

DISTRIBUTION AGREEMENTS IN ITALY

AGENCY AGREEMENTS (art. 1742 c.c.)

DEALERSHIP AGREEMENTS (Atypic)

FRANCHISING (L. 129/2004)

1. AGENCY AGREEMENTS

ADVANTAGES

The agent allows the producing/exporting Company a more effective control on the clients, as the company sells directly to clients

DISADVANTAGES

The agent is appointed for sales only and no other service.
The risk of insolvency remains to the producing/exporting company

2. DEALERSHIP AGREEMENTS

ADVANTAGES

The Dealer organizes the sale taking care of the following operations: customs clearance, shipping to the addressee, stocking, post-sale assistance, sale, installation services.
Occasionally the Dealer will pay in advance for products and will bear the risk of insolvency of the customer.

DISADVANTAGES

The licensee sells directly to customers (he considers his own) and on whom the producing/exporting company has limited control.
At the termination of business relation, the Manufacturer risks to lose customers or worse that customers are redirected to the competition.
Risk of insolvency if anticipated payments are not agreed.

DISTRIBUTION AGREEMENTS (AGENCY AND DEALERSHIP AGREEMENT) IN EUROPE

- Uniformity of the regulations in the CEE 86/653 directive;
- Agent as "weak party in the agreement";
- Absence of specific laws (atypic contract) for the dealership agreement; general reference to the regulation No. 330/2010 about vertical agreements

1. AGENCY AGREEMENT

CEE 86/653 DIRECTIVE of December 18, 1986:

- it has been adopted by all the member states;
- it does not regulate all the aspects of the agreement and grants the member states the freedom to regulate the matter on issues the Directive has not dealt with ;
- it offers alternative solutions for instance on the Agents' Indemnity ;
- the national law applicable regulates the agency relations.

Definition of commercial agents is under art. 1.2 of the UE directive No. 86/653.

- The appointment of the agent is to promote and negotiate business on behalf of the producing/exporting company. A commission is due for this service, to be calculated on a percentage of the value of the business;
- The agent will work with the freedom to arrange his schedule and taking upon himself the risks of his business organization;
- In some Countries the activity may occur also as paid employment.

According to the Directive **86/653/CEE (art. 17)** an indemnity shall be paid to Agents in the event of termination of the business relation.

ITALIAN STATUTES

Under article 1751 of the civil code, at the termination of the agreement, the principal shall pay an indemnity to the agent.

- a) Such indemnity is due when the agent has procured new customers to the principal or has significantly increased the business with existing customers and the principal is still profiting from such business with said customers;
- b) The payment of said indemnity must be fair, and must keep in mind all the circumstances, in particular the commissions the agent shall lose resulting from his business with the customers;
- c) The amount of the indemnity cannot exceed an amount equal to a yearly indemnity, calculated on the basis of the yearly average of the payment the agent has collected in the last 5 years, and in case the contract was drawn up less than 5 years ago, on the average of the period;
- d) The indemnity is not due if the termination occurs for the agent's breach or for the Agent's withdrawal;

The calculation of the indemnities could also be calculated pursuant to the **Collective Economic Agreements - A.E.C.** (for instance business A.E.C. of 10.03.10), which provide for:

- An indemnity of termination of the business relation calculated on the basis of the commissions accrued yearly (between 30% and 100% of the average yearly commissions);
- If the contract is terminated by the Principal or for a reason not ascribable to the agent's breach of contract, a further indemnity is due (calculated in percentage on the total amount of the commissions and other sums due to the agent).

A.E.C. are applicable: if the parties are enrolled in contracting unions, if they have explicitly mentioned it or have accepted during the business relation.

According to the Court of Justice (23.03.2006, lawsuit C-465/04, Honyvem Informazioni commerciali Srl) *"the indemnity of termination of business relation cannot be replaced, when applying a collective agreement, by an indemnity calculated according to criteria different from those fixed by this provision"* unless more favorable.

AGENCY AGREEMENT AND ANTITRUST

Since the principal assumes financial and commercial risks linked to the sale and purchase of goods or services subject matter of the agreement, **all the obligations charged upon the agent relevant to the agreements drawn up and/or negotiated on behalf of the principal do not fall under the application span of article 101 TFUE (before: art.81 TCE), paragraph 1.**

The situation is different for misconduct of Principals in using agents to implement concerted practices relevant to the business strategy in the markets.

THE FOLLOWING OBLIGATIONS FOR THE AGENT will be considered part of a common Agency Agreement (in compliance with Antitrust Rules)

- a. **Limitations relevant to the territory** where the agent may sell such goods or services;
 - b. **Limitations relevant to the clients** to whom the agent may sell such goods or services;
 - c. **Prices and conditions** under which the agent must sell or purchase such goods or services.
- **CLAUSES OF EXCLUSIVE AGENCY:** the principal cannot appoint other agents for a certain kind of operation, for a certain client, or territory. Such clauses **do not usually cause anticompetitive effects.**
 - **CLAUSES prohibiting the agent to work as an agent or distributor for companies competing with the principal** (the so-called single branding) **and those exceeding the duration of the agreement**, relevant to the competition among brands, **may breach article 101, par. 1;**

Such clauses can benefit from the Regulation 330/2010 (Vertical Agreements), a regulation of exemption by category.

THE INDEPENDENT DISTRIBUTOR

As regards the application of article 101 par. 1, the **agent must be considered as an independent distributor and must undertake one of the following financial or business risks:**

1. **specific risks of the agreement** (for instance financing the stocks);
2. **risks originated from specific investments** (usually not recoverable);
3. **risks connected to other activities; EXAMPLES :**
 - Transportation and logistics;
 - Item stocks;
 - Advertisement investments;
 - Investments on equipment / software / specific training for the principal's items;
 - Advertisement;
 - Technical support

DEALERSHIP AGREEMENT

Dealership agreement has the purpose of promoting and organizing the sale of items of a manufacturer/exporter in a foreign territory.

This is a "FRAMEWORK AGREEMENT" containing the following:

- specific obligations (e.g.: exclusive, promotional)
- the possible content of future agreements (e.g.: to purchase items);
- the obligation to have a target (e.g.: obligations in the purchase of a minimum amount of goods).

Moreover:

- The promotion and resale may occur through sub-dealers or agents;
- Such dealership is usually granted exclusively to the distributor provided the latter does not sell competitive items;
- Such agreement may be used both for wholesale and retail.

In ITALY, dealership agreements are not regulated by statutes, but there are a lot of rules (by case law, etc) applicable on the matters. So **the contractual text must be drawn up with special care and details.**

GENERAL CONTRACTUAL REGULATION

OBLIGATIONS OF THE GRANTOR/MANUFACTURER :

1. Obligation to **supply the products** (specify listing conditions, terms and prices)
 - The possible rejection of the Manufacturer is considered as breach.
2. Obligation to **guarantee that the products are not defective, not working, or not complying with the regulations of the market (cfr. Consumer Code).**

OBLIGATIONS OF THE DEALER:

1. obligation to purchase and distribute the items;
2. promotional obligations;
3. post-sale assistance;
4. other collaboration obligations.

EXCLUSIVITY

- territorial or on determinate clients;
- on all the items or part of them;
- bilateral or unilateral:
 - ✓ Favoring the dealer
 - ✓ Favoring the Manufacturer

DISCOUNTS AND BONUS

- purchase of minimum amounts or targets (occasionally);
- Bonus and discounts when the amount of items has been reached in a certain period;
- for promotional activities

Other Clauses: TERMS; PRICES; TERMINATION; SUSPENSION

