agency for intellectual property matters. In cases of infringement by its distribution partners or third parties, the supplier may then exert different remedies and may for instance request the competent court to prohibit an imminent infringement or remedy an existing infringement, or also claim for damages, satisfaction and handing over of unlawfully earned profits.

Technology transfer agreements are also commonly used in Switzerland. However, such agreements are not ruled by a specific regulation and fall into the category of innominate contracts (see question 8). The parties are thus generally free in the way they intend to rule their relationship, provided they comply with antitrust law. Nevertheless, Swiss-based companies that are involved in cross-border licence agreements or whose activities have an effect in the European Union may have to comply with the EU's Technology Transfer Block Exemption Regulation and its corresponding guidelines.

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

Switzerland does not have a specific consumer protection law. Consumers are directly and indirectly protected by different rules disseminated in numerous laws. The following acts may be given as a non-exhaustive list of examples: the Consumer Information Law requires that products are correctly declared. The UWG prohibits deceptive and any other behaviour violating the principle of good faith (see question 23). The Ordinance on Price Disclosure ensures that prices are transparent and may be compared with each other and prevents misleading price indications. The Federal Act on Product Safety imposes essential safety requirements on products brought into circulation on the Swiss market (see question 26). In general, it may be observed that in consumer protection matters Swiss laws are widely harmonised with the laws of the EU.

26 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?

Swiss law does not prescribe any specific requirements with respect to recalls of distributed products. However, the Federal Act on Product Safety (PSA) stipulates various post-market obligations of the producer and importer for products that are intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers (section 8 PSA). Accordingly, the producer or the importer shall adopt appropriate measures enabling them to be informed of risks which the products might pose, prevent possible dangers and guarantee the traceability of the products. The producer and the importer shall closely cooperate with the competent executing authorities in any action aimed at preventing risks. They also have an obligation to inform said authorities if they have reason to believe that certain of the products supplied may represent a risk for the safety or health of the users or third parties. As a last resort, the executing authorities may then withdraw or recall dangerous products from the market.

Within the limits of freedom of contract, the parties can stipulate in the distribution agreement under which conditions a party may be deemed responsible for carrying out and absorbing the costs of a recall action.

27 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 an expression of the principle of freedom of contract, the parties may agree, even for consumer contracts, to fully exclude or limit any warranty obligation. However, such agreements are void if the seller has fraudulently concealed the failure to comply with warranty from the buyer (section 199 CO). An exclusion or limitation of warranty stipulated in general terms and conditions may be regarded as unfair with respect to the UWG if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (section 8 UWG).

28 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 Act on Data Protection (FADP) sets up specific rules and restrictions to the processing and exchange of data pertaining to natural persons and legal entities. As a general rule, the processing of personal data has to be lawful, must be carried out in good faith and be proportionate. In the context of distribution, the consent of customers and end-users is generally requested before the processing of any personal data. However, such consent may only be regarded as valid if given voluntarily on the provision of adequate information (section 4(5) FADP). Suppliers and distributors should also pay attention to cross-border disclosure of personal data. Pursuant to section 6 FADP, personal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, in particular due to the absence of legislation that guarantees adequate protection.

The person or legal entity whose data is processed ('data subject') remains the 'owner' of the collected data. By contrast, the private person or the authority that decides on the purpose and content of a data file is referred as the data 'controller'. The FADP stipulates under certain conditions an information right in favour of the data subject and, as a corollary, imposes upon the data controller different information duties.

29 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?

Generally, yes. Within the limits of the freedom of contract, a supplier may approve or reject the individuals who manage the distribution partner's business if such a right is explicitly provided by the contract. However, the conditions for terminating the relationship depend primarily on the qualification of the contract entered by the parties. If it is qualified as an employment contract (see question 30), the supplier has to comply with the provisions of section 334 et seq CO (ie, termination with a minimal notice period or for good cause). If the contract is considered as an agency contract, the supplier may terminate the contract in accordance with section 418q CO (see question 9).

30 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 or distributor may be considered as an employee if it is subordinated to the supplier and obliged to perform its work in strictly complying with the supplier's general directives and specific instructions. According to case law, restrictions imposed by the principal to its distributor or agent with respect to time management or work organisation may indicate that the latter is subordinated to the former. By contrast, a distributor or agent is deemed to be self-employed if it is independent and bears its own financial risk. However, such distinction may be difficult since it always depends on the concrete circumstances of the particular case.

If a distribution relationship is qualified as employment contract, the supplier has to comply with numerous mandatory labour law provisions regarding employee protection against dismissal, salary payment during holidays and illness, social security contributions, etc.

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The supplier shall therefore grant to its distributor or agent a sufficient freedom of action, especially regarding time management and work organisation. The independence of the distributor or agent shall be reflected in the provisions of the agreement. It is also common in practice to require evidence from the competent AHV (unemployment insurance) compensation office that the distributor or agent has been recognised as self-employed.

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

Yes, section 418g CO provides that the agent is entitled to the agreed or customary commission on all transactions that it facilitated or concluded during the period of contract. This rule is mandatory and thus cannot be waived in advance by the parties. Unless otherwise agreed in writing, the commercial agent is also entitled to the agreed or customary commission on all transactions concluded during the agency relationship by the principal without the agent's involvement but with clients acquired by it for transactions of that kind as well as for transactions concluded during the agency relationship with clients belonging to an exclusive area or clientele.

Provided that it is authorised to accept and collect payments, the agent may be entitled to a 'collection commission' based on any amounts it collects and delivers to the principal in accordance with the latter's instructions (section 418l CO). If it assumes liability for the clients' payments, the agent may also be entitled to a 'del credere' commission (section 418c(3) CO).

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

Pursuant to section 2(1) of the Swiss Civil Code (CC), every person must act in good faith in the exercise of its rights and in the performance of its obligations. The parties of a distribution relationship shall therefore act in a fair and loyal way and safeguard each other's interests. As a corollary to this general principle, the manifest abuse of a right is not protected by law (section 2(2) CC). Typically, the use of a legal institution for a purpose contrary to its original aims, a useless exercise of rights, a manifest disparity of the interests at hand or a self-contradictory behaviour (venire contra factum proprium) may be regarded as abusive and fall under section 2(2) CC.

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

No.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Bribery and corruption in the private sector are mainly addressed by the UWG. Pursuant to section 4a(a) UWG, any person who offers, promises or grants an undue advantage for the commission or omission of an act in connection with its professional or commercial activity that is contrary to its duty or depends on the exercise of its discretionary powers (active bribery) is liable, on complaint, to a custodial sentence not exceeding three years or to a monetary penalty (section 23 UWG). The same sanction also applies to passive bribery, that is, in cases where a private individual demands, secures the promise of, or accepts an advantage which is not due to it for itself or for a third party in order that it carries out or fails to carry out an act in connection with its professional or commercial activity that is contrary to its duty or depends on the exercise of its discretionary powers (4a(b) UWG).

35 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 already mentioned (see question 8), most distribution agreements are not explicitly regulated by Swiss statutory law. As an exception to that principle, the commercial agency contract is governed by section 418a et seq CO. The CO provides numerous mandatory provisions to protect the position and the interests of the agent. The provisions regarding the del credere provision (section 418c(3) CO), prohibition of competition (section 418d(2) CO), statement of commission (section 418k CO), inability to work (section 418m CO), special lien (section 418o CO), notice of termination (section 418q CO), as well as compensation for clientele (section 418u CO) cannot be contracted out by the parties.

In its decision BGE 134 III 497 (see question 10), the Federal Supreme Court held that section 418u CO (compensation for clientele) cannot validly be contracted out in advance by the parties, even if applied by analogy. Distributors and franchisees shall therefore be aware of such restrictions.

Governing law and choice of forum

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

The parties are generally free to choose the law that will govern their distribution contract. However, the Federal Act on Private International Law (PIL) sets some restrictions to this general principle. Pursuant to section 17 PIL, foreign law provisions that are incompatible with the Swiss ordre public will not be applied. Furthermore, the freedom of choice of the parties may also be restricted by the application of overriding mandatory provisions (section 18 and 19 PIL).

37 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 are generally free in their choice of a court to resolve existing or future disputes arising from a particular distribution agreement. If at least one of them is domiciled in a member state of the Lugano Convention, the Swiss court which has been chosen by the parties cannot in principle decline jurisdiction (section 23 Lugano Convention). The PIL shall apply if none of the parties is domiciled in a member state of the Lugano Convention. According to section 5 PIL, the parties may freely agree on a court as long as a party is not abusively deprived from the protection granted to it by a forum provided by Swiss law. Moreover, the Swiss court chosen by the parties may not deny jurisdiction if one of the parties is domiciled in the Swiss canton where the chosen court sits or if Swiss law shall govern the dispute. If both parties are domiciled in Switzerland, section 17 of the Swiss Civil Procedure Code (CPC) provides as a general rule that the parties may freely agree on which court shall have jurisdiction over an existing or future dispute arising from a particular legal relationship, subject to mandatory places of jurisdiction as provided by section 9 CPC. The parties may also agree to submit their dispute to arbitration (see questions 38 and 39).

38 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?

Supplier and distribution partners may freely choose among different dispute resolution mechanisms, such as mediation, litigation or arbitration. Pursuant to the CPC litigation shall, as a general rule, be preceded by an attempt at conciliation before a conciliation authority (section 197 CPC). Subject to the limitations explained above (see question 37), foreign businesses are not restricted in their ability to make use of these proceedings. The parties can expect a fair treatment before Swiss courts. In this respect, section 29 of the Swiss Constitution explicitly provides that any person has the right to equal and fair treatment in judicial proceedings and to have its case decided within a reasonable time.

As a general principle, the CPC imposes to the parties a duty to cooperate in the taking of evidence. Unless they have a legitimate right to refuse to cooperate, the parties shall in particular make a truthful deposition as well as produce the physical records requested by the adverse party (section 160 et seq CPC). It shall be noted that if a party refuses to cooperate without valid reasons, the court shall take this into account when appraising the evidence (section 164 CPC).

The advantages of resolving business in Switzerland may be seen in the rapid and fair treatment of proceedings, as well as in the variety of languages (German, French or Italian) in which court proceedings may be held.

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39 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 Switzerland. To be valid, an arbitration agreement has to be made in writing or in any other form that permits it to be evidenced by text. The parties may generally agree without specific limitations on the arbitration tribunal, the location of the arbitration and on the language of arbitration. If they have opted for an institutional arbitration, the parties shall ensure that their arbitration agreement meets the requirements of the rules set by the arbitration institution chosen.

The main advantages of resolving a dispute by arbitration in Switzerland are the rapidity and confidentiality of the proceedings, the (very) limited possibilities to appeal, the enforceability of the arbitral sentence, as well as the costs of the proceedings. However, the cost factor may turn out to be a disadvantage in cases where the value in dispute is comparatively moderate.

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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 United Kingdom 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 United Kingdom. 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. The UK government may also seek to intervene if a business is in a sensitive defence sector.

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 United Kingdom. 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 United Kingdom. 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 meaning that the partners will be taxed on their own share of the profits. 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 (another form of tax) 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, and whether it is required to account for customs duties.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Any number of structures can be chosen depending on commercial, market and tax considerations. Normally, some form of market representative, whether employed or otherwise contracted, would be sensible. An agent with varying levels of authority or indeed a stockholding distributor with obligations to expand sales might be attractive. Depending on the strength of the marketing format, franchising could be an attractive option to expand. Supply chain efficiency and relationships down the chain will dictate what is the most appropriate model to pursue.

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

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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 an extension 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.

Agency is a highly flexible arrangement that can be arranged to suit the requirements of the parties.

The supplier may opt for a franchising format for distribution of goods and services under the franchisor's business model and brand with associated know how or methods. There is no UK regulation of franchising and so general law and legal principles apply. The British Franchise Association requires its members to abide by the European Code for Franchising but compliance cannot be guaranteed.

The supplier may seek to establish a subsidiary charged with distribution of the products. Alternatively, the supplier may seek a joint venture partner to handle distribution.

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 in regulated sectors such as financial services.

There are specific rules governing agency relationships where an agent is a 'commercial agent' as defined in the Commercial Agents (Council Directive) Regulations 1993 as amended (the Agency Regulations). Those 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. A recent case (*Software Incubator Ltd v Computer Associates Ltd* [2016] EWHC 1587 (QB); Official Transcript; QBD (Merc) (London); 1 July 2016) confirmed that computer software amounts to 'goods' for the purposes of the Regulations. There are certain exclusions such as where the agent is involved in the sale and purchase of services rather than goods from the Agency Regulations. The scope and application of these agency rules differ a little between member states of the European Economic Area (EEA).

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 or vice versa.
- The Bribery Act 2010 – Under section 7 of that Act, a commercial organisation will be guilty of an offence if a person associated with it bribes or attempts to bribe another person for the commercial organisation's 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 performing services on behalf of the supplier. 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 Modern Slavery Act 2015 – In force since October 2015, this legislation requires certain commercial organisations to publish a slavery and human trafficking statement every financial year outlining the steps taken to ensure that slavery and human trafficking are not taking place in the business or anywhere in its supply chains. Organisations are caught if they carry on business (or part of a business) in the UK and have turnover above £36 million. While the statutory obligation is easily satisfied – publish a statement as to what the entity has done – it is increasingly a requirement of retailers and others demanding a system of compliance and verification that no slavery or exploitation is in a supplier's supply chain.
- 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 several 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.

In terms of supply to major supermarkets, the Groceries Code Adjudicator administers a code, the Groceries Supply Code of Practice, governing the relationship between the 10 largest UK supermarkets and their direct suppliers in order to reduce or eliminate unfair or unreasonable treatment. This deals with abusive behaviour that transfers undue risk to suppliers such as direct or indirect delays to payment, changes in supply terms, charging for prime positioning or increased shelf space unless connected with promotions and a number of other practices found to be unfair. Her remit is limited to direct suppliers to supermarkets and not to the indirect supplier.

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 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

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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 makes no specific provision for termination without cause or there is no written agreement in place, it can nevertheless be terminated provided 'reasonable notice' has been given to the other party. Reasonable notice depends on the particular contract and the factual background to the contract; namely what the parties had in mind as at the date the contract was formed. Considering what is 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; the extent of the distributor's early investment; the percentage of the distributor's turnover made up of the supplier's products; whether the distributor had agreed not to sell competing products; the seasonal nature of the business; and how long it would take to find a new brand to distribute and achieve profitability. 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)). (See also *Hamsard 3147 Limited (trading as 'Mini Mode Childrenswear') v JS Childrenswear Limited (In Liquidation) and Boots UK Limited* [2013] EWHC 3251 (Pat).)

In an agency relationship the Agency Regulations (assuming they apply) prescribe what is minimum reasonable notice to be given by a principal in giving notice of termination to any agent 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 in the particular circumstances. Where the Agency Regulations do not apply common law rules will determine what is reasonable notice.

Where the supplier decides not to renew the contract, it will expire at the end of the relevant term.

A principal is entitled to decide not to extend or renew an agency that has been concluded for a fixed period or that is due to terminate at the end of its term.

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 or implied terms of the agreement or, in the absence of written notice provisions, reasonable notice of termination is not given, no mandatory compensation or indemnity is payable but 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 in their agreement either for indemnity or compensation to apply. If an indemnity is not expressly provided for, the agent will be entitled to compensation – UK law defaults to compensation in the absence of a choice of indemnity or indeed in the absence of any choice at all. In *Shearman v Hunter Boot* [2014] EWHC 47 (QB) it was held that a clause that provided the agent was entitled to either compensation or indemnity, whichever concept produced the lower sum, was invalid. The agent was held to be entitled to compensation. In a subsequent case a similar provision in an agreement that had a severance provision allowed the alternative of compensation if lower to be excised as unenforceable, leaving indemnity as the available award (*Brand Studio Ltd v St John Knits, Inc* [2015] EWHC 3134 (QB). In *Hunter Boot*, the principal failed to argue that the clause should be severed, so as to leave the indemnity provision intact 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). This is based on the legal assumption there is a 'hypothetical purchaser' of the agency.

The Court of Appeal decision in *Warren (T/A On-Line Cartons and Print) v Drukkerij Flach BV* 2014, provided further guidance on what the valuer should assume when valuing the agency business. The principal terminated the agency agreement and a dispute arose about how much compensation was due to the agent under Regulation 17. At first instance, the judge assumed, first, that there was a hypothetical purchaser who was able to purchase the agency business. This assumption was correct and followed the rule in *Lonsdale*. However, the judge also assumed that the hypothetical purchaser would have been prepared to pay an actual price for the business and noted that his function was to determine that price. That part of the judgment was overruled by the Court of Appeal; it was quite possible that a hypothetical purchaser would not have been prepared to pay any price for the agency business, for example, where an agency business was terminally in decline.

The right to compensation or indemnity will be lost when the principal terminates with cause in circumstances where immediate termination would be justified or where the agent terminates the agreement (unless the agent does so in circumstances attributable to the principal (unreasonable conduct) or where it is unreasonable to require the agent to continue the agency owing to infirmity, age or illness).

Grounds which would justify immediate termination by the principal are likely to be similar to fundamental or material breach of contract but the English court has held that gross personal abuse of the worst kind in two telephone calls was enough (*Stephen Gledhill v Bentley Designs (UK) Ltd* 2010 EWHC 88). In another case, publication of disparaging remarks by an agent and its employees of its principal (meaning its poor services) was not grounds to justify immediate termination and denying compensation. The breach was not a breach of condition (ie, in English law a term of the contract serious enough to justify repudiation of the contract) (*Crocs Europe BV v Craig Lee Anderson t/a Spectram Agencies* [2012] EWCA (IV 1400)).

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

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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) of the Treaty on the Functioning of the European Union (TFEU) or Chapter 1 of the Competition Act 1998. 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).

In *Jones v Ricoh UK Limited* [2010] EWHC 1743 (Ch) concerned a confidentiality agreement put in place between CMP's (Jones') and Ricoh. CMP assisted corporate customers purchase their photocopying and other requirements and CMP did not want Ricoh to cut them out by forging a direct relationship with the clients (which it needed to disclose to Ricoh during the course of their trading relationship). The agreement 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 had bid for contract with one of CMP's clients, successfully, 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. The clause had a very broad reach, was unlimited in place, of uncertain and extensive ambit in time, and applied to dealings by Ricoh and its associated companies that were not only plausible, but very likely to occur. Where any confidential information was still with Ricoh, it prevented 150 of its group companies from making approaches. Although CMP argued that the clause benefited from an exemption under the 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 the VRBE.

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

This is an issue governed by principles of EU competition law.

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 from the supplier or someone designated by the supplier 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 automatically given protection and enforceability by the VRBE would have to be individually assessed under article 101(3) TFEU to determine whether on their facts they merit being exempted and unenforceable.

In an agency relationship preventing an agent from acting for a competing principal is commonly dealt with in the agreement but, if not, it may be implied either from correspondence or from the agent's obligation to act 'dutifully and in good faith' under Regulation 3, and in accordance with the other general fiduciary responsibilities of an agent at common law. However, that will be affected by knowledge and delay or acquiescence on the part of the principal.

In *Rossetti Marketing v Diamond Sofa Co Limited* 2012 EWCA Civ 1021, the court ruled that the fact the agent had an agency selling competing goods was not a fundamental breach of contract so the agent was still entitled to compensation when the principal terminated that agency. The judge noted that the principal had known for some time that the agent had a competing agency selling sofas for a competing brand.

The principal appealed this to the Court of Appeal that looked more closely at exactly what the principal knew about the agent's other agency and when. It came to the opposite conclusion, ruling that the principal had not initially understood that the agent would be selling goods so directly competing with its own. Therefore, the principal could not be held to have consented and therefore selling directly competing goods was, in this instance, held to be a fundamental breach of contract.

Principals should bear in mind that requiring an agent to take on a product which competes or conflicts with their other products handled for other principals may entitle the agent to terminate and claim compensation or indemnity.

Restrictions on agents selling competing products may also infringe competition law in certain circumstances if the non-compete obligations have significant foreclosure effects on a relevant market.

After termination of an agreement to which the Commercial Agents (Council Directive) Regulations 1993 apply, a restraint can be imposed on an agent handling competing products but subject to a maximum of two years.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Distribution

In distribution arrangements, competition law requires that a supplier has limited control over 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, In effect, 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 UK CMA has, as one of its priority areas, online commerce and competition (and other issues for consumers). Resale price maintenance and internet minimum advertised pricing are restraints that create price floors. It is difficult (though conceivably possible) to justify this on efficiency grounds to prevent free riding, improve customer service or protecting brand signalling of quality.

Resale price maintenance is an object infringement and as such it is irrelevant that the parties have low market shares or are otherwise insignificant in market terms.

In 2013, the CMA issued infringement decisions against mobility scooter suppliers for bans imposed on online sales and online advertising of prices below a recommended resale price even where actual

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prices in the showroom were unrestrained. Such a practice reduces transparency and increases search costs. The fact that these restraints were imposed in the sale of mobility scooters for less mobile individuals heightened their impact – search via the web being all the more important for those who would find it challenging to visit bricks and mortar outlets. In May 2016, the CMA imposed substantial fines on suppliers in the bathroom fittings and commercial catering equipment sectors. The CMA found that the suppliers had illegally engaged in online resale price maintenance with some of their retailers, specifying the minimum prices that the retailers could advertise for sales of the suppliers' products over the internet (see question 15).

The European Commission has also recently launched (in February 2017) investigations in relation to allegations of resale price maintenance concerning certain suppliers of electronic goods (following its e-commerce sector inquiry).

This upturn in activity in relation to resale price maintenance follows something of a lull in enforcement action in this area for a number of years.

The VRBE Guidelines of the European Commission suggest an efficiency defence is available:

- when retail price maintenance (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; or
- in relation to complex or experience products, the extra margin would allow distributors to provide additional pre-sales services where 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 the 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.

It is often unclear whether a price comparison website should be regarded as a true agent.

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 as 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. The UK's competition authority has taken action against agreements not to advertise discounted prices.

The CMA recently fined a supplier of commercial catering equipment (ITW Limited) for a minimum advertised pricing policy which restricted the price at which retailers could advertise the supplier's products online. Action was also taken against a supplier of bathroom fittings (Ultra Finishing Limited) for threatening retailers with penalties for not pricing at or above a 'recommended' online price. Such threats included charging retailers higher prices for products, withdrawing their rights to use the supplier's images online or withholding supply. In the CMA's view, each of these arrangements restricted the retailers' ability to sell their products online at independently determined prices, reducing price competition between competing retailers, and contributing to keeping prices artificially high.

The CMA concluded that that the application of a minimum advertised price (MAP) policy genuinely restricted in practice the ability of resellers to determine their online sales prices at a price below the MAP, and therefore amounted to RPM in respect of online sales of the product. The European Commission would likely adopt similar reasoning and consider minimum advertised pricing policies as an indirect means of RPM which do not benefit from the VRBE.

Unilateral minimum retail pricing policies are not 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 a notified recommended resale price.

A supplier may set a maximum resale price provided it does not, in effect, mean a fixed resale price.

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 (often referred to as MFNs), were relatively unexplored in EU or UK antitrust law. A spate of cases has, however, highlighted their prevalence, particularly retail MFNs in the context of online platforms such as online travel agents, price comparison websites (PCWs) and online marketplaces, such as Amazon marketplace, iBookstore, Booking.com, Expedia, etc. When adopted by such platforms in their agreements with the providers or sellers seeking to reach consumers through the platforms, MFN clauses ensure that the provider or seller does not charge a higher price on their platform than it does on another or in another channel.

In the UK the competition authorities considered online hotel booking sites and their restraint on a hotel group offering room only rates at prices lower than the rates offered by the price comparison sites. Initially, the UK authorities accepted commitments from the hotel group, IHG, from Booking.com and Expedia that allowed this hotel group to offer discounts to a closed group of members. This was successfully challenged by a metasearch site, Skyscanner Ltd, on process grounds and eventually the competition authority closed the file without determining whether the MFN was lawful.

In its investigation into the UK private motor insurance sector, the CMA drew a distinction between the use of what it termed narrow and wide MFNs in agreements between private motor insurance providers and PCWs. Although it recognised that MFNs on PCWs may result in efficiencies (such as reducing search costs for customers), the CMA concluded that widely drafted MFNs were not necessary to achieve those benefits. Therefore, it found that narrow MFNs, which require that the price on the insurer's own website is no cheaper than that offered to the PCW, were acceptable. Wide MFNs, which ensure the price offered to the PCW is no higher than the price offered directly or via any other channel, were prohibited by means of an order applicable in respect of significant PCWs (the Private Motor Insurance Market Investigation Order 2015).

However, there is still much uncertainty with different approaches being taken in EU jurisdictions. The German competition authorities came down against narrow MFNs in the *Booking.com* case, whereas other national competition authorities have accepted commitments permitting narrow MFNs.

The CMA last year sent a questionnaire to a large sample of hotels in the UK as part of a joint monitoring project, in partnership with the European Commission and nine other competition agencies in the EU. This project is looking at how changes to hotel room pricing terms, and other recent developments, have affected the market, in particular, whether the Europe-wide removal by online travel agents Expedia and Booking.com of certain 'rate parity' or 'most-favoured nation' clauses in their standard contracts with hotels in July 2015 has affected the

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market. The CMA is also looking at MFNs in the context of online auction services.

In January 2017, Amazon responded to European Commission concerns about parity clauses contained in contracts between Amazon and e-book publishers which required those publishers to inform Amazon about more favourable or alternative terms offered to Amazon's competitors and offer Amazon similar terms and conditions. Amazon has agreed to scrap these clauses for a period of five years.

In contrast to the complex retail MFNs which are widely under investigation, MFNs in distribution agreements may not always be problematic. They 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 most distribution scenarios and, in the absence of other restrictive effects, narrow MFNs may be enforceable. Each case should be assessed on the facts.

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?

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.

However, where discrimination in price is to penalise one dealer for its low resale prices, for selling into a territory of another dealer (except where a geographical restraint is permissible); or for selling over the internet, EU and UK competition law would step in. In one example, the UK competition authorities investigated a scheme whereby Yamaha dealers were given retrospective discounts that rewarded dealers according to the ratio of face-to-face sales of high-end pianos and keyboards against distance sales. Following the authorities' intervention Yamaha withdrew this discount scheme.

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. In the *GSK* case the European Court agreed that the dual pricing practised by GSK in Spain to deter (or make more expensive) purchases destined for export was an infringement of article 101, but did require that the Commission should not have refused to consider efficiency arguments before assessing them.

European Commission guidance 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.

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 the limitations on such conduct 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, in principle, be free to resell within the EEA without restraint. Restricting sales by the buyer outside specified territories or specified customers is a serious restriction permissible only under certain conditions, 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. The European Commission is currently investigating video game publishers and tour operators for restrictions in agreements with online distributors which they suspect discriminate between customers based on where they live ('geoblocking') and lead to partitioning of markets.

However, there are some limited exceptions that 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 emails or advertisements on the internet that 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. However, a distributor should not be prevented from making passive sales to customers outside its exclusive customer group or territory. The Commission is currently investigating publishers of video games for 'geoblocking' (ie, preventing online customers in certain countries from benefiting from cheaper prices in neighbouring countries). In particular it is looking at whether agreements with online distributors prevent consumers from buying (or distributors from selling) activation codes in eastern Europe, where they are cheaper, for use in western markets.

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' that 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.

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Where the supplier has established a selective distribution system or network it can prevent its distributors or dealers selling to resellers which are not approved members of that network.

Where a supplier is dominant it should avoid exclusive contracts of any significant duration. In *Calor Gas Northern Ireland* the UK competition authority established that Calor was dominant and objected to the effect which its network of duration five years had on entry or expansion of competitors. Calor agreed to reduce the duration to two years. In a case in the Scottish courts which began when a Calor dealer was encouraged by a competitor to terminate its agreement with Calor, the court found that Calor's agreements were overly long, given Calor's dominant position, and the agreements were unenforceable as was a post-termination ban on handling Calor's gas canisters (*Calor Gas Ltd v Express Fuels (Scotland) Ltd* [2008] ScotCS CSOH 13).

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

It is highly unlikely that entering into a distribution agreement in itself would amount to a merger that could be subject to the merger control provisions of the Enterprise Act 2002 as amended by the Enterprise and Regulatory Reform Act 2013. There would have to be circumstances where a business obtains in relation to another:

- a controlling interest (de jure or legal control);
- de facto control (control of commercial policy); and
- material influence (ability materially to influence commercial policy).

The lowest threshold, of material influence can be established through a range of factors, most obviously voting rights where shares above 15 per cent can be held to give material influence (and in some cases the authorities have required divestment to well below 10 per cent in order to remove influence judged to be otherwise undesirable under relevant criteria). This assessment of influence may also occur where the minority shareholder is accorded special voting rights or veto rights, board representation and/or there is financial interdependence.

Acquiring rights of distribution in itself is unlikely to constitute a merger but where an entity, rights plus a brand name plus assets and contracts are acquired that may constitute the transfer of a business. The distribution rights may, however, be a factor taken into account in the assessment of influence. A good example in the UK was Heineken's acquisition of control over two Diageo subsidiaries:

> *The CMA considers that Heineken has already, on 7 October 2015, acquired legal control over D&G who owned the Target Brands and material influence over the Target Brands in GB. This acquisition of material influence is further supported by the Manufacturing, Bottling, Selling, Distribution, and Marketing Agreement that is currently in place between D&G (now controlled by Heineken) and Diageo GB. ... However, with the transfer of the licence and distribution rights of the Target Brands to Heineken, Heineken will acquire a higher level of control ('legal' control) over these brands.*

The CMA's position is set out in Mergers: Guidance on the CMA's jurisdiction and procedure. It sets out a range of relevant factors:

> *The transfer of customer records is likely to be important in assessing whether an enterprise has been transferred.*
>
> - *The application of the TUPE regulations would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.*
> - *The CMA would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some consideration for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred.*
>
> *4.9 Outsourcing arrangements involving ongoing supply arrangements will not generally result in enterprises ceasing to be distinct, but may do so where, for example, they involve the permanent (or long-term) transfer of assets, rights and/or employees to the outsourcing service supplier and where those may be used to supply services other than to the original owner/employer. The CMA will assess whether, overall, the assets, rights and employees transferred to the outsourcing service supplier are such as to constitute an enterprise under the principles set out above.*
>
> *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*

The assessment of the merger, assuming it constitutes a 'merger' under the UK regime, will ultimately be whether the transaction is found to result, or is expected to result, in a substantial lessening of competition in the UK. In the distribution context the issue will often be whether there is foreclosure of a supplier or of a distributor. Not every transaction that is a merger is examined; there is no obligation to pre-notify though, where the authorities have jurisdiction, it may be sensible to do so. The authorities have no jurisdiction to look at a merger unless as a result of the transaction the merged entity's share of supply or purchases, of goods or services of a particular description in the UK or a substantial part of the UK, exceed 25 per cent, or such a share of supply (not to be confused with market share) is increased. If the target acquired has a turnover of at least £70 million in the UK the authorities also have jurisdiction irrespective of the share of supply.

21 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 in every other state in the European Union, indeed the EEA, the UK's principal competition authority will from time to time intervene in supplier or distributor relationships to enforce competition laws. That authority is the CMA. It intervenes to enforce UK and EU competition laws, most often in relation to resale price maintenance and also in relation to online restraints. Recent examples include auction services, light fittings, bathroom fittings, commercial catering equipment and the online sale of sport (golf clubs) merchandise.

The CMA also has powers to intervene and conduct studies of particular markets and this could impact on distributor supplier relationships. An example is the investigation of the market for aggregates, cement and ready mixed concrete which resulted in divestment orders and also a ban on supplies issuing generic price announcement letters. The CMA is currently investigating the role of digital comparison tools across a range of product and service markets and has identified concerns about lack of transparency over whether suppliers can influence how products are presented on such tools as well as potential competition concerns about whether certain clauses in contracts between suppliers and providers of tools could limit price competition or innovation, or restrict market entry.

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. In June 2016, the CMA issued a statement of objections to Ping Europe Limited (Ping) alleging that it breached EU and UK competition law by banning its retailers from selling online.

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.

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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, but the distributor would have to show it did not pass on any overcharge. Suppliers or distributors may face claims for damages for abuse of a dominant position. Labinvesta raised proceedings in November and December 2016 against a supplier of consumables used in medical treatment and its subsidiary distributors, alleging that the defendants had unlawfully refused to supply products to Labinvesta for onward distribution in Belarus (CAT Case No. 1273/5/7/16).

Similarly, a party may be able to claim damages even if it is a party to an agreement that is anticompetitive 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* [2006] EWHC 538 (Comm) 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.

Parties can bring an action in the Competition Appeal Tribunal or the High Court for damages, or for injunctions. The CAT obtained new powers in respect of stand-alone damages claims for competition law breach and for injunctions as a result of the Consumer Rights Act 2015 from 1 October 2015. Its jurisdiction to issue injunctions does not extend to Scotland. It also introduced an opt-out collective claim procedure to operate alongside an opt-in procedure. The first opt-out collective claim was raised as a 'follow-on' action for damages arising from the OFT *Mobility Scooters* decision which found a manufacturer of mobility scooters guilty of prohibiting online advertising of prices below the manufacturer's recommended retail prices (*Dorothy Gibson v Pride Mobility Products Ltd* CAT Case No. 1257/7/7/16). A decision on the claimant's application for a collective proceedings order is expected in spring 2017.

The Consumer Rights Act (CRA) 2015 introduced a 'fast-track' procedure, intended to make it quicker and cheaper to obtain a remedy for harm suffered as the result of anticompetitive behaviour, with limited exposure to costs risk. Though intended to make it easier for individuals and small and medium-sized entities, it is not restricted to them.

To be suitable for the 'fast-track' a case must be brought to trial within no more than six months of allocation and, in general, the trial must take no longer than three days. Therefore, it was thought that use of the 'fast track' might be restricted to straightforward cases involving few parties and not requiring significant disclosure or extensive expert evidence. The procedure has proved popular, particularly in cases involving an alleged abuse of a dominant position. So far, only one such case has proceeded to trial (*Socrates Training Limited v The Law Society of England and Wales* CAT Case No. 1249/5/7/16, judgment pending), with others settling. Although the 'fast-track' might have been thought suitable only for cases in which the relief sought is limited to a finding of infringement and the grant of an injunction (eg, to restrain further infringement, to require a resumption of supplies or to grant access to an 'essential facility'), most cases have also involved a claim for damages. Only in one case, a claim for damages which followed on from the European Commission's *Polyurethane Foam* decision, has allocation to the fast-track been refused (*Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others* [2016] CAT 8).

22 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. An interesting question in the context of selective distribution is whether online sales on third-party platforms can lawfully be prevented (on the basis that the relevant standards are not met by such platforms). The Court of Justice of the European Union has been asked to consider this matter by a German court (*Coty Germany GmbH v Parfümerie Akzente GmbH* (Case C-230/16)). Outright bans on selling online are not permissible.

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: where the condition of the goods has changed; where the goods have been repackaged in breach of conditions set out in case law; and 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*).

23 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.

Other than as set out above, parties to a distribution contract are generally 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:

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- 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 an express 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 and to assign all goodwill in the use of the supplier's branding to the supplier.

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

Suppliers would typically seek to safeguard their intellectual property rights (IPR) from infringement by distribution partners through the express terms and protections which would be set out in the distribution agreement. 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;
- obligations on distributors regarding the transfer and use of confidential information and trade secrets; and
- assignments of goodwill generated by the distributor using the supplier's branding to the supplier.

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 notify the supplier of any third-party IPR that is, or that may be, infringing the supplier's IPR and 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 patent licence 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.

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

There is a wide range of consumer protection laws that are relevant in the context of distribution mostly in business to consumer sales. These are summarised very briefly below:
- The CRA – The CRA was introduced in October 2015 and applies to contracts entered into on or after 1 October 2015. The CRA consolidated the previously fragmented approach to UK consumer law and reformed many aspects of consumer law in the UK. The CRA sets out statutory rights and tiered remedies for consumer contracts for goods and services, and introduces a new category of contract for the supply of digital content. The law on unfair contract terms in consumer contracts has been reformed by the CRA and private actions for breach of competition law have been introduced. The powers of enforcement authorities under some consumer protection legislation are also reformed.
- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 – These implement most of the Consumer Rights Directive (2011/83/EU) and require a distributor to provide certain information to consumers, provide consumers with a right to cancel within fourteen days and receive a refund and set out specific delivery times unless otherwise agreed.
- The Consumer Protection from Unfair Trading Regulations 2008 – These prohibit consumer sales practices that are misleading by action or omission or are otherwise unfair or are aggressive. In 2014 they were amended to introduce a new direct civil right of redress by consumers against traders who conduct misleading or aggressive practices.
- The Electronic Commerce (EC Directive) Regulations 2002 – These place requirements on information service providers about how contracts concluded through electronic means will be made.
- Provision of Services Regulations 2009 – These require that the service provider must (i) provide consumers with certain information about itself; (ii) deal with customer complaints promptly; and (iii) not discriminate against consumers in the provision of services on the basis of place of residence (unless such different treatment can be objectively justified).

Contracts entered into with consumers before 1 October 2015 may require consideration of legislation that is no longer in force or partially in force, including:
- 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 Unfair Terms in Consumer Contracts Regulations 1999 – Apply to unfair terms in contracts between a consumer and a supplier of goods or services.
- UCTA – Applies to contract terms or notices that seek to limit or exclude liability. Whereas previously UCTA applied to contracts with consumers it now applies only to business-to-business contracts. Limiting or excluding liability for death or personal injury is ineffective and excluding the implied term as to title is ineffective in all contracts. Other exclusions or limitations are effective only if reasonable. In standard form contracts, such as terms and conditions of sale, an exclusion or limit of liability for failure to perform will be effective only if reasonable.
- 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.

26 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 2001/95/EC (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 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. A distributor is capable of having the same obligations as the producer of the product it is handling. For example, a distributor (and producer) is obliged where it discovers a product it has placed on the market is unsafe, to notify the local authorities and provide information on the action they plan to take. A distributor is under an obligation to act with due care to ensure products supplied are safe.

The parties are free to agree which party is responsible for carrying out and absorbing the cost of a product recall. However, a manufacturer

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cannot contract out of liability to a consumer that has suffered harm as a result of an unsafe product.

27 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 (and this area has been consolidated to a large extent by the CRA in respect of terms implied into consumer contracts); 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. 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 C. None of the terms implied by the CRA, including those relating to the quality of the goods digital content or services or both, can be excluded. Exclusions and limitations of liability (including for breaches not involving negligence) in consumer contracts are subject to the reasonableness test under the CRA. This test may be difficult to satisfy in consumer contracts, particularly if there is a blanket exclusion.

28 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?

There are no legal barriers to distributors sharing customer data with suppliers other than the data protection and privacy legislation that applies in the UK 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, although the EU General Data Protection Regulation No. 2016/679 (GDPR) (discussed below) was adopted on 24 May 2016 and shall apply to all member states from 25 May 2018.

Under the current 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 has 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.

Transfers of personal data outside of the EEA must comply with a range of requirements. Such transfers are permitted where the individual has consented to the transfer or the transfer is necessary for the performance of the contract with the individual. Transfers outside of the EEA are also permitted if the country to which the personal data is transferred has been approved as offering an adequate level of protection. The European Commission maintains a list of approved countries (which does not include the US).

If no finding of adequacy has been made in respect of a country outside of the EEA, a business can transfer data internationally within its corporate group subject to Binding Corporate Rules provided they are specifically approved by the UK Information Commissioner's office or by including the European Commission approved model contract clauses.

As mentioned above, the GDPR shall apply to all member states from 25 May 2018. The core concepts which underpin the current legislation will remain, however the new regulation will introduce important key changes including:

- a single legal framework which will apply in each individual EU member state. This will result in a more consistent approach to data protection compliance across the EU;
- more onerous obligations regarding obtaining consent from individuals. Consent to processing must be 'freely given, specific, informed and ambiguous' under the GDPR and, where sensitive data is involved, consent must also be explicit;
- direct statutory obligations on processors, as well as controllers;
- greater regulation of the transfer and processing of personal data outside the EU (in certain circumstances);
- significant increases in potential fines for controllers. Certain breaches could incur a fine of €20 million or up to 4 per cent of the controller's total global annual turnover; and
- more onerous obligations in respect of accountability for both controllers and processors, including a requirement to maintain records of personal data being processed (and to make these available to the supervisory authority on request).

The European Commission has also adopted a new EU–US Privacy Shield on 12 July 2016 to facilitate transfers to the US. The new arrangement provides stronger obligations on companies in the US to protect the personal data of Europeans and stronger monitoring and enforcement by the US Department of Commerce and Federal Trade Commission, including through increased cooperation with European Data Protection Authorities. The arrangement includes commitments by the US that possibilities under US law for public authorities to access personal data transferred under the Privacy Shield will be subject to clear conditions, limitations and oversight, preventing generalised access. Businesses transferring personal data are advised to rely on European Commission approved model contract clauses and/or Binding Corporate Rules.

Any sharing of data between a data controller and another party should be in writing, comply with the Data Protection Act 1998 and the Data Sharing Code of Practice. Data sharing should take place subject to contractual obligations to ensure personal data are kept secure and processed only in line with data protection principles.

29 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. Therefore, in principle, the supplier is entitled to insist on a contractual right to object to the management of the distributor. 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, especially where it does not have a link with economic performance: a claim of discrimination on, among others, race, creed, sexual orientation, gender, disability or age would be a serious issue.

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30 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 a distributor or agent could be treated as an employee of the supplier. This 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.

31 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):

> *7.—(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract—*
> *(a) where the transaction has been concluded as a result of his action; or*
> *(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.*
> *(2) A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group.*

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 that 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 is not thought to be different from effective cause (*PJ Pipe &Valve co Ltd v Audco India Ltd*). What is a reasonable period after termination will vary according to the facts and context but in one case nine months after termination was a reasonable period.

In *Georgios Kontogeorgos v Kartonpak AE* (Case C-104/95 [1997] 1 CMLR 1093), the Court of Justice held that a commercial agent who is in charge of a particular area has a right to commission even if the contracts are concluded without the agent's intervention (eg, the principal concludes the contracts directly). The same would apply in respect of orders from a group of customers for whom the agent was responsible. However, it is clear that the agent is not entitled to commission when it is a third party selling into the exclusive territory or customer group rather than the principal (Case C-19/07 *Heirs of Paul Chevassus-Marche v Groupe Danone*).

The timing of when commission becomes due and when payment of commission should be made is also covered by the Agency Regulations (Regulation 10).

32 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 the 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.

The relationship of agent and principal includes a fiduciary duty at common law in favour of the principal specifically to avoid a conflict with the agent's main interests and not to profit from its position at the expense of its principal.

The Commercial Agents Regulations state that a commercial agent must look after the interests of his principal and act dutifully and in good faith (Regulation 3(1). Likewise, a principal has an obligation of good faith towards his agent (Regulation 4(1).

33 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

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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, they are sold subject to the burden of the registered licence. This means even where the third-party purchaser was unaware of the licence, they are required to honour it going forward;
- similarly, if the owner of the IPR attempts to grant an exclusive licence that 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 of damages that can be recovered by the distributor in a court action for infringement.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The UK's Bribery Act 2010 very much applies to the relationship between suppliers and distributors. A distributor may offer or give a bribe in order to win orders or retain business. If it does so with the connivance or knowledge of the manufacturer, supplier or brand owner then both will have committed an offence.

However, given that a distributor, as with local consultants, agents, licensees or joint venture partners can be regarded as associated persons in relation to a manufacturer or supplier; they perform services for or on behalf of the supplier. Under the Bribery Act 2010, even where a supplier has no knowledge or indication that an associated person has offered or given a bribe, the supplier may commit the offence under section 7 of the Act of failure to prevent bribery where the offer was intended to obtain or retain business for or on behalf of the supplier. If it can demonstrate that the offence took place despite all its measures taken to prevent bribery by associated persons and that those measures are viewed as adequate then it will have a defence. Such measures will include taking all reasonable diligence commensurate with the geographic or sector risk or other risk factors (such as links the agent or distributor may have with public officials or with private buyers). Associated persons are a wide group of persons who may be regarded as performing services on behalf of the supplier.

Therefore, when appointing a distributor, a supplier should undertake some diligence on the risks of bribery. It should ascertain whether the distributor or agent has any history of involvement or accusations of involvement in such activities; likewise it should determine whether the distributor or agent has an anti-bribery policy of any worth. It should make clear, in writing preferably, that avoiding bribery including facilitation payments is an essential policy with which compliance is required. The scope of the UK Bribery Act (extending to bribery of private persons, not solely public officials and covering facilitation payments). The need to avoid lavish entertainment of relevant decision makers should be made clear. The supplier should also contractually require compliance with all bribery laws and seek to be indemnified for losses it might incur should there be bribery proceedings or investigations. It is also possible that a supplier might bribe a customer or an official where that brings or retains business for the distributor or agent. It is not likely that the supplier would be an associated person as it does not normally perform services on behalf of the supplier. Therefore, assuming the distributor or agent is not conniving with the supplier in respect of the bribery, it is not likely to incur liability. Nevertheless, It would be advisable for a distributor or agent to require contractually the supplier comply with anti-bribery laws and indemnify against the costs of any investigation and loss of business.

35 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: usage or custom; the previous course of dealings of the parties; the intentions of the parties; common law; and 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 and the Consumer Rights Act 2015.

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 the contract specifically provides for this; or 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

36 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. It is important to establish what law will apply to a contract before the parties enter into any binding agreement and the best way of doing so is to agree at the outset.

A governing law clause allows the parties to specify which law will be used to interpret a contract and deal with any disputes that arise under that contract. The choice of governing law should be considered before a contract is drafted. A lawyer qualified in the relevant jurisdiction will need to advise on how the chosen governing law will apply to the contract. In the absence of an express choice of governing law then, in the event of a dispute, a court will decide which law to apply in accordance with the relevant conflict of laws principles in that jurisdiction.

The Rome Convention

The Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention) governs contracts entered into before 17 December 2009. The Rome Convention sets out the rules for determining the law which should be applied by courts when resolving contractual disputes, but it does not apply to non-contractual obligations. It came into force in 1991.

The Rome Convention applies to any contract where there is no express choice of law. There are special provisions relating to employment and consumer contracts; it does not apply to certain disputes including those involving wills and trusts, property rights related to family relationships, arbitration agreements and disputes governed by company law.

Under the Rome Convention, in the absence of agreement, the contract will be governed by the law of the country with which it is most closely connected. It will be assumed that this is the country where the party which has to perform the main obligations of the contract is normally resident.

The European Union resolved that the Rome Convention needed updated and that its status should change from being a multilateral inter-governmental agreement to a Regulation, EC Regulation 593/2008 (Rome I), that applies directly in the laws of the EU states and is directly enforceable. Rome I applies to 'contractual obligations

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in civil and commercial matters'. The term 'contractual obligation' is not defined, and care must be taken about whether a claim is one made in tort (to which Rome II, EC Regulation 864/2007, may apply) or one made in contract. Some claims that are regarded as torts in English law may be regarded as contract claims for the purpose of the two regulations. Contracts entered into on or after 17 December 2009 are therefore governed by Rome I, or the Rome Regulation on the law applicable to contractual obligations. Rome I covers much of the same ground as the Rome Convention and the basic rule has been preserved and firmed up – in the absence of agreement, the applicable law will be the law of the place where the party that has to perform the main obligations of the contract is normally resident. That is now a fixed rule rather than a presumption.

The most important changes are as follows.

Specific contract types, such as those dealing with sale of goods, services, franchise arrangements and distribution agreements are addressed. If the contract in question is not one of these, then the governing law will be determined according to 'where the party required to effect the characteristic performance of the contract has his habitual reference', unless it is clear from the circumstances of the case that the law of another country should apply.

In consumer contracts, although the agreement can stipulate which law applies, that cannot invalidate the application of any mandatory rules of law that would otherwise apply to protect the consumer. National courts have some flexibility to decide whether to apply the 'overriding mandatory rules' of another country 'where the obligations arising out of the contract have to be or have been performed', even where the parties have selected another law.

For Rome I to apply, the parties do not need to have an EU connection – all that is required is that the case is raised in a relevant court which raises a choice of law issue in subject matter that falls within the Regulation. The law agreed as the applicable law of the contract does not have to be the law of an EU member state. 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.

Matters that are expressly excluded from Rome I include revenue, customs and administrative matters; arbitration agreements and agreements on choice of court; issues governed by company law – for example, registration, legal capacity, internal organisation, winding-up or personal liability; obligations arising out of dealings before the contract was finalised.

Choice of a foreign non-EU law will not necessarily prevent the application of mandatory rules of law; a choice of US law will not prevent the application of the Commercial Agency laws protecting agents. In *Ingmar v Eaton Leonard Technologies* [2000] ECR I-9305, the agent was active in the United Kingdom, but the parties had chosen California law to govern the contract. The European Court held that the mandatory provisions of EU law that are given effect by the UK Commercial Agency Regulations could not be evaded 'by the simple expedient of a choice-of-law clause'. In *Accentuate v Asigra* the English court held it had jurisdiction to hear a claim for compensation under the Agency Regulations, even though the relevant agreement was subject to a choice of Canadian law and arbitration and the Canadian arbitral tribunal had already ruled against the claim.

37 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 except in relation to certain disputes over which certain states may have exclusive jurisdiction such as land, or the constitution of corporate bodies. In the absence of express choice, jurisdiction will be determined either by common law rules or by the European regime that was established to regulate jurisdiction and enforcement of judgments in Europe. As regards disputes subject to the European regime, jurisdiction is governed by the Brussels Regulation (EU) 1215/2012 (known as the Recast Brussels Regulation), which applies to proceedings instituted on or after 10 January 2015 (with the exception of articles 75 and 76, which have applied since 10 January 2014).

If the parties have agreed that the courts of one or more member states have jurisdiction in relation to a dispute, then the Recast Brussels Regulation recognises that agreement and the agreed courts will have jurisdiction. That jurisdiction will be exclusive 'unless the parties have agreed otherwise' (article 25(1)). This provision applies regardless of where the parties are domiciled and applies even where none of the parties are domiciled in the EU. So , if two parties domiciled in the US and China agree that the English court will have jurisdiction, that will be recognised.

That aside, the default rule is that defendants should be sued in the courts of their domicile (article 4).

An exception is that a defendant domiciled in a member state may be sued in another member state:

- in matters relating to a contract, in the courts for the place of performance of the obligation in question; and
- for the purposes of this provision in the sale of goods, the place in a member state where, under the contract, the goods were delivered or should have been delivered and in the case of the provision of services, the place in a member state, where, under the contract, the services were provided or should have been provided (article 7).

In most cases, the place where the services are provided by the distributor will be where the distributor can sue or be sued under a distribution agreement.

In an agency contract, it is the agent who provides the services under the contract. Under the Commercial Agency Directive, a commercial agent has authority to negotiate the sale or purchase of goods on behalf of the principal and, where appropriate, conclude such transactions on behalf of and in the name of that principal. Therefore, the 'place of performance' under article 5 must mean the place of the main provision of those services by the agent. Agents may provide services in several member states. To determine where to sue, a principal should consult the provisions of the agreement; what does it say about where the services are to be provided? If the contract does not help, then the relevant place is where the agent has actually carried out most of his or her contractual activities, assuming the place where the services are mainly carried out is not contrary to the intentions of the parties. If that does not assist then the place should be identified by reference to where the agent is domiciled.

Jurisdiction may be affected by the Hague Convention on Choice of Court Agreements (Hague Convention), which came into force on 1 October 2015 in all EU member states (except Denmark) and Mexico (and Singapore on 1 October 2016). The Hague Convention contains rules regarding the validity and effect of jurisdiction agreements, and the subsequent recognition and enforcement of a judgment given by a

Update and trends

The vote to leave the EU in the UK referendum on 23 June 2016 will have a number of repercussions for competition law and, consequently, distribution. There are unlikely to be any major effects on the substance of competition law, because UK competition law is modelled closely on the EU system. Single market concerns, which are influential in so much of competition law applicable to vertical relationships, may disappear or at least become less prominent should the UK leave the single market. However given that the CMA and UK courts will no longer be bound by European case law or article 3 of Regulation 1/2003, which ensures consistency between EU and UK competition law, there may be some divergence. There will be a major impact on procedure and enforcement. There will be a higher likelihood of concurrent investigations into the same behaviour by the CMA and the European Commission, leading to a degree of duplication and increased costs for business. The UK may become a less attractive forum for international damages litigation, and the claimant-friendly rules surrounding jurisdiction and choice of law may no longer apply. If the UK decided to join the EFTA/EEA, which now seems very unlikely, it would be bound by the EEA Agreement provisions on competition, which are broadly the same as the EU rules. If, on the other hand, the UK leaves the Single Market, the implications are still very uncertain. The UK government's White Paper on the United Kingdom's exit from and new partnership with the European Union aims for 'tariff-free trade in goods that is as frictionless as possible between the UK and EU Member States'. If this can be negotiated, it is possible that many of the rules affecting distribution, such as those preventing geographic market partitioning, for example, would remain. See: www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper.

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court of a contracting state designated in an agreement. It gives effect to an exclusive choice of a court in contracting state. In essence, the chosen court is obliged to hear the case and any other court must refuse to hear the case. The judgment of the chosen court will be recognised and enforced in other states. The Convention applies to international cases (article 1); a case is international unless the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that state (article 1(2)).

Although the United States has signed the Hague Convention, this expresses, in principle, only its intention to become a party. It has not yet taken steps to make itself bound.

The common law rules will apply where the European regime does not and where the Hague Convention does not. The common law rules are based on either service of process (either within or outside the jurisdiction) and submission to the jurisdiction by the defendant.

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.

38 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 the 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 Sheriff Courts have exclusive jurisdiction over cases with a value up to £100,000.

Procedures

The procedure before the County Courts and the High Court in England and Wales is set out in the Civil Procedure Rules 1998 (CPR) as amended from time to time, and supplemented by court-issued guidance.

Remedies

The remedies most likely to be sought in respect of distribution agreements in the UK are: damages (ie, compensation for breach of contract); and specific implement, specific perfomance or an injunction (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. However, in Scotland the innocent party has the option, in addition to the option of accepting there has been a breach and suing for damages, to require implementation of the contract.

Fair treatment

There are no restrictions on foreign businesses using the courts or procedures of Scotland or England and Wales as long as they have jurisdiction. 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 certain exceptions including 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).

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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 opt for the jurisdiction of England and Wales for that reason.

39 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 that 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.

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United States

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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 the Crimea region of Ukraine, Cuba, Iran, North Korea, Sudan and Syria. (Sanctions relating to Iran and Cuba remain in effect as of this writing, although they are in the process of being relaxed to a very limited extent.) 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

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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 parties' rights 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 (FTC) require disclosure documents in a prescribed format to be provided to the prospective franchisee and, in some states, to be 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 of 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 typically 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

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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.

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.

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.

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, 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. Even in the case of a purported unilateral policy (eg, an announced supplier policy to deal only with retailers who maintain the manufacturer's suggested retail price) care must be taken to enforce the policy strictly. Lax enforcement can be construed as coercion of a resale price maintenance agreement rather than mere establishment of a unilateral policy. See question 15 for more details.

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 anticompetitive harm from the conduct is outweighed by potential competitive benefits, rather than by the per se rule, which makes 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 anticompetitive, 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 anticompetitive 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, instead of simply terminating sales upon a violation (with the resulting loss of sales to the salesperson), and such efforts can be enough to take the seller out of the *Colgate* safe harbour and into a potentially unlawful RPM situation.

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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. The decision was affirmed on appeal by the US Court of Appeals for the Second Circuit. Apple sought US Supreme Court review, however, the Court declined to review the decision.

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 the limitations on such conduct 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

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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 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

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 (more than US$80.8 million) and the size of the parties (if the value of a proposed transaction is more than US$323 million, it is reportable; if the value is more than US$80.8 million but less than US$323 million, it is reportable if one party to the transaction has total assets or net sales of US$161.5 million or more and the other has total assets or net sales of US$16.2 million or more). In the absence of an ownership interest, however, distribution relationships are not generally subject to antitrust reporting requirements or agency clearance procedures.

21 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 anticompetitive 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, should not share one distributor's pricing information with other distributors, 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 interstate or international 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 FTC 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, subject to being increased to twice the amount gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over US$100 million. 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.

22 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 Protection Service (CBP), 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'. The CBP can also block genuine trademarked goods not intended for the US market, even If the non-US manufacturer is affiliated, if the goods are physically and materially different from the goods intended for sale in the US. However, the grey importer can bring in the products if a disclaimer is affixed stating that the goods are materially and physically different from the authorised US goods. 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 no current 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.

Under current law, grey market importation of products protected by a US patent infringes the patent even if the products were lawfully sold abroad with the authority of the patent holder. However, the law in this area is currently scheduled for review by the US Supreme Court and could be changed to conform to copyright law as discussed above.

23 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 FTC. 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.

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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.

24 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 federal 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 Trade 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 audiovisual 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.

25 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

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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 23 and 27 regarding advertising and warranties.

26 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 direct and indirect customers may require for recalled products.

27 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 FTC 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 US$15. 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 which 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.

28 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.

Until recently, companies in the US could subscribe to the Safe Harbour principles agreed to between the FTC and the EU, thereby bridging the gap between EU privacy principles and those of the US, and permitting EU businesses to exchange personal data with their US affiliates and business partners, including distribution partners. The October 2015 decision of the European Court of Justice in the *Schrems* case invalidated the Safe Harbour arrangement and has called into question the ability to share data between the EU and the US in the absence of Binding Corporate Rules, standard contract clauses or some other permitted undertaking of compliance with EU data protection rules. Negotiations to replace the Safe Harbour regime led to a new arrangement called the EU-US Privacy Shield, which imposes more robust and detailed data protection obligations on US companies that subscribe, including annual self-certification to their compliance with the principles of the Privacy Shield. The Privacy Shield offers EU citizens several routes to redress: complaints to the company must be resolved within 45 days; a no-cost alternative dispute resolution mechanism will be available; and complaints may be made to local European data protection authorities, which will then work with the US Department of Commerce or FTC to make sure that complaints are investigated and resolved. The extent to which national data protection

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authorities in Europe will be bound by the Privacy Shield has been seriously questioned in light of the *Schrems* decision, and a provision for annual review of the effectiveness of the Privacy Shield calls into question the extent to which US companies may rely on it. Parties to EU-US distribution relationships accordingly must tread carefully when it comes to exchanging personal data about customers, employees or others, and should consider other means of complying with EU privacy requirements, such as Binding Corporate Rules or Model Contract Clauses.

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 sometimes 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.

29 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.

30 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 to perform services for the supplier?
- 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.

31 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.

32 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.

33 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, and some state laws governing specific industries, such as alcoholic beverages, there generally are no such requirements.

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34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

In addition, it is important that counsel for multinational businesses recognise the risks to a supplier of third party misconduct by foreign distributors and agents under the Foreign Corrupt Practices Act. 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. For example, the FCPA prohibits the giving of anything of value to 'any person' while knowing that all or a portion of such money or thing will be given, 'directly or indirectly', to bribe any foreign official, foreign political party or official, or to any candidate for foreign political office. Moreover, constructive knowledge of the misconduct, including wilful blindness or deliberate ignorance, is enough to impose liability. A defendant may be convicted under the FCPA based upon the defendant's 'conscious avoidance' of learning about a third-party's illegal business practices. Accordingly, it is critically important to take steps to prevent such misconduct by those acting on a business's behalf, including distributors, agents, brokers, sales representatives, consultants, advisors and other local business partners. A business with foreign business partners must exercise appropriate due diligence in selecting its partners, and adequately supervise their activities. It is important to consider FCPA compliance before entering into an agreement with a foreign partner through due diligence, in the agreement through provisions requiring FCPA compliance and reporting, and after entering into the agreement through ongoing training, monitoring and audits.

35 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

36 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 39.

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.

37 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 39, 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.

38 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

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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 39, 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.

39 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 the 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.

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