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Contributing editor
Andre R Jaglom

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GETTING THE DEAL THROUGH

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Spain

Ignacio Alonso
Even Abogados

Direct distribution

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

Yes. Generally foreign persons are authorised to establish their own entities to import and distribute their products in Spain and they are treated as nationals. Nevertheless, some restrictions could be applicable in the sectors mentioned in question 4.

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

Yes. There are generally no restrictions on foreign suppliers being partial owners. Some restrictions may be applicable in certain sectors, however, as discussed in question 4.

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

An importer can perform its activity through the following types of capital companies:

- joint-stock company (SA);
- European joint-stock company (SE);
- limited liability company (SRL);
- new limited liability company (SLNE); and
- limited partnership by shares (SCom.pA).

Less frequently, a subsidiary of a foreign entity or partnership can be used as a form of business entity.

The company's incorporation requires the signature of a public deed (including the by-laws) by the founding partners before a notary public. The deed must be registered at the Commercial Register.

The following documents must be obtained, prepared and presented in order to execute the public deed of incorporation:

- a certificate (issued by the Central Commercial Register) stating the availability of the company name;
- identification documents, which must be presented to the notary by the shareholders. If the shareholders are represented, their representative must also show a notarised power of attorney;
- the by-laws have to contain certain minimum information. For example, the company's name, the corporation's purpose, address, share capital and its distribution in shares or parts, etc; and
- the company must have a minimum share capital (in money, goods or rights). For an SA, the amount is €60,000 (although it could be only 25 per cent disbursed at incorporation); for an SRL, it is €3,000. It is also possible for an SRL to have less than the mentioned minimum capital: in these cases some rules on reserves, distribution of dividends, and payments to shareholders and administrators will apply. These funds must be deposited in a bank account (if the capital is paid up in cash) directly by the shareholders or (less frequently) by the notary. In the first case, the bank issues a certificate of deposit that must also be shown to the notary public. In the case of capital paid in goods or rights, it will be necessary to identify them and their economic value and, in case of an SA, to provide an expert's report on their value.

The incorporation also needs to decide the way the company will be managed and to appoint at least one director (it is also possible to nominate several or even a board of directors). Each director shall accept the nomination and provide his or her personal data. This person shall also obtain a personal tax identification number. A different company can also be appointed as director (or as a member of 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 (RRM) is also applicable to such companies' incorporation and functioning.

The formation of a business entity is governed by the Central Commercial Register and the Provincial Commercial Registers where the company has its corporate domicile.

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

Generally, foreign business investments are not subject to particular restrictions. Nevertheless, in some cases investors are obliged to make official disclosures of their investments, such as previous declaration of investments when the investor is domiciled in a country that is considered a tax haven, regardless of the amount, and previous administrative authorisation for certain special sectors (television and radio, weapons, gambling, national defence or air transport). Certain investments have to be communicated ex-post to the authorities for statistical, administrative or economic purposes. This is especially true for investments in real estate that exceed €3 million, and if, regardless of the amount, the money comes from a tax haven.

For money laundering purposes, companies also have to inform about the physical person or persons owning directly or indirectly at least 25 per cent of their capital but this is also applicable to national or resident persons.

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

Yes.

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

Tax considerations for the formation of an importer will be the same as those for the formation of a Spanish company.

The formation of the company is usually exempted from taxes although some costs will be incurred in, basically advisers, notaries and commercial register fees.

Foreign business and individuals are submitted to the Non-resident Tax Act and to the specific conventions for the avoidance of double taxation depending on the tax residence of the foreign business or person. These conventions usually treat the incomes obtained depending on their kind and the place they are obtained.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

A supplier may generally use the following structures: distribution, commercial agency, franchise or supply agreements.

A distribution agreement is usually an agreement in which the distributor purchases goods from the supplier and resells them in the territory on a continuative basis and with some additional clauses (non-competition, exclusivity, minimum purchases, use of trademarks, etc). Some different kinds of distribution agreements are possible depending on the specific clauses: for instance exclusive distribution (the distributor is the only one appointed in a specific territory) or selective distribution (the distributor is appointed for selective products – luxury products, for instance – in a specific territory with some additional obligations related to the presentation of such goods, 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 supplied, or in joint ventures with a foreign supplier, principal, franchisor or supplier.

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

There is no specific legislation regarding specific distribution contracts. These contracts, also called commercial concessions, are basically constructed under the general freedom for contracting regulated in the Civil Code in its article 1255. Governing rules are, therefore, a construction made by the authors and case law of the Supreme Court. In this matter the Supreme Court has established that the rules of the Agency Act can be applicable indirectly as interpretative criteria by analogy. European rules related to distribution agreements (particularly those referring to competition law) are also applicable to this kind of agreement.

For the agency agreements the main rules are contained in Act 12/1992 on Agency Contracts of 27 May. This Act implements Directive No. 653/86/EEC of 18 December 1986 and its provisions are mandatory except those expressly mentioned in it.

The offer and sale of franchises is governed by the Retail Commerce Act 7/1996 of 15 January. Article 62 is particularly applicable to franchise agreements. The Act is completed by Royal Decree 201/2010 of 26 February on Franchise Agreements and the Franchisors' Register. The administrative agency in charge of franchise matters is the Franchisors' Register, which is administered by the State Secretary of Commerce (General Directorate of Internal Commerce and General sub-directorate of Internal Commerce) of the Ministry for Economy and Competitiveness. Regional franchisors' registries can be created if the regions' respective legislation foresees it.

Supply agreements are ruled by the Commercial and Civil Code and particularly the rules related to purchase agreements (articles 325 to 345).

The Vienna Convention on Contracts for the International Sale of Goods is also applicable in Spain.

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

Agency agreements for an indefinite period can be terminated by the parties with prior written notice. The notice period will be (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.

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

When an agency contract terminates, the agent has the right to compensation if certain requirements are reached:

- the agent has increased the number of clients or sensibly increased activity with a previous client, or has contributed to increased sales;
- the previous activity of the agent is deemed to have produced substantial advantages for the principal (supplier); and
- such compensation is appropriate owing to the existence of agreements limiting the competition, loss of commissions or other circumstances.

This compensation could not exceed in any case the average yearly amount of the remuneration received by the agent in the previous five years or during the whole contractual period if it was shorter.

In the case of distribution agreements, nothing is foreseen for compensation and parties can expressly exclude it. Nevertheless, if nothing

is foreseen courts tend to apply by analogy the same criteria herein mentioned for agency agreements. In this case, the amount to be considered is usually the gross margins obtained by the distributor.

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

These provisions are usually contained in the distribution or agency agreements and are enforceable provided the reasons for prohibition are clearly stated in the agreement. As mentioned before, these are usually considered 'intuitu personae' agreements and, therefore, the specific characteristics of the agent or distributor are considered essential for the continuity of the agreement.

Regulation of the distribution relationship

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

In principle there are no limitations to the enforcement of confidentiality provisions in distribution agreements before, during or after the expiration of the agreement and negotiations provided these agreements are not made in abuse of rights or could be considered excessive for the purposes.

In franchise agreements a franchisor can expressly impose a confidentiality provision before the contract is signed, which will affect all the information the franchisor is obliged to disclose.

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

Restrictions on the distribution of competing products cannot usually be implied in a distribution contract but have to be clearly agreed by the parties.

It is possible to contractually extend the distributor's non-competition obligation to the distribution of non-competing products. In order to determine whether a product is competing with another product it will be necessary to study the respective markets and the characteristics of the products and not only their uses.

On the other hand, and in general terms, Spanish antitrust law does not admit non-competition obligations for the distributor after the termination of a distribution contract.

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

Together with the general EU antitrust rules, the Spanish Antitrust Law prohibits, in similar terms, direct or indirect resale price maintenance as well as other commercial conditions imposed by the supplier. Nevertheless competition authorities have authorised in some cases the fixing of maximum prices.

In agency agreements, however, there are no restrictions on the fixing of the final prices since the sale is made by the principal, who fixes them, and there is no resale. The agent is only acting as an intermediary or as a representative of the principal.

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

In distribution agreements, a recommended price is admissible when there is sufficient competition between distributors: it therefore works as a maximum price and permits the consumers an easy comparison of different offers.

Resale price maintenance clauses in franchise agreements have been considered null and void by the Supreme Court when the franchisor has not only recommended prices to the franchisee but has sent a list of resale prices. These clauses have been considered restrictive even in cases where only a minimum price or a minimum and a maximum price was fixed and the price was fixed not for all products, but only for some of them.

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

In general terms, prices are freely established by the parties and there are no special dispositions provided the distributor remains free to decide them.

Nevertheless it will be considered unfair to sell goods below the cost of production or purchasing prices when this is likely to mislead consumers about the level of prices of other products or services of the same establishment; when it is done with the purpose or effect of discrediting the image of a different establishment; or when it is done as part of a strategy to eliminate a competitor from the market.

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

As mentioned above, prices are freely established. Therefore suppliers could charge different prices to different customers based on different circumstances. 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 these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Yes, it is possible for a supplier to restrict contractually the geographic areas or categories of customer to which its distribution partner can resell. Exclusive territories are permitted and quite often agreed in distribution agreements.

The reseller is also authorised to reserve certain customers to itself or even the direct sales in the agreed territory.

Usually the exclusivity prevents other distributors from actively selling in other territories (actively promoting the activity in territories different from the one specifically granted) but does not prevent them from accepting orders (passive sales) from these territories.

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

A refusal to deal could be acceptable in case of active sales outside the territory agreed or by restricting the sales to specific kinds of clients.

20 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 acquired assets do not reach €10 million provided each one of the affected companies do not have a market share at least of 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 income of at least two of the participants exceeds €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 are usually public procedures. This Commission 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 is the only authorised person to sell the goods within the exclusive territory. In this case the supplier will not be usually authorised to sell directly to final customers in the same territory. Nevertheless, these clauses do not oblige the supplier to take the necessary measures to avoid possible exports to the distributor's exclusive territory and 'parallel imports' cannot be completely avoided by the supplier.

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 terminating 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 to the patents and trademarks registration 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) 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 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 Act and in these cases they cannot be limited by agreements between a supplier and a distributor. Liability can be excluded in some cases foreseen in the Act such as (among others) when the defect did not exist at the time of putting the product into circulation, 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 States do 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/CE, 2004/915/EC and 2010/87/EU and 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).

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 was the case, these agents will be affected and the regulation ruled under labour law.

The first criterion to distinguish commercial agents and agents-employees is the responsibility of the agent assuming the risk of the transaction (if the agent assumes the risk, it will be considered as a commercial non-labour agent). But even this is not enough because the Agency Act also foresees its application to agents who do not assume this responsibility. Therefore, the second element to distinguish an independent agent from an employee is the higher or lower independency from the principal. In order to be considered as an independent agent, the 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.

In general terms, the consequences of being considered as an employee are the application of the labour law, which usually foresees higher protection for them than the commercial law (the Agency Act in case of agents).

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. 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 terrorism finance, to communicate to the authorities any incidence regarding these risks, refrain from executing any risky activity, avoid any information to the suspecting party and keeping 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 relationship since there is no express distribution law affecting these contracts. Nevertheless, where parties do not expressly agree certain conditions, courts can apply the Agency Act analogically. This could be particularly important for the termination notice and for the compensation in case of termination of distribution agreements.

On the other hand, the Agency Act is basically mandatory and its principles affect both the principal and the agent except when the possibility to modify its principles has been expressly foreseen.

Governing law and choice of forum

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 agreed on a particular country's law to govern the contract and if the Rome Convention is not applicable, and in case of different nationalities and national domiciles, the jurisdiction of the place where the agreement has been signed can be applicable. Notwithstanding, in case of absence of choice of the applicable law and in case of purchase of moveable goods, the applicable law will be the one of the place where the goods are located.

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 the competent court to settle disputes will be the one 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 the disputes in Spain will be related to the proximity to the counterparty. Usually all the previous procedural measures, enforcement, information about the party, etc will be easily obtained from a local court.

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 the case of distribution agreements is possible under the Spanish legal system. Spain has ratified the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and has its own Arbitration Act based on the Model Act prepared by the United Nations in 1985.

According to the Arbitration Act 60/2003 (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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