Spain

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1. AGENCY

1.1 Definition and Various Types of Agency to Distinguish

Having been without specific regulation for a long time, the mercantile agency agreement is presently governed by the Law 12/1992 on Agency, of 27 May. This regulation has been adopted on the basis of EC Directive 86/653, of 18 December 1986, although the Spanish law went beyond it. While the Directive 86/653 limits its scope of application to those contracts where the object of the agent's activity is the purchase and sale of goods,¹ the Law 12/1992 applies to all those contracts the object of which is any trade act or transaction.

It is Article 1 of the Law 12/1992 which sets forth the definition of mercantile agency agreement:

By means of an agency agreement, a natural or legal person called an agent binds himself before another person in a continuous or stable manner and in exchange for a remuneration to promote commercial acts or transactions for the other's account, as an independent intermediary, without assuming, unless otherwise agreed, the risk of such transactions.

The above transcribed definition contains the characteristics of the mercantile agency agreement which enable to differentiate it from other similar contracts.²

Thus, the agency agreement differs from the mercantile commission agreement in the fact that the former gives rise to a long-lasting relationship between the parties, while the second one entails a mandate whereby a person agrees to perform a trade act or transaction for another's account. Prior to the enactment of the Law 12/1992 the case law considered precisely that the agency agreement was a sub-kind of the commission contract.

The agency agreement differs as well from the mediation contract to the extent that the mediator, contrary to the agent, acts in a sporadic and impartial way, trying to bring the parties together in the conclusion of an agreement but without representing any of the parties.

The agency agreement varies from the distributorship agreement in that the distributor contracts with third parties for his own account and assumes in all cases the risk inherent to the resale of the products acquired.³

Finally, the independence of the agent is the distinctive element between the agency agreement and the employment contract. Now, the question of knowing whether a determined contract is governed by the Law 12/1992 or by labour regulations in actual practice may present difficulties. It is for this reason that it is desirable to explain further this distinction.⁴

¹ See art. 1.2 of EEC Directive 86/653.
³ For a detailed explanation of the differences between both agreements, see Sentence of the Supreme Court of 8 November 1955.
⁴ See Ortega Prieto, E., El Contrato de Agencia, Bilbao (1993).
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Article 2.1 of the Law 12/1992 provides as follows:

"They shall not be deemed agents sales representatives and travellers nor, in general, the persons linked by a labour relationship, whether common or special, with the principal for whose account they act."

As we have seen, common and special labour relations are excluded from the application scope of Law 12/1992. Common relations are those governed by the so-called common law of labour contracting which is basically contained in Title I of the Workers' Statute\(^3\) and in the applicable collective agreements. The employees members of the staff whose labour prestation consists in the promotion of the goods or services of the undertaking fall within this category. The said employees are given many different names, such as travellers, salesmen or detailmen.

On the other hand, special labour relations are those labour relations which under the provisions of Article 2 of the Workers' Statute are subject to special labour systems. Thus paragraph (f) of the said Statute includes within the frame of the said relations "The relation of persons who intervene in mercantile transactions for the account of one or more entrepreneurs, without assuming the risk and venture of the same". This provision has been developed by the Royal Decree 1438/1985 of 1 August,\(^6\) which applies "to relations whereby a physical person, acting under the denomination of representative, mediator or any other name assigned to him within the labour scope, agrees with one or more entrepreneurs, for a remuneration, to promote or personally conclude commercial transactions, for the account of the same, without assuming the risk and venture of such transactions."\(^7\) Sales representatives fall within this category although it is not limited to them.

This distinction between the agency relation and common labour relation does not present any major problems. In fact, the latter does not differ in any aspect from the other labour prestations, except for the particular functions performed by the worker within the undertaking (i.e. the promotion of goods or services of the undertaking to third parties).

Much less clear is the criterion to distinguish between the agency relation and the special labour relation regulated by Royal Decree 1438/1985. There is some confusion created by the fact that Article 1.1 of the said Royal Decree defines the scope of application of the same as follows:

The present Royal Decree will apply to the relations whereby a physical person, acting under the name of representative, mediator or any other name given to him in the labour scope, agrees with one or more entrepreneurs, for a consideration, to promote or arrange personally for mercantile transactions for the account of the same, without assuming the risk or venture of such transactions (...).

\(^3\) Royal Legislative Decree 1/1995, of 24 March.

\(^6\) Royal Decree 1438/1985, of 1 August, regulating the special labour relation of persons intervening in commercial transactions for the account of one or more entrepreneurs, without assuming the risk and venture of such transactions.

\(^7\) Art. 1.1 of Royal Decree 1438/1985.

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For this reason, and except in the event when it is a question of a legal entity or where
the person entrusted with the promotion of goods or services of the undertaking
assumes the risk of the transactions, where the mercantile character of the agreement is
clear, in all other cases there may be real doubts as to the legal system applicable
thereo. Article 2 of the Law 12/1992 presents the said criterion of independence as the
only criterion on which to distinguish agents from sales representatives:

2.1. They shall not be deemed agents sales representatives and travellers nor, in general, the
persons linked by a labour relationship, whether common or special, with the principal
for whose account they act. 2.2. It shall be presumed that dependency exists when an individual
who is devoted to promoting commercial acts or operations for another’s account, may
not organize his professional activities, nor the time devoted to the same, pursuant to his own
criteria.

However, in many cases it is not clear whether the agent is acting with independence.
This will be particularly the case, when the agent receives instructions relating to
the way of conducting the promotion of the goods or services since the Law 12/1992
permits such instructions to be given provided that they do not affect the independence
of the agent (Article 9.2 c).8

Since the Law 12/1992 is very recent, there is very little case law on the subject. In
this respect, we should point out the Decision of 30 January 1995 rendered by the
Provincial Court in Barcelona, which takes into consideration all the concurring circum-
stances in order to determine whether the independence of the agent exists or not.
In particular, the Court examined whether the agent is free to engage the personnel for
his organization; whether the agent is or is not responsible for unsuccessful transac-
tions, the amounts uncollected having to be deducted from the commissions owed to
him; whether the agreement classifies the relation as a labour relation or as a mer-
cantile agency relation; and, finally, whether the instructions from the principal refer or not
to working hours, itinerary, distribution criteria, or form of making the orders or con-
tracts by the agent.

In any case, the agreement will be subject to the Law 12/1992 in two cases:

(a) If the agent assumes the risk of the transactions or shares it with the principal.
(b) If the agent is a legal entity.

In all the other cases, it will be necessary to examine the circumstances concurring in
the performance of the activity by the agent so as to determine whether he is inde-
pendent or not or, what is the same, whether it is the question of a commercial agent
subject to Law 12/1992 or a sales representative subject to the provisions of Royal
Decree 1438/1985. As we have seen, one of the circumstances which will be taken into

et seq. which mentions several examples where the independence of the agent is not clear. Thus, when he is
required a determined number of trips, for the purposes of establishing a performance parameter, or when
the principal requests the agent to refrain from promoting transactions with certain clients.

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account when determining the independence of the agent is the fact that the wording of the agreement states such independence. For this reason, if one wishes the relationship to have a mercantile character, it is advisable to state this point not only in the preamble of the agreement but also in the covenants of the same.9 However, as we have already indicated, this will not determine per se that the contract is necessarily subject to the Law 12/1992. It is the judge who will, with final character and in the light of the concurring circumstances, determine whether a particular relation is subject to the labour or mercantile scope.

1.2 Basic Aspects of Commercial Agency Agreements under Spanish Law and Court Practice

• **Scope of application.** From a material point of view, the Law 12/1992 applies only to mercantile agency agreements as defined in the preceding section. However, certain agreements which would, in principle, be governed by the said Law, escape, in whole or in part, from the scope of application of the same.

On the one hand, there are in Spain specific regulations relating to determined categories of agent which are applied, with priority character with respect to the general system set forth in the Law 12/1992. This is the case of insurance agents,10 credit entities agents,11 advertising agents12 and ship’s agents. On the other hand, Article 3.2 of the Law 12/1992 expressly excludes from the scope of application of this Law the agents acting in minor official or regulated stock markets.13

From a temporal point of view, the Law 12/1992 is presently applied to all of the mercantile agency agreements, whether the same have been entered into prior to or after the entry into force of the Law 12/1992.

• **Imperative character of the Law 12/1992.**14 As it is the case with Directive 86/554/EEC, the Law 12/1992 is aimed at protecting the supposedly weaker party to the mercantile agency agreement: the agent.15 It is for this reason that Article 3.1 of the Law 12/1992 sets forth that its provisions have an imperative character unless expressly otherwise provided by the issue.16 The Spanish Courts have hardly had any opportunity to pronounce any judgment on the scope of the imperativeness precept contained in the Law 12/1992.

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9 In this sense see Pau Santaususana, J., op. cit.
10 Law 9/1992, of 30 April, on Mediation in Private Insurance, as amended by Law 30/1995, of 8 November, on Regulation and Supervision of Private Insurance. With respect to this category of agents, the Law 12/1992 is applied with supplemental character.
11 Royal Decree 1245/1995 of 14 July 1995. It is the question of those physical persons or legal entities to whom a credit entity has granted powers of attorney to act on a regular basis in respect of their clientele, for and on behalf of the grantor of the powers, in the negotiation or conclusion of transactions characteristic of a credit entity’s activity.
13 These are regulated by the Law 24/1988, of 28 July, on stock market and complementary rules.
14 See Ortega Prieto, op. cit., pp. 118 and 119.
15 The validity of the postulate upon which both the European Directive and the Spanish law are based are questionable, since practical experience presents a great number of examples where the agent is not in a position of inferiority with respect to the principal.
16 It should be noted that the European Directive, contrary to the Spanish law, does not establish the general imperativeness of its provisions, but only some of them expressly state their imperative character.
In particular, the only provisions of the Law 12/1992 which may be derogated from by the will of the parties are the following:

(a) The parties may agree that the agent will assume the risk and venture of transactions promoted by him. Now, for the said covenant to be valid, it must be stated in writing with an indication of the commission to which the agent is entitled. Naturally enough, failing an express covenant to this effect, the commercial agent will not assume the risk and venture of transactions procured by him.

(b) The parties may agree that the agent will exclusively promote the goods and services of the principal. Failing this covenant, the agent is free to carry on his professional activity for the account of several entrepreneurs. However, the agent will always require the consent of the principal to conduct, for his own account or for the account of another entrepreneur, a professional activity related with goods or services of equal or similar nature and competitive with those he would have agreed to promote.

(c) The parties may reduce the time limit within which the principal has to deliver to the agent a list of the commissions due (see 1.2.3 below).

(d) Likewise, the parties may reduce the time limit set forth by the Law 12/1992 for payment of commissions (see 1.2.3 below).

(e) Failing a covenant in this respect, the agent will bear the expenses arising out of the exercise of his professional activity. However, the parties may provide that the principal will reimburse the said costs to the agent.

(f) The period of previous notice set forth by the Law 12/1992 for termination of the agreement by any of the parties may be increased at the will of the contracting parties.

We think that the Law 12/1992 is excessively rigid with respect to the imperativeness of its provisions. Actually, under a literal interpretation of the same, we might reach the absurdity that one could not establish conditions more beneficial to the agent than those provided by the law. The Spanish courts have hardly had any opportunity to pronounce any judgment on the scope of the imperativeness precept contained.

- Impact of Competition Law on Agency Agreements. Until now, agency agreements have not attracted the attention of the Spanish competition authorities. However, this situation could change after the entry into force of Commission Regulation No. 2790/99, of 22 December 1999, on the application of Article 81(3) of the EC Treaty of categories of vertical agreements and concerted practices, which entered into force on 1 January 2000 (the "Vertical Agreements Regulation"). Indeed, according to the current Guidelines on Vertical Restraints (which provide the Commission’s view on the provisions of the Vertical Agreements Regulation) the decisive factor when assessing whether

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18 Ibid., Art. 19.
19 Ibid., Art. 7.
20 Ibid., Art. 15.1.
21 Ibid., Art. 16.
22 Ibid., Art. 18.
23 Ibid., Art. 25.
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Article 81(1) is applicable to agency agreements is the financial and commercial risk borne by the agent in relation to the contracts concluded under the agency agreements. Therefore, it may not be completely ruled out that the Spanish competition authorities will accept the examination of the compatibility of agency agreements with competition law in those cases where the financial and commercial risk is borne by the agent pursuant to the criteria set forth in the Guidelines.

Notwithstanding the above, as long as the contractual provisions that may raise competition law concerns are imposed by the Spanish Law 12/1992 on Agency, then the same should be regarded as permissible. Certain doubts may arise, however, when the relevant provision is not imposed, but merely permitted, by Law 12/1992. In such a case, we understand that Spanish competition law would not be applicable but EU competition law could apply.

It therefore seems possible to conclude that the requirements set forth in the Vertical Agreements Regulation need to be abided by, if two conditions are simultaneously met:

(a) the financial and commercial risk is borne by the agent in relation to the contracts concluded under the agency agreements; this needs to be determined under the criteria set forth in the Guidelines on Vertical Restraints, and
(b) the provision(s) of the agreement which raise(s) competition law concerns is not imposed by an imperative provision under Law 12/1992.

If Law 12/1992 expressly contemplates and permits any covenant which would restrict competition, but does not impose the same, then Spanish competition law does not seem applicable, but Article 81(1) of the EC Treaty could apply if the agreement is capable of affecting trade between Member States.

1.2.1 Formalities

The Law 12/1992 does not require any particular formality for the full validity and efficacy of the agency agreement. It can therefore be written or verbal. This Law also provides, in its Article 22, that “Each one of the parties may at any time require the other to formalize in writing the agency agreement showing therein the amendments, if any, that may have been introduced in the same”.

Although this is not legally necessary, it is advisable that the parties execute a written agreement for the purposes of giving stability and security to their relations.

Section II.2 of the draft Guidelines.

Article 1.2. of Spanish Law 16/1989 on the Defense of Competition, provides that “without prejudice to the eventual application of the provisions of Community Law on defense of competition, the prohibitions of Article I [which refers to agreements which restrict competition] shall not apply to the agreements, decisions, recommendations and practices which result from the application of a law”.

In fact, a number of entrepreneurs contract verbally the services of the agent without being aware that this may entail entering into an agreement subject to the Law 12/1992. In particular, when such entrepreneurs wish to terminate their commercial relation with the agents verbally contracted they may face the unexpected surprise of being obliged to pay the indemnities set forth in Law 12/1992.

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1.2.2 Exclusivity

From the agent’s point of view, Article 7 of the Law 12/1992 provides that:

unless agreed otherwise, the agent may carry on his professional activity for the account of various entrepreneurs. In any case, he will require the consent of the entrepreneur with whom he has executed an agency agreement in order to be able to exercise for his own account or for another’s account a professional activity related with goods or assets of equal or similar nature and which compete with those he would have agreed to promote.

Consequently, although from the formal point of view it is established, unless otherwise agreed, the non-exclusivity of the agent’s activity, the principal will not in normal conditions miss a non-exclusivity pact in the agreement: the agent may not promote competitive goods or services without the principal’s consent.\(^{27}\)

From the entrepreneur’s point of view, he may grant the agent the exclusivity for a determined territory and with respect to a particular group of persons. In this case, the agent will be entitled to a commission provided that the trade act or transaction has been concluded during the term of the agency agreement with a person pertaining to the said territory or group, even when the act or transaction has not been promoted or concluded by the agent.\(^{28}\)

1.2.3 Agent’s Compensation (Commission)

The agent’s remuneration may adopt three forms: a fixed amount, a commission or a combination of the two.\(^{29}\) If the remuneration is not expressly agreed, it will be determined pursuant to the trade usage of the place where the agent carries on his activity. Failing such usage, the agent will receive a reasonable compensation taking into consideration the circumstances concurring in the transaction.\(^{30}\) The Law 12/1992 regulates only the commission, which is the agent’s typical remuneration. By commission is understood “any element of remuneration which varies according to the volume or value of the acts procured and, as the case may be, concluded by the agent”.\(^{31}\)

1.2.3.1 CASES WHERE THE AGENT IS ENTITLED TO A COMMISSION

During the term of the agency agreement, the agent is entitled to a commission in the following cases:

(a) when the trade act or transaction has been concluded as a result of the agent’s professional intervention;

\(^{27}\) However, we feel that it is always advisable to set forth in writing the exclusivity of the agent’s activity, even when this refers to competitive products only, so as to avoid eventual conflicts between the parties. Thus, the agent might sustain that the consent to which Art. 7 of the Law refers was given verbally or that it was tacit.


\(^{29}\) Ibid, Art. 11.1.

\(^{30}\) Ibid, Art. 11.1.

\(^{31}\) Ibid, Art. 11.2.
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(b) when the trade act or transaction has been concluded with a person previously procured by him and/or with whom he had concluded a similar act or transaction;
(c) in the event of an agent having the exclusivity in respect of a determined territory or group of persons, when any trade act or transaction is concluded with a person pertaining to the said territory or group.\textsuperscript{32}

Consequently, the agent is entitled both to direct and indirect commissions. The agent is further entitled to receive a commission for acts or transactions concluded or promoted after the expiry of the agency agreement in the following cases:

(i) when the act or transaction is basically the result of the activity performed by the agent during the term of the agreement, provided that it is concluded within three months following the expiry of the same;
(ii) when the principal or the agent have received the order or request prior to the expiry of the contract, provided that the agent would have been entitled to said commission during the term of the agreement.

In these cases, if there exists a new agent with an agreement in force, such new agent will not be entitled to a commission unless it would be equitably appropriate to share the same between the former agent and the present agent.\textsuperscript{33}

1.2.3.2 ACCRUAL OF COMMISSION

The right to the commission arises from the moment when any of the following events occurs:

(a) the principal performs the trade act or transaction;
(b) the principal having to perform a trade act or transaction does not perform it for causes attributable to him;\textsuperscript{34}
(c) the trade act or transaction is performed in whole or in part by a third party.\textsuperscript{35}

1.2.3.3 AGENT’S RIGHT TO INFORMATION

Under this heading, Article 15 of the Law 12/1992 grants the agent several rights of an instrumental character, aimed at the agent being able to know with exactitude the commissions to which he is entitled. Thus:

(a) The principal must provide the agent with a list of the commissions accrued in respect of each act or transaction, showing the essential elements upon which the calculation of the commissions has been based. The said list will be delivered,

\textsuperscript{32} Ibid, Art. 12.
\textsuperscript{33} Ibid, Art. 13.
\textsuperscript{34} See fn. 37. \textit{Pérdida del derecho a la comisión}.
\textsuperscript{35} Art. 14 of Law 12/1992. This last case will be verified, as pointed out by Ortega Prieto, E., op. cit., p. 138, when the client partly or totally paid the price.

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unless the parties agree upon a shorter period, on the last day of the month following the accrual of the commissions;

(b) The agent may require the principal to produce the accounting records to the extent necessary to verify the commissions accrued;

(c) The agent is entitled to obtain from the principal all the information in possession of the latter to verify the amount of the commissions.

1.2.3.4 PAYMENT OF THE COMMISSION
The commission will be paid no later than the last day of the month following the calendar quarter of their accrual, unless the parties agree upon a shorter time limit.\(^{36}\)

1.2.3.5 RIGHT TO COMMISSION FORFEITED
The right of the agent to the commission will be forfeited if the principal provides evidence that the act or transaction agreed as a result of the agent's mediation has not been executed on account of circumstances not attributable to the principal. Consequently, if the third party who concludes the agreement with the principal fails to pay or rejects the order, the right to commission is forfeited and the agent must, as the case may be, return the commission received.\(^{37}\)

1.2.4 Territory
The Law 12/1992 does not contain any limitation in respect of the territory. It is desirable to establish the same with precision in order to avoid eventual conflicts between the parties.

On the other hand, it should be emphasized that in the case when the principal grants the agent the exclusivity for a determined territory, the agent is entitled to commission in respect of any and all trade acts or transactions concluded during the term of the agency agreement with a person pertaining to the said territory, even when the act or transaction may not have been brought about or concluded by the agent.

1.2.5 Main Obligations of Principal
These are:

(a) to act loyally and in good faith in his relation with the agent, in general;
(b) to pay the agreed remuneration. In connection with the performance of this obligation, the Law 12/1992 sets forth a number of obligations of instrumental nature (see 1.2.3 above).\(^{38}\)


\(^{37}\) Ibid, art. 17.

\(^{38}\) It is basically the case of relative obligations when dealing with Right to Information and Payment of Commission.
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(c) to place, sufficiently in advance and in the appropriate amount, at the disposal of the agent, all the documents (such as samples, catalogues and tariffs) necessary for the performance of his professional activity;

(d) to provide the agent with all the information necessary to perform the agency agreement. In particular, to advise the agent, as soon as he is aware of it, whether it is foreseen that the volume of the acts or transactions will be materially lower than the agent might have expected;

(e) to advise the agent, within the time limit of 15 days, of the acceptance or rejection of the transaction reported; and

(f) to advise the agent, at the earliest possible time, whether the transaction has been concluded and to what extent.

1.2.6 Main Obligations of Agent

These are:

(a) to act loyally and in good faith in general, taking care of the interests of the principals for whom he is acting;

(b) to promote and, as the case may be, conclude with the diligence of a dutiful trader the acts or transactions entrusted to him. In principle, the agent must perform the said activity personally or through his employees. For the acting through sub-agents to be possible, the express authorization of the principal is required, the agent being liable for the acts performed by the sub-agent if he has been appointed by the agent;

(c) to communicate to the principal any information in his possession and which is necessary for the proper coordination of the acts or transactions the promotion and, as the case may be, conclusion of which was entrusted to him. In particular, he shall inform the principal on the solvency of third parties with which there are transactions pending for conclusion or execution;

(d) to carry on his activity pursuant to the reasonable instructions received from the principal, provided that these do not affect his independence (see 1.1 above);

(e) to receive, on behalf of the principal, any kind of claims from third parties relating to faults or quality defects in the goods sold and in the services rendered as a result of the transactions promoted, even when they might not have been concluded by him;

(f) to keep independent accounts for the acts or transactions relating to each principal for whom he is acting; and

(g) to refrain, without the principal's consent, from exercising for his own account or for the account of a third principal, any professional activity relating to goods or services of a nature similar or competitive with those the contracting of which he had agreed to promote (see 1.2.2 above).

1.2.7 Term

The fact that an agency agreement is executed for a fixed period or for an indefinite term entails substantial differences as regards its juridical treatment and, in particular, with regard to the causes for termination of the agreement and the indemnities corresponding to the agent after termination thereof.


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1.2.7.1 CONTRACT FOR A FIXED PERIOD

For an agency agreement to be for a fixed period this must be expressly agreed by the parties. Otherwise, the contract will be considered for an indefinite term.\(^{40}\)

The termination of the agreement for a fixed period will take place upon expiry of the agreed term. However, agency agreements which continue to be performed by both parties after the expiry of the initially agreed term, will be considered as transformed into agreements for an indefinite term. Consequently, to avoid this happening, the common practice is to set forth an initial relatively short term in the agreement with automatic and successive extensions for the same period unless any of the parties gives the other party appropriate and prior notice of his intention to terminate it.\(^{41}\)

Agreements for a fixed period may not be terminated by any of the parties except in cases of breach, bankruptcy or suspension of payments of the other party (see below).\(^{52}\)

1.2.7.2 CONTRACT FOR AN INDEFINITE TERM

The contract shall be for an indefinite term whenever it is not an agreement for a fixed period pursuant to indefinite term explained above.

The contract for indefinite term shall terminate by written notice given by any of the parties. The period of notice shall be one month for each year of duration of the agreement up to a maximum of six months. As we have seen, the parties may agree on longer periods of notice, and unless agreed otherwise, the end of the period of notice will coincide with the last day of the month.\(^{43}\)

1.2.7.3 RULES IN COMMON ON THE CONTRACT FOR A FIXED PERIOD AND FOR INDEFINITE TERM

Both in agreements for a fixed period and for indefinite term any of the parties may terminate the agreement without prior notice, in the following cases:

(a) when the other party has failed to fulfil, in whole or in part, any of the legal or contractual obligations;

(b) when the other party has been declared bankrupt or a suspension of payments proceeding has been admitted.

In both cases, the agreement terminates upon receipt of the written notice stating the will of terminating it and the cause for termination. The termination notice has immediate

\(^{40}\) Ibid, Art. 23.


\(^{42}\) If the aim of allowing the transaction of the agreement is to avoid the parties becoming bound on a permanent basis, it is logical that the generic faculty of terminating the agreement exists only in the agreements for an indefinite term (see below). In this sense, Porfídio Carpio, L. J., op. cit., p. 1260.

\(^{43}\) Art. 25.5 of the Law 12/1992 clarifies that for the purposes of determining the period of notice in agreements for a fixed period which have been transformed into agreements for indefinite term as indicated hereabove, it is computed the term of the agreement for a fixed period adding thereto the time elapsed since the same was transformed into a contract for indefinite term.
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effect upon the parties. If the party who receives the notice does not agree with the
termination, it may resort to court to claim either an indemnity or performance of the
contract.

The agency agreement also terminates in the case of death or declaration of death of
the agent. However, it will not terminate in the event of death or declaration of death of
the principal, without prejudice to his successors being able to give a termination notice
with the appropriate period of notice. Although it is not expressly provided by the Law
12/1992, we understand that when the agent is a corporation, the dissolution of the same
will entail the termination of the agreement.

1.2.8 Indemnification upon Termination

Upon termination of the agency agreement, the principal must pay the agent two classes
of indemnities which are compatible between them. The Law 12/1992 provides certain
cases where the said indemnities do not apply.

1.2.8.1 Indemnity for Clienteles

This indemnity applies both in the case of agreements for a fixed term and for an indefinite
term. To be entitled to the indemnity for clientele, all of the following requirements must
be met:

(a) the agent must have procured new clients to the principal or materially increased
the transactions with pre-existent clients. Tribunals tend to consider that the agent is
responsible for having increased the clientele or the business and is therefore entitled
to receive an indemnity when the contract has been concluded for a long term;
(b) the activities conducted by the agent continue to produce substantial advantages to
the principal after the termination of the agreement. The agent has to prove that
the new clientele accrued by himself during the contract shall continue producing
substantial benefits after the termination of the contract;
(c) the indemnity is equitable because of the existence of commitments limiting com-
petition (see 1.2.9 below), because of commissions the agent may fail to receive or
any other concurring circumstances.

The indemnity for clientele applies even in the case when the agreement is terminated
because of death or declaration of death of the agent.

The Law 12/1992 sets forth a ceiling to the said indemnity: it may not, in any circum-
stance, exceed the annual average amount of remuneration received by the agent during
the last five years (or, during the total term of the agreement, if shorter).

44 Art. 28 of Law 12/1992. For a detailed explanation on indemnity for clientele see Fernandez Sanz, F.,
VÁZQUEZ ALBERT, Daniel. Las indemnizaciones derivadas de la extinción de los contratos de agencia y

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1.2.8.2 INDEMNIFICATION FOR DAMAGES\textsuperscript{45}

Without prejudice to the indemnity for clientele, the principal must pay the agent an indemnity for damages caused to the agent whenever all the following prerequisites concur:

(a) the agreement is for an indefinite term;
(b) the agreement subject to termination has been unilaterally terminated by the principal;
(c) following instructions from the principal, the agent has incurred expenses in the performance of the agreement; and
(d) early termination does not permit the agent to amortize the expenses mentioned in paragraph (c).

The amount of the indemnity for damages corresponds to the value of the damages caused to the agent because of the early termination of the agreement.

1.2.8.3 CASES WHERE THERE IS NO ENTITLEMENT TO THE INDEMNITY

Article 30 of Law 12/1992 sets forth three cases where the agent is not entitled to indemnity for clientele or for damages:

(a) When the principal terminates the agreement for failure by the agent to fulfill his obligations legally or contractually established. In this case, as it has been indicated above, the principal has no obligation to give previous notice.
(b) When the agreement is terminated by the agent. The above notwithstanding, the agent will be entitled to the indemnities that may correspond to him when the termination is based on circumstances attributable to the principal or when based on age, disability or illness of the agent and the agent cannot be reasonably required to continue performing his activities.
(c) When the agent, with the principal's consent, has assigned the rights and obligations under the agency agreement to a third party.

A judgment of 7 April 2003 of the Spanish Supreme Court, has clearly stated that the right to claim for an indemnity on the part of the agent cannot be waived in the contract, any such clause being considered null. A recent judgment of 7 May 2005, of the Provincial Court of Barcelona has ruled that it is also null the clause whereby it is established "ex ante" the quantification of such indemnity. Accordingly such indemnity must be stated after the contract has expired and having regard to the concurring circumstances in each case.

1.2.9 Non-competition after Termination

Article 20.1 of Law 12/1992 expressly establishes that the parties may agree upon a restriction or limitation of the professional activities to be conducted by the agent after

\textsuperscript{45} Art. 29 of Law 12/1992.
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expiry of the agency agreement. However, the Law 12/1992 sets forth some time limitations and a number of requirements for the clause on limitation of competition to be valid.

1.2.9.1 TIME REQUIREMENTS FOR THE LIMITATION OF COMPETITION CLAUSE

As a rule, the non-competition clause may not exceed the term of two years from the expiry of the agency agreement. If the agency agreement was agreed for a term under two years, the term of the limitation of competition clause may not exceed one year.

1.2.9.2 OTHER REQUIREMENTS FOR THE CLAUSE ON LIMITATION OF COMPETITION

For the clause on limitation of competition to be valid each and all of the following requirements must be met:

(a) the clause must be established in writing;
(b) the clause limiting competition may only extend to the geographical area involved or to the geographical area and the group of persons entrusted to the agent;
(c) the clause limiting competition may only affect the kind of goods or services which are the subject of the transactions or acts promoted or concluded by the agent.

46 Ibid, Art. 20.2.
2. DISTRIBUTION

2.1 Definition

In spite of the fact that Spanish doctrine has long since been asking for a specific regulation of distributorship agreements they still do not have their own legislation. In the absence of a legal concept, Spanish doctrine and case law have proposed multiple definitions of the distributorship agreement. It has to be added that, in actual practice, various terms are frequently used to refer to the same subject: distribution, representation, concession and even agency.

However, we can define the distributorship agreement as the agreement whereby an entrepreneur (called distributor) agrees, on a regular and continuous manner, to acquire in his own name and under his own risk, the products of another entrepreneur (called supplier), for the purposes of reselling them in a given territory.

Doctrine has set the characteristic lines of the distributorship agreement:

(a) it is an atypical agreement, since it has no specific legislation;
(b) it is an adhesion agreement, to the extent that very frequently contract forms or patterns prepared by the supplier are used;
(c) it is a contract involving duration, since it entails a performance over a period of time, either fixed or unlimited;
(d) it is a consensual agreement which is consummated by the consent of the parties (see 2.2.1 below);


50 Thus, the Decision of the Provincial Court in Bilbao dated 26 November 1992, defines distribution as “an atypical agreement of mercantile collaboration whereby a physical person or legal entity, the principal, agrees to commercialize, on a permanent basis, and in a qualitative and quantitative form previously determined, the products of another principal, either in the name and for the account of such principal – agent – or in its own name and for its own account – concessionaire”. Another example of definition given by our case law is found in the Decision rendered by the Court in Segovia of 25 January 1994, according to which “At the service of commercial distribution there are several contractual categories, such as the supply agreement; the so called estimation agreement; and the commercial concession or distribution agreement in the strict sense which, in turn comprises the modalities of franchise, authorized distribution and commercial concession or exclusive distribution, the last one being defined as the “agreement whereby an entrepreneur (concessionaire) places his business organization at the service of another industrial or commercial entrepreneur (the principal) for the purposes of commercializing, for an unlimited or limited term, within a determined geographic area and under the directions and supervision of the principal, but for his own account and in his own name, certain products the exclusive resale of which is granted to him under the terms previously determined”.

51 While the use of the terms “representation” and “agency” seem inappropriate when referring to the distributorship agreement in the strict sense, Spanish doctrine often uses the expression “concession agreement” to designate exclusive distributorship agreements.

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(e) it is an agreement intuitus personae, since it is based on mutual trust between the parties; and
(f) it is an agreement where there is an economic dependence of one of the parties (distributor).

2.2 Basic Aspects of Distribution Agreements under Spanish Law and Court Practice

The legal system applicable to distributorship agreements is made up of three categories of regulations:

(a) The general regulations on contracts, contained in the Civil Code and in the Commercial Code.

The main provision is contained in Article 1255 of the Civil Code which reads as follows: "The contracting parties may establish the covenants, clauses and conditions that they deem appropriate, provided they are not contrary to the law, ethics or public order".

Consequently, contrary to the agency agreement (see above at 1.2) the parties enjoy an important degree of autonomy of will to determine their respective rights and obligations. Only if and to the extent that contractual provisions are insufficient and/or contrary to law, moral, and public order, the general regulations will apply.

(b) Spanish and European Community rules on competition.

In this respect, it must be pointed out that the Spanish competition rules are largely inspired by the European regulations. To such effect Royal Decree 378/2003 expressly refers to the Commission Regulation No. 2790/99 of December 1999, on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices, which is to be applied when assessing the compatibility of distribution agreements with Spanish competition rules.

These are the main requirements set forth by the Vertical Agreements Regulation:

(i) The following distribution agreements may not benefit from the block exemption:
- distribution agreements entered by suppliers with a market share exceeding 30 per cent in the relevant market;

52 Perhaps, as indicated by Juan Luis Iglesias Prada, op. cit., pp. 277 and 278, it would be more appropriate to speak of intuitus instrumenti than intuitus personae, to emphasize that the decisive element is not the trust in the person of the trader, but in the mercantile organization owned by him. See also the above-mentioned Decision of the Provincial Court in Bilbao of 26 November 1992.


54 See Decision of the Supreme Court of 27 February 1990, op. cit., by Fernando Sánchez Calero, op. cit., p. 469.

55 The application of the general regulations provides the integration of eventual gaps by resorting to analogy. In this sense, doctrine insistently advocates for the application by analogy of Law 12/1992 on agency to distributorship agreements.

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• exclusive distribution agreements when the distributor has a market share which exceeds 30 per cent;
• most agreements entered into by competitors.56

(ii) In order to be cleared by the block exemption, the agreement must not contain any blacklisted clauses. The main blacklist clauses are the following:
• to fix a minimum resale price (maximum prices and recommended prices are permissible);
• to prohibit the distributor to carry out passive sales outside the granted territory;
• to establish a non-compete provision for a term exceeding five years. It is worth noting that a non-compete clause which may be tacitly renewed is also prohibited as from the expiry of such five-year term; and
• to establish a post-termination non-compete clause which exceeds one year and/or does not satisfy the other criteria referred to in Article 5 of the Vertical Agreements Regulation.

It should also be pointed out that the Spanish laws provide the possibility of applying for an individual exemption when the agreement does not meet the conditions necessary to fall within the block exemption.

(c) Finally, it should be taken into consideration that Spain is a party to the Vienna Convention of 1980 on the International Sale of Goods and therefore the provisions contained in the said convention may, as the case may be, apply to distributorship agreements subject to the Spanish laws.57

2.2.1 Formalities

Pursuant to the Spanish laws,58 distributorship agreements are not subject to any formality for them to be valid.59

It should be taken into account, however, that Article 51 of the Commercial Code sets forth that the declaration of witnesses by itself is not enough to prove the existence of an agreement involving an amount exceeding 1500 pesetas, [i.e. 9 Euro], and therefore to prove the existence of a distributorship agreement other means of evidence will be required.

On the other hand, it is highly recommended to formalize the distributorship agreement in writing, not only with a view to proving the existence of the same (there are other evidences, such as presumptions),60 but especially to set forth in detail the contents and scope of the obligations assumed by the parties. It is particularly important to establish in writing the territory where the contract is to have effect and, above all, the system relating to the termination of the agreement.61

56 See Section 2.4. of the Vertical Agreements Regulation.
57 In such event, if the parties wish to avoid the application of the said Convention, they must expressly agree so.
59 See, for instance, the Decision of the Supreme Court of 4 July 1994.
60 Ibid.
61 This will not only facilitate the solution of the conflicts that may arise between the parties (since the judge will, in the first place, stand to the covenants agreed by the parties) but prevent such conflicts (since both parties will know their respective obligations and anticipate the consequences of their default).
DISTRIBUTION

2.2.2 Exclusivity
For a distributorship agreement to be exclusive (understanding as such an agreement whereby the distributor has the exclusivity of sale), it must be expressly agreed by the parties. It is thus understood by our case law which, on the basis that any exclusive covenant entails a commercial restriction for the parties, it emphasizes the need of interpreting the said covenant in a limited form (odiōsa sunt resīngenda). This means that any restriction to be imposed on the parties must be expressly agreed, implicit restriction being not admitted. The Spanish courts have also stated that the distributorship agreement (also called concession agreement) cannot be unlimited with respect to time or territory.

2.2.3 Territory
The parties are free to establish the territory where the contract is to have effect. There is only one limitation: the territory cannot be unlimited (see 2.2.2 above).

With respect to the territory, the provisions set forth in Article 4.b) of the Vertical Agreements Regulation contain an important limitation in this respect: the distributor can only be prohibited from conducting an active sales policy outside the territory granted, and only with respect to other territories of the Common Market which have not been exclusively allocated to other distributors or to the supplier. Consequently, within the framework of the European Community, the territorial protection of the distributor will always be relative and never absolute.

2.2.4 Obligations of Supplier
We can make a distinction between basic obligations inherent to the concept of distributorship agreement, and the obligations which, not being required by law, are usually agreed upon by the parties.

2.2.4.1 BASIC OBLIGATIONS
(a) To supply the products to the distributor, pursuant to the agreed terms.
(b) When it is a question of an exclusive distribution agreement, to abide by the exclusivity granted which, to our belief, includes both the prohibition of appointing other distributors and the prohibition to effect direct sales in the territory.

2.2.4.2 EXAMPLES OF OPTIONAL OBLIGATIONS
(a) To conduct promotion campaigns on the products distributed.
(b) To give products for demonstrations, free of charge.

63 For this reason, although it can be reasonably understood that the prohibition on the supplier of making direct sales in the territory (and not only the prohibition of appointing other distributors) is inherent to the concept of exclusive distribution, we think it advisable to put in writing this restriction in the agreement.
64 See note 59 above.
65 We understand that the territorial limitation affects all the distributorship agreements, including those which do not contain an exclusivity clause.
66 See note 63 above.
(c) To provide the distributor with information and/or technical assistance for the purposes of facilitating the commercialization of the distributed products.
(d) To keep in force and defend the trademark of the products against eventual claims by third parties.
(e) To grant the distributor an option right on the new products of supplier.

2.2.5 Obligations of Distributor

It is also appropriate to make the distinction of the preceding section.

2.2.5.1 BASIC OBLIGATIONS

(a) To pay for the products acquired.
(b) To commercialize the products pursuant to the agreed terms.

2.2.5.2 EXAMPLES OF OPTIONAL OBLIGATIONS

(a) To follow the instructions of supplier in the promotion and sale of the products.\(^{67}\)
(b) To provide supplier with information from time to time in connection with the commercialization of the products.
(c) To acquire a minimum amount of products.
(d) To achieve minimum sales quota.\(^{68}\)
(e) To have a sufficient number of spare parts.
(f) To conduct sales promotion activities (such as advertising, after-sale service and guarantee, maintenance of specialized personnel).
(g) To purchase the products exclusively from supplier.
(h) To purchase the complete range of products.
(i) To sell the products under the same trademarks or the same presentation indicated by the manufacturer.
(j) Not to commercialize products of the same or similar characteristics. As we have mentioned (see 2.2 above), however, the Vertical Agreements Regulation provides that such obligation may not exceed five years.
(k) Not to actively promote the sale of products (including, without limitation, advertising, opening of branches or keeping depots in territories which have been exclusively allocated to other distributors or to the supplier).\(^{69}\)
(l) Not to appoint sub-distributors.
(m) Not to compete with supplier after the expiry of the agreement (see 2.2.7 below).

\(^{67}\) It is questionable whether this is an obligation in the essence of any distributorship agreement or if, for it to exist, must be expressly agreed by the parties. Since Spanish courts interpret any commercial restriction in a limited way, we consider that for the distributor to be obliged to comply with the instructions of supplier an express covenant to the effect is required.

\(^{68}\) It is a question, as it has been justly pointed out by Juan Luis Iglesias Prada (op.cit., p. 263) as a result obligation, which differs from the obligation of means consisting in the commercialization of the products (which is, as we have already seen, an obligation consensual to any distributorship agreement).

\(^{69}\) As it has already been said, "passive sales" cannot be prohibited.
2.2.6 Indemnification upon Termination

There is freedom to agree upon the term of the agreement, which can be executed for a fixed or an indefinite term. The only limit to the freedom of the parties is the prohibition of establishing a perpetual contract (even in the case of a non-exclusive distributorship agreement) (see 2.2.2 above). Failing an agreement between the parties, it will be understood that the agreement is for an indefinite term.

The absence of specific legal regulations on the distributorship agreement is mainly experienced with respect to the termination of the same. Spanish courts have, not without some vacillations and inconsistencies, elucidated the rules applicable to this stage of the agreement-making, drawing a distinction between agreements for a fixed period and agreements for an indefinite term.

2.2.6.1 AGREEMENT FOR A FIXED TERM

When the parties have agreed upon a fixed term, the termination of the agreement by one of the parties before the expiry date entails, according to the case law of the Supreme Court, two consequences:

(a) The agreement is extinguished with final character.\(^{70}\)
(b) The denouncing party has to indemnify the other party unless evidence can be produced that the termination was due to a previous and sufficiently material breach by such other party.\(^{71}\)

Otherwise, most of our case-law states that after the expiry of the term agreed by the parties, the agreement terminates without entitlement to indemnity in favour of any of the two parties, such indemnity not being applicable if the parties have expressly waived such possibility in the contract.\(^{72}\) In this respect, there are authors\(^{73}\) who consider that if after the expiry of the initially agreed term the contractual relation continues to exist, the agreement becomes an agreement for an unlimited period, thus applying the solution set forth by the Law 12/1992 with respect to the agency agreement (see 1.2.7.1 above).

It is clear, in any case, that if both parties continue to perform the agreement after the expiry of the term, it may serve to support the existence of a verbal covenant whereby the parties have agreed upon the extension of the agreement.\(^{74}\)

2.2.6.2 AGREEMENT FOR AN INDEFINITE PERIOD

The parties to a distributorship agreement for an indefinite period may terminate it at any time, with or without cause ("ad nutum"),\(^{75}\) provided, however, that a prior written

\(^{70}\) As it is stated by the Decision of the Supreme Court of 24 February 1993, notice of termination by itself ends the contractual relation; the judicial decision that may be dictated will merely declare the termination which already took place.

\(^{71}\) Decision of the Supreme Court of 30 May 1994.

\(^{72}\) In any event we deem it advisable to include in the agreement a clause expressly establishing that no indemnity will apply upon termination of the same.

\(^{73}\) See Alicia Garcia Herrera, op. cit.

\(^{74}\) Decision of the Provincial Court in Barcelona of 22 June 1995.

\(^{75}\) We consider that to terminate the agreement no just cause is required, it being a question of successive tract agreement based on the mutual trust of the parties (in the same sense, Alicia Garcia Herrera, op. cit., p. 354.

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notice of termination be given with six months' notice when the terminating party is the supplier. 76

The failure to give the appropriate termination notice is not the only case where an indemnity will have to be paid by the terminating party. The Spanish courts have also ruled that an indemnification is also payable:

(a) When, under the concuring circumstances, the termination of the agreement may be considered as malicious, abusive or contrary to good faith. 77

The fact that the party which terminates the agreement may have given the other party an economic compensation (such as a reasonable compensation for the investments effected) may help to evidence that the termination has been made in good faith. 78

Finally, we think that when there is no just cause and the possibility of terminating the agreement "ad nutum" has not been expressly set forth in the contract, it may be considered that the termination is abusive and that an indemnity applies. 79

(b) When the termination on the part of the supplier is followed by his benefiting from the clientele obtained by the distributor, 80 under the application of the doctrine on enrichment without cause or the analogic application of Law 12/1992 on Agency. 81

Up to now we have examined the cases where the Spanish Courts determine the existence of an obligation to indemnify payable by the party who terminates unilaterally the agreement. There are, however, several instances where the existence of such an obligation can be contested:

(i) Some authors consider that under the analogic application of the Law 12/1992 on agency, an indemnity will be payable for the investments effected (see 1.2.8.2 above). 82

(ii) It is not clear either whether the remaining stocks which the supplier refuses to repurchase after termination of the agreement should be the subject of indemnity.

(iii) It is also questionable whether there is entitlement to indemnity in the cases when the obligation of non-competition after the termination of the agreement has been imposed upon the distributor.

(cont'd)

et seq.; see also Decision of the Provincial Court in Barcelona, of 30 January 1995). However, some court decisions seem to oppose the termination of the agreement ad nutum (see Decision of the Provincial Court in Bilbao of 26 November 1992).

76 This requirement has been established by means of a recent amendment (effected by means of Law 52/1999, of 29 December) of the Spanish Law 2/1991, of 10 January, on Unfair Competition. The consequence of infringing such provision is that the termination shall be considered as abusive and the supplier shall be liable to damages. The only cases where the absence of such termination notice is permissible are (a) when the distributor is in material breach of the agreement, and (b) in force majeure situations.

77 See Decision of the Supreme Court of 17 October 1995.

78 See the Decision of the Supreme Court of 24 February 1993.

79 See the Decision of the Provincial Court in Barcelona, of 25 February 1992.

80 See the Decision of the Supreme Court of 22 May 1988 and 27 May 1993, among others.

81 See the Decision of the Supreme Court of 14 February 1997 and the Decision of the Provincial Court in Salamanca of 9 June 1997.

82 See Alicia García Herrera, op. cit.
In cases (ii) and (iii) it seems that the party who has seen the agreement terminated, is not entitled to specific indemnity for the above-mentioned concepts. As regards case (i), considering the analogical application of Law 12/1992 to distribution agreements made by the Spanish courts, our understanding is that the distributor could be entitled to an indemnity for his investments. Be as it may, in the event of abusive termination or contrary to good faith, we have already seen that there is entitlement to indemnity. In such case the indemnity must cover all of the damages caused,\(^86\) we therefore think, that it should include, as the case may be, both an indemnity for the investments effected and which have not been amortized,\(^87\) and for the remaining stocks.\(^88\) As regards the indemnity for the non-competition clause, it seems that the distributor will only be entitled to compensation if the supplier takes advantage of the clientele contributed by the distributor (such an indemnity thus leading to an indemnity for clientele).

In all cases, the indemnity must include not only the value of the loss incurred, but also the profit that the distributor failed to obtain (Article 1106 of the Civil Code).\(^89\) In actual practice, the courts have a great margin of discretion to fix the amount of the indemnity which, as it can be seen, must include both the consequential damage and the loss of profit.

As we have already mentioned at the beginning of this section, no economic compensation is due when the termination of the contractual relation takes place by reason of a previous and sufficiently serious default by the other party.\(^90\) Thus, for instance, the supplier shall have no obligation to pay an indemnity if he terminates the agreement on the grounds that the sales quota agreed in the contract by the parties\(^91\) has not been met by a great difference, or if the distributor has failed to pay a substantial amount.\(^92\) In addition, no economic compensation shall be due to the distributor where such right is expressly waived in its contract, as recently stated by the Supreme Court in its judgments dated March 18, 2002 and April 7, 2003.

2.2.7 Non-competition after Termination

Non-competition clauses after the termination of the agreement are only permissible if certain requirements laid down by the Vertical Agreements Regulation are met. In any event, when the relevant non-competition clause is permissible under such Regulation, it must not exceed the term of one year.

\(^87\) See Decision of the Provincial Court in Valencia of 25 January 1990. On the contrary, the Decision of the Territorial Court in Valencia of 20 January 1992 considers that the indemnity should not be increased by the amount of the investments effected, since such investments had already been partially amortized during the years when the distributor was working with the supplier and may be used to continue performing the same tasks in respect of other goods.
\(^88\) The Decision of the Supreme Court of 12 December 1990 sentences the supplier to acquire again the material supplied at the price of supply.\(^93\) It should also be taken into account art. 1107 of the same Code according to which the damages for which the good faith debtor is liable, are those envisaged or which could have been envisaged at the time the obligations were established and which derive from his non-compliance.
\(^89\) Decision of the Supreme Court of 8 November 1995 which nonetheless provides that if the difference between the agreed sales quota and the results obtained is minimal, the termination should be considered abusive, lacking of grounds and capricious.
\(^90\) Decision of the Supreme Court of 3 December 1992 where unpaid bills amounted to seven million pesetas.
On the other hand, it does not seem that the inclusion in the distributorship agreement of a clause on non-competition after the termination of the agreement entails, by itself, the entitlement to indemnity. However, it is considered that such an indemnity will be payable in the cases where the supplier benefits from the clientele contributed by the distributor.

[THE NEXT PAGE IS SPAIN–45]
MERCANTILE AGENCY AGREEMENT

This Agreement, made as of the day of ____________, by and between ____________, a __________ company duly organized and existing under the laws of ____________, having its registered office at ____________, (hereinafter referred to as the "COMPANY") and ____________, a corporation duly organized and existing under the laws of ____________, having its registered office at ____________, (hereinafter called the "AGENT").

WITNESSETH

WHEREAS, the COMPANY is engaged in manufacturing of certain PRODUCTS (as hereinafter defined); and

WHEREAS, the AGENT desires to acquire the exclusive right to represent, sell and market the PRODUCTS in the TERRITORY (as hereinafter defined) under the terms and conditions of this Agreement,

NOW THEREFORE, for and in consideration of the mutual promises and covenants herein contained and other good and valuable consideration, the parties hereto agree as follows:

1. Definitions

1.1. "COMMISSION(S)" shall have the meaning set forth in Article 6.1. below.

1.2. "PRODUCTS" shall mean all _______________ manufactured by the COMPANY at the date of execution of this Agreement and listed in Schedule A hereto as well as any other _______________ manufactured by the COMPANY during the term of this Agreement, which future products shall be automatically incorporated to such Schedule A.

1.3. "TERRITORY" shall mean Spain.

2. Appointment. Object

2.1. Appointment

Subject to the terms and conditions of this Agreement, the COMPANY hereby appoints the AGENT as the COMPANY's exclusive agent for the representation, commercialization and sale of PRODUCTS in the TERRITORY, and the AGENT hereby accepts and agrees to such appointment.

The appointment of the AGENT as the COMPANY's agent in the TERRITORY being agreed on an exclusive basis, the COMPANY hereby binds itself not to appoint any other agent for PRODUCTS in the TERRITORY during the term of this Agreement.

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2.2. Object

During the term of this Agreement, the AGENT shall obtain orders for PRODUCTS in the TERRITORY in the name of the COMPANY, which shall be completed and fulfilled by the COMPANY.

The COMPANY shall establish and notify in writing to the AGENT:

a) Prices for the Products.
b) Delivery Terms.
c) Conditions of Payment.
d) Other economic conditions relevant to such orders.

The AGENT shall perform its agency activities under this Agreement through its own organization or through any sub-agents it may choose at its entire discretion.

2.3. Other Orders received by the COMPANY

Both parties represent and recognize that the intervention of the AGENT in opening the market in the TERRITORY for PRODUCTS may result in the COMPANY's receiving orders for PRODUCTS directly from third persons established within the TERRITORY and not through the AGENT.

Both parties agree that the AGENT should also be compensated for any such orders. Therefore, every month during the term of this Agreement, the COMPANY agrees to send to the AGENT a written report stating all orders received from any customer in the TERRITORY and directly sent to the COMPANY.

3. Promotion and Advertising of PRODUCTS

3.1. The AGENT shall use its best efforts to faithfully and diligently promote the PRODUCTS in the TERRITORY, participating in commercial fairs, sending samples provided by the COMPANY to the customers, advertising the PRODUCTS, and performing any other reasonable activities that the COMPANY may suggest in order to develop and promote the sale of the PRODUCTS in the TERRITORY.

3.2. During the term of this Agreement the COMPANY agrees to pay ___ percent (___%) of the expenses of advertising and participation in commercial fairs incurred by the AGENT, to promote the sale of the PRODUCTS in the TERRITORY, until the limit amount of ______________ (____________) per year.

4. Information

4.1. The COMPANY shall have the obligation to inform the AGENT about the possibilities of sale of the PRODUCTS.

4.2. Upon request by the COMPANY, the AGENT shall send to the COMPANY reasonable reports on the situation of the market for PRODUCTS in the TERRITORY.
5. Stock

The COMPANY agrees to maintain a minimum stock of ___ of PRODUCTS chosen by the AGENT on the AGENT’s warehouses in order to allow the AGENT to promote future orders.

6. COMMISSIONS. Form of Payment

6.1. COMMISSIONS

The COMPANY agrees to pay the AGENT a commission, which shall consist in ___ per cent (%) on the F.O.B. value of the PRODUCTS (the “COMMISSION”), for all sales performed in the TERRITORY, following orders received from the AGENT or other orders as referred to in paragraph 2.3. above.

If during the ____ (__) months following the date of execution of this Agreement, the sales of PRODUCTS in the TERRITORY by the COMPANY (through orders received from the AGENT or other orders as referred to in paragraph 2.3. above) achieve the levels indicated below, then the COMPANY shall pay to the AGENT, in addition to the COMMISSIONS, the amounts also indicated below:

a) Sales by the COMPANY from ___ to ___:
   the COMMISSION shall be increased in ___ percent (%).

b) Sales by the COMPANY from ___ to ___:
   the COMMISSION shall be increased in ___ percent (%).

6.2. Form of Payment

COMMISSIONS shall be paid in ________________, in the Bank designated by the AGENT and following instructions in respect of the necessary transfers.

COMMISSIONS shall be paid within _______________ days from the date in which the COMPANY has collected the letter of credit or the amount of the sales from the customers.

7. Term

7.1. Subject to 7.2. below, this agreement shall be effective as of the date first above written, shall be in full force and effect during an initial period of ___ (__) years as of such date, and shall be automatically extended for subsequent periods of ___ (__) years each unless one party notifies the other its intention to terminate it at least ___ (__) months prior to the expiry of the initial period or of any of its extensions.

7.2. Notwithstanding the provisions of 7.1. above, both parties agree that this Agreement shall be automatically extended, if the sales of PRODUCTS in the TERRITORY during the initial period of validity exceed ___ and, thereafter, if sales of PRODUCTS in the TERRITORY during any extension period of
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___(____) years exceed at least in ____% the sales of the PRODUCTS in the TERRITORY during the ____(___) precedent years.

8. Compensation for Termination

CLAUSE FAVORABLE TO THE AGENT

8.1. At the end of this Agreement the AGENT, shall have the right to receive from the COMPANY, as compensation for the AGENT's efforts in opening the market of the TERRITORY for PRODUCTS, a compensation which shall be calculated as follows:

\[
\text{Compensation} = \frac{a + b}{2}
\]

Where:

(a) = Commissions paid by the COMPANY to the AGENT during the _____ months immediately preceding the month in which termination of the Agreement is effective.

(b) = Commissions paid by the COMPANY to the AGENT during the __________ months immediately preceding the __________ months referred in (a) hereinabove.

8.2. The AGENT shall not have right to the compensation for termination referred above if this Agreement is terminated because of breach by the AGENT.

8.3. The AGENT's right to the compensation for termination herein agreed does not preclude the AGENT's right to claim any other amount for damages and indemnities in case of termination of this Agreement because of breach of the COMPANY.

CLAUSE FAVORABLE TO THE COMPANY

8.1. Upon expiration of the term of this Agreement, the AGENT shall not be entitled to seek for an indemnity from the COMPANY.

9. No Competition

During the term of this Agreement, the AGENT shall not represent in the TERRITORY any product equivalent or directly competitive with the PRODUCTS.¹

¹ NON COMPETITION AFTER TERMINATION:
If a post-termination non-competition clause is to be included, it must be taken into account that Law 12/1992, on Agency, provides that an indemnification for the agent is possible upon termination of the agreement on the grounds of such a prohibition of competition. In order to avoid the payment of such indemnification, the following clause could be tried:

"9. No competition
During the term of this Agreement and _____ (____) months thereafter, the AGENT shall not represent in the TERRITORY any product equivalent or directly competitive with the PRODUCT. Considering the amount of the remuneration of the AGENT hereunder, the AGENT acknowledges that an indemnification upon termination would not be equitable on account of this non-competition after termination obligation. Therefore, the AGENT hereby binds itself not to seek for any such indemnification upon termination this Agreement.”

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10. General

10.1. Confidentiality

Both parties shall consider all information received from the other party relating to that party's business activities or products as confidential and shall prevent disclosure to any third party.

Such confidentiality obligation shall not be applicable to any information that is in the public domain at the time of its disclosure, or becomes part of the public domain thereafter by any means different from an act or omission of any of the parties disclosing it, nor to any information which any of the parties hereof may obtain from any third party which has it in its possession legally.

This Article 10.1. shall remain in force after the termination of this agreement and as far and as long as the totality of the information referred to in the first paragraph becomes part of the public domain.

10.2. Entire Agreement

This Agreement incorporates the entire understanding of the parties in respect of its subject matter, and supersedes any and all agreements, contracts, undertakings or arrangements that might have been existed heretofore between the parties regarding the subject matter hereof.

10.3. Amendments and waivers

This Agreement might not be amended unless by means of a written instrument agreed upon and executed by both parties.

Any waiver by either party of any provision of this Agreement or breach hereof shall not constitute a waiver of that provision or that breach on any future occasion or of any other provision or breach of this Agreement.

10.4. Governing Law

This agreement shall be governed and interpreted under the laws of Spain.²

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in duplicate, as of the day and year first above written, by their duly authorised representatives.

²The court corresponding to the domicile of the AGENT is the only one who is competent to resolve any discrepancies on the agreement.
DISTRIBUTION AGREEMENT

This AGREEMENT is made and effective this _____ day of _____, 20__, by and between _____, a ______ corporation organized and existing under the laws of_____, having its principal office at _____ (hereinafter referred to as "SUPPLIER"), and ________, a ________ corporation, organized and existing under the laws of ______, having its principal office at _____ (hereinafter referred to as "DISTRIBUTOR").

WITNESSETH

WHEREAS SUPPLIER is engaged in the manufacture and sale of certain PRODUCTS (as hereinafter defined) and

WHEREAS SUPPLIER desires to have these PRODUCTS distributed in the TERRITORY (as hereinafter defined) and the DISTRIBUTOR desires to be appointed and named exclusive DISTRIBUTOR for such PRODUCTS in the said TERRITORY,

NOW, THEREFORE, in consideration of these premises and of their mutual agreements, covenants and conditions hereinafter set forth, the parties hereto mutually agree as follows:

1. Definitions

The parties agree that, for the purposes of the present Agreement, the following terms will have the meaning specified hereinafter:

a) “PRODUCTS” shall mean those products listed in Schedule A attached hereto and made part hereof. The addition of other PRODUCTS to Schedule A might be agreed by the parties from time to time.

b) “TERRITORY” shall mean Spain.

c) “TRADEMARK” shall mean the trademarks which are described in Schedule B hereto and made part hereof, which shall be registered by the DISTRIBUTOR in the TERRITORY if necessary, and owned by the SUPPLIER.

2. Appointments

2.1. Subject to the terms and conditions of this Agreement, SUPPLIER hereby appoints DISTRIBUTOR, who accepts, as the distributor of the PRODUCTS in the TERRITORY.
DISTRIBUTION AGREEMENT

2.2. The SUPPLIER grants DISTRIBUTOR the exclusive right to distribute the PRODUCTS under the TRADEMARK in the TERRITORY. Therefore, the parties hereby agree as follows:

2.2.1. SUPPLIER agrees (a) not to grant any distribution rights for the PRODUCTS distinguished by the TRADEMARK in the TERRITORY in favor of third parties, and (b) not to actively distribute nor supply the PRODUCTS distinguished by the TRADEMARK, itself or through third parties, in the TERRITORY.

2.2.2. DISTRIBUTOR agrees not to advertise, solicit orders or otherwise actively seek customers for the PRODUCTS nor maintain any distribution facility for the PRODUCTS outside the TERRITORY.

3. Rights and Obligations of DISTRIBUTOR

3.1. DISTRIBUTOR will perform the Agreement in good faith, and shall use its best reasonable efforts to promote, develop and increase the sales of the PRODUCTS in the TERRITORY.

3.2. In order to ensure a continuous distribution of the PRODUCTS, DISTRIBUTOR shall at all times keep a stock of PRODUCTS adequate to meet the needs of the market.

3.3. DISTRIBUTOR will seek SUPPLIER’s approval in writing for any planned publicity for the PRODUCTS in the TERRITORY, which consent shall not be unreasonably withheld. Any and all costs incurred by DISTRIBUTOR in promoting, advertising and distributing the PRODUCTS shall be entirely borne by the DISTRIBUTOR.

3.4. DISTRIBUTOR is not entitled to appoint sub-distributors and/or agents in the TERRITORY, without the prior written consent of the SUPPLIER.

3.5. During the term of this Agreement, DISTRIBUTOR shall purchase all its requirements of PRODUCTS from the SUPPLIER (or from a third party indicated by the SUPPLIER).

1 Exclusivity is not presumed by Spanish law and must therefore be expressly agreed upon by the parties. Nevertheless, even if the agreement is to be entered under a non-exclusivity basis, our recommendation would be to make this clear as well.

2 Therefore, the SUPPLIER is entitled to appoint other distributors in the TERRITORY with respect to products bearing trademarks other than the TRADEMARK. If this possibility is wished to be eliminated then the expressions “under the TRADEMARK”, and “distinguished by the TRADEMARK” (in Section 2.2.1.) should be deleted.

3 See the previous Note.
4. Rights and Obligations of SUPPLIER

4.1. During the term of this Agreement, SUPPLIER shall supply DISTRIBUTOR those quantities of PRODUCTS ordered by DISTRIBUTOR in accordance with the following procedure:

4.1.1. DISTRIBUTOR shall furnish SUPPLIER with quarterly estimates of its requirements of PRODUCTS at least three (3) months before the start of each calendar year.

4.1.2. All orders placed by DISTRIBUTOR, shall be in writing, and shall indicate the following:
   (a) Quantity if the Product ordered by DISTRIBUTOR.
   (b) Transportation mean to be used.
   (c) Date of delivery.
   (d) Exact address to which the order is to be sent.

4.1.3. SUPPLIER shall supply all PRODUCTS ordered by DISTRIBUTOR, but shall not be obligated to supply more than ___% of the estimates furnished by DISTRIBUTOR. Except in extraordinary force majeure situations, SUPPLIER shall supply DISTRIBUTOR with the entirety of the PRODUCTS ordered within the maximum period of ____ (__) days after the receipt of the corresponding order by SUPPLIER.4

4.1.4. PRODUCTS shall be supplied in finished form, and packaged ready for their sale by DISTRIBUTOR, using DISTRIBUTOR’s packaging materials as DISTRIBUTOR may from time to time indicate, provided that such materials have been previously approved by SUPPLIER, which approval shall not be unreasonably withheld. The PRODUCTS supplied hereunder shall not have an expiry date shorter than ____ (__) days from the receipt of the said PRODUCTS by DISTRIBUTOR.

4.2. SUPPLIER warrants that PRODUCTS supplied to DISTRIBUTOR under this Agreement shall meet the quality specifications set forth in Schedule C hereto.

4.2.1. Within the period of ____ (__) days after receiving any PRODUCTS, DISTRIBUTOR shall perform the necessary tests on the PRODUCTS to determine whether they comply with such specifications and shall inform SUPPLIER of the results. If, within the mentioned term, SUPPLIER does not receive any notice from DISTRIBUTOR, it will be understood that the PRODUCTS have been found satisfactory by DISTRIBUTOR.

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4 It is possible to add that DISTRIBUTOR will be entitled to acquire the same from any third party as long and as far as SUPPLIER (or the third party indicated by SUPPLIER) is unable to supply DISTRIBUTOR with the entirety of the ordered PRODUCTS, provided that the relevant orders do not exceed a determined percentage of the forecasted amount.
DISTRIBUTION AGREEMENT

4.2.2. Should the results of the tests performed by DISTRIBUTOR indicate that the PRODUCTS do not comply with the specification, and once the SUPPLIER agrees with the results obtained by DISTRIBUTOR, DISTRIBUTOR shall have the right to request replacement of such PRODUCTS by SUPPLIER. In such event, DISTRIBUTOR shall deduct from future invoices all transportation and insurance costs, custom duties and any others charges that DISTRIBUTOR may have paid for the importation in the TERRITORY of those PRODUCTS which did not comply with said specifications.

4.2.3. Should SUPPLIER not agree with any claim made by DISTRIBUTOR under the provisions of this Article, both parties shall designate by mutual agreement a third party which shall analyze the corresponding PRODUCTS in order to ascertain whether they meet said specifications or not. Both parties agree to accept the result obtained by such independent third party. The costs arising from its intervention shall be entirely borne by the party whose results were found in error.

4.2.4. Notwithstanding the provisions of this Article, SUPPLIER shall not be deemed responsible in the event that such unfavorable results are due to faulty storage conditions on the side of DISTRIBUTOR or to delays in customs clearance or due to any other cause beyond the control of either party.

4.3. SUPPLIER shall assist DISTRIBUTOR in the sales of the PRODUCTS in the TERRITORY. To this effect, SUPPLIER will provide technical support to DISTRIBUTOR to the extent it is customary in normal commercial practice. SUPPLIER shall also furnish DISTRIBUTOR with all information available to SUPPLIER reasonably necessary and adequate for a better exercise of the rights hereunder granted to DISTRIBUTOR, it being understood that such obligation shall be subject to the terms and conditions of any agreement under which SUPPLIER may have acquired such information.

4.4. SUPPLIER shall, at its own cost, maintain in force the TRADEMARK during the term of this Agreement, and shall fulfill the other obligations set forth in Article 7 hereto.

5. Payment and Prices. Transportation

5.1. PRODUCTS shall be sold to DISTRIBUTOR at the prices stated in Schedule D hereto during the first ____ (___) years following the entry into force of this Agreement. After such period, SUPPLIER will be entitled to review the prices, it being understood that any such modifications will be notified in writing to the DISTRIBUTOR and will not affect orders placed by the DISTRIBUTOR prior to receiving such notification.5

5 It is convenient for the DISTRIBUTOR to provide expressly both the terms and the periodicity of such price reviews.

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5.2. Late payments will automatically give rise to interests of ____% per month without express notification.

5.3. The PRODUCTS shall be sent to the DISTRIBUTOR using the transportation means indicated by the DISTRIBUTOR when placing its order. All transportation and insurance costs shall be paid by _____.

6. Minimum Purchases

During the term of this Agreement, DISTRIBUTOR agrees to purchase from SUPPLIER, every year, an amount of PRODUCTS not inferior to those specified in Schedule E hereto.

7. TRADEMARK

7.1. DISTRIBUTOR shall commercialize the PRODUCTS in the TERRITORY under the TRADEMARK and may also use the TRADEMARK in all its activities to promote the sale of the PRODUCTS. DISTRIBUTOR shall not use the TRADEMARK and logo for any other purpose different than those stated in this Agreement. Under no circumstances the Agreement will be interpreted or construed as to grant any other right with respect to the TRADEMARK and logo to DISTRIBUTOR. DISTRIBUTOR will not register or cause to be registered, or do anything to lessen the value of SUPPLIER’s trademark or logos.

7.2. SUPPLIER warrants that the use of the TRADEMARK and the logo referred to in Article 7.1 heretofore do not infringe the rights of any third party, and agrees to indemnify and hold DISTRIBUTOR harmless in case of any claim is addressed against DISTRIBUTOR because of the use of the TRADEMARK and/or the logo.

7.3. As soon as DISTRIBUTOR is aware of any infringement of the TRADEMARK or use of the same by third parties, DISTRIBUTOR shall notify such circumstance to SUPPLIER. DISTRIBUTOR may initiate judicial actions against any infringer or potential infringer in case SUPPLIER fails to do so within a reasonable period of time, in which case DISTRIBUTOR shall bear all the costs of action and shall be entitled to all recoveries.

7.4. At the request of DISTRIBUTOR, SUPPLIER shall at any time during this Agreement, execute such public and/or private documents as may be necessary to record DISTRIBUTOR as licensee of the TRADEMARK and the logo referred to in Article 7.1.

8. Liability

8.1. The SUPPLIER shall indemnify and hold the DISTRIBUTOR harmless from any third party’s claims addressed to the DISTRIBUTOR and resulting from the manufacture of the PRODUCTS by the SUPPLIER or for its account.
DISTRIBUTION AGREEMENT

8.2. The DISTRIBUTOR shall indemnify and hold the SUPPLIER harmless from any third party's claims addressed to the SUPPLIER and resulting from the activities conducted by the DISTRIBUTOR or for his account under this Agreement, including, without limitation, the storage, distribution, promotion, and sale of the PRODUCTS in the TERRITORY.

9. Term

9.1. This Agreement shall commence as of the day of its execution, and continue for a period of ____ (__) years.

9.2. The Agreement will be tacitly renewed for successive periods of ____ (__) years each, until one of the parties terminates the Agreement by registered mail, by giving ____ (__) month’s notice to the other party.

10. Early Termination

10.1. In the event of serious breach of contract or gross negligence by a party or in the event of bankruptcy, liquidation, attachments, or similar proceedings regarding a party, the other party will have the right to terminate the Agreement by registered letter with immediate effect, and without any damages being due to the terminated party.

10.2. The parties agree that the following events will be qualified as a serious breach, as referred to in the previous article:

- any non-observance of the Agreement, which is brought to the attention the non-observing party by registered letter, and which is not remedied within thirty (30) days after mailing such a letter.

- The failure to observe its payment obligations, and particularly the payments terms pursuant to Article 5.

- The non-fulfillment by DISTRIBUTOR of the Minimum Purchases referred to in Article 6, in any year during the term of this Agreement.

11. Upon Termination

Upon termination of this Agreement for any reason whatsoever:

11.1. SUPPLIER shall buy from DISTRIBUTOR all the stocks of PRODUCTS held by DISTRIBUTOR which are in good selling condition, at the same price paid by DISTRIBUTOR to SUPPLIER.

11.2. DISTRIBUTOR shall immediately cease in the promotion and sale of the PRODUCTS.

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11.3. DISTRIBUTOR shall cease in the use of the TRADEMARK and logo.6

11.4. The DISTRIBUTOR shall not be entitled to claim from the SUPPLIER any amount in consideration for concepts such as opening of market, goodwill, loss of business or loss of profit, transfer of customers, investments made. The DISTRIBUTOR expressly renounces to any claim of such sort even if it legally entitled to file it under any relevant Law.7

12. Non-Competition

12.1. DISTRIBUTOR warrants that on the day hereof, DISTRIBUTOR is not commercializing any PRODUCTS directly competitive with the PRODUCTS. The terms “directly competitive” mean PRODUCTS being of the same nature of the PRODUCTS.

12.2. During the term of this Agreement, and unless otherwise agreed by SUPPLIER in writing, DISTRIBUTOR agrees not to manufacture nor commercialize any product directly competitive with the PRODUCTS.8

13. Miscellaneous

13.1. Unless otherwise expressly mentioned in this Agreement, the rights and obligations hereunder may not be transferred in favor of third parties without the prior written consent of the other party.

13.2. Neither party has authority to oblige the other in any manner whatsoever by means of any agreement, convention, guarantee or order, written or oral, or by means of any instrument or action of any nature whatsoever, except with the prior written consent of such party.

13.3. This Agreement constitutes the entire understanding of the parties with respect to the subject matter hereof and supersedes all prior offers, discussions, agree-

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6 To reinforce the DISTRIBUTOR’S position, this Article 11.3. may be replaced by the following text: “11.3. Upon termination of this Agreement, neither SUPPLIER nor DISTRIBUTOR shall be entitled to use TRADEMARK and/or the logo in the TERRITORY (and/or any trademarks, trade names and/or logos similar to the TRADEMARK or to the logo). SUPPLIER shall adopt all steps required to cancel the TRADEMARK in the TERRITORY.”

7 It is not clear whether the Spanish Courts would accept the enforceability of this last sentence.

8 In case that a non-competition after termination clause is included in the agreement, then the DISTRIBUTOR might be, according to the current Case-Law of the Spanish Supreme Court, entitled to an indemnification if the SUPPLIER benefits from the clientele contributed by the DISTRIBUTOR. A solution to avoid uncertainty between the parties, which would be possibly accepted by the Spanish Courts, would be to predetermine the amount to be paid by SUPPLIER to DISTRIBUTOR in consideration of the assumption by DISTRIBUTOR of the non-competition after termination clause.
14. Governing Law and Jurisdiction

14.1. The Agreement will be governed and interpreted under the laws of Spain. The United Nations Convention on Contracts for the International Sales of Goods shall have no application to this Agreement and is hereby excluded.

14.2. The parties shall make all reasonable efforts to amicably resolve any disputes which may arise out of or relating to the application of this Agreement. In the event that the parties fail to so resolve any dispute, then the dispute shall be settled by arbitration by one (1) arbitrator and according to the rules of the International Chamber of Commerce. The parties bind themselves to comply with the Arbitration Resolution that may be enacted.

The proceedings shall take place at _____ if arbitration is requested by SUPPLIER and at _____ if arbitration is requested by DISTRIBUTOR.

This provision shall not preclude the right of either party to address any competent Court or Tribunal in respect of obtaining interim measures.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in duplicate, as of the day and year first above written, by their duly authorized representatives.

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