

Distribution & Agency

Contributing editor
Andre R Jaglom



2018

GETTING THE
DEAL THROUGH

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Andre R Jaglom

Tannenbaum Helpert Syracuse & Hirschtritt LLP

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This article was first published in April 2018

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Published by
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London, W11 1QQ, UK
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No photocopying without a CLA licence.
First published 2014
Fourth edition
ISBN 978-1-78915-014-8

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



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Preface

Distribution & Agency 2018

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Distribution & Agency*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, France, Greece, India, Poland, Turkey and UAE.

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

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

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

GETTING THE 
DEAL THROUGH

London
March 2018

Poland

Olga Sztejnert-Roszak and Magdalena Kowalczyk-Szymańska

SWKS Sztejnert, Winnicka, Kowalczyk, Sosnowska

Direct distribution

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

A foreign supplier may establish its own entity to import and distribute its products in Poland. It may be registered as a branch, may establish a partnership or a capital company. There is no need to obtain permission. A branch must be registered in the entrepreneurs register of the Land Court Register; a partnership or a company must be first established and, after that, registered in the same register. The scope of formalities depends on the legal form of the entity.

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

A foreign supplier may establish a partnership with a Polish natural or legal person or persons and may also establish a capital company and acquire some of its shares.

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

The most popular form of conducting business in Poland is limited liability company (Ltd). A foreign supplier may establish an Ltd solely, unless a supplier (shareholder) is a limited liability company having the sole shareholder. An Ltd having the foreign supplier as a shareholder, has to be established in the presence of the Polish Notary Public; the content of the deed of association is provided in the Polish Code of Commercial Companies. The foreign supplier, while establishing a Polish Ltd, must elect at least one member of the management board, who does not have to be a Polish citizen. The newly created company must have an address in Poland and be registered in the Land Court Register, statistical and tax register. An Ltd becomes a legal personality while it is registered in the Land Court Register. It is governed by Polish law.

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

There are no general restrictions in conducting business in Poland. Polish and foreign entrepreneurs are treated equally. There are some restrictions in acquiring real estate by a foreign entity and by the company or partnership where foreign entities are involved.

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

A foreign supplier may own an equity interest in the local entity that distributes its products; it may be a partner of the Polish distributor in a partnership established under Polish law and a shareholder in the capital company. It may be the majority or minority shareholder.

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

The conducting of business in Poland is in general subject to value added tax. Registration of the entity in the competent tax office for tax purposes is necessary. There are also fees related to the establishment and registration of the company, such as notary fee, court fee for the registration of the company and fee for the publication of the announcement of the company's registration in the official journal.

Although limited liability company is the most popular and well-known form of conducting business in Poland, it is not advantageous from the shareholder's tax perspective, because first the company's profit is taxed in the company (by corporate income tax) and the dividend is taxed as personal income tax, as the income of the shareholder. The business entity in Poland, which hires the employees, is obliged to notify the Social Security Institution and to pay the social security contributions monthly.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

The choice of distribution structure depends on the needs of the parties. The Polish agents are often natural persons but there are also the companies that are dealing with the representations of the domestic and foreign principals. An agent – pursuant to the Polish Civil Code – must be an entrepreneur, that is, must be registered in the entrepreneurs registers and obtain the statistical number (which is pure formality). The popular way of conducting business in Poland is franchising. The 'pure' distribution of goods (ie, resale of the products) is more often carried out by suppliers' own subsidiaries than by independent distributors (car dealers are the exception).

Polish civil law is based on the freedom of contract rule so the parties may in general regulate their distribution relationship, as they deem proper. The regulations regarding the agency agreement provide some restrictions, which are in accordance with the European law (ie, the commercial agents Directive 86/653/EEC). The distribution (sale-resale) agreement and franchising agreement are not regulated by Polish civil law, but their provisions must be in accordance with the European and Polish regulations regarding vertical restraints.

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

The relationship between a supplier and its distributor is regulated by the provisions of the Polish Civil Code; however, only the agency agreement is provided explicitly in the Civil Code. The other distribution related contracts are governed by the general provisions of the Polish Civil Code and by the provisions regarding the competition protection (in particular, the vertical restraints). The provisions on the intellectual property apply to the issues regarding trademarks licences. There are no industry mandatory self-regulatory constraints.

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

Pursuant to the Polish Civil Code, an agency contract concluded for an indefinite period of time may be terminated with one month's notice in the first year, by a two-month notice in the second year, and by a three-month notice in the third and any subsequent year of the duration of the contract. Statutory terms of notice shall not be shortened. They may be prolonged in a contract provided that the term of notice specified for the principal is not shorter than that which is specified for the agent. Prolongation of the term of notice for the agent renders identical prolongation for the principal. The provisions of the Polish Civil Code on the termination of the agency contract are mandatory.

Neither the law nor the courts provide the exact minimum period of notice for other distribution-related contracts. Pursuant to the general provisions of the Civil Code, the continuous obligation without the term shall expire in accordance with contractual term, legal term or customary term but if any, it shall expire without delay after the termination's notice is effective. Considering the absence of the legal term, the contractual provisions shall be binding. If the parties have not provided the period of notice in the contract, the court has to discover, whether there is a customary term. The result will depend on the circumstances of the case (ie, length of the contract, its character, other terms provided, etc).

There is no other limitation as to the termination of the distribution contract and there is no specific cause required to terminate a distribution relationship.

An agency contract concluded for a definite time and performed by the parties after the lapse of the time for which it was concluded shall be deemed as concluded for an indefinite time.

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

Pursuant to the Polish Civil Code, after the termination of the agency contract, an agent may demand a compensating performance, if the agent, within the duration of the contract of agency, obtained new clients or led to a significant increase in turnover with the existing clients and the principal is still deriving considerable benefit from the contracts with those clients. The compensating performance cannot exceed the amount of the agent's commission for one year as calculated on the basis of an average annual remuneration commission obtained within the last five years. If the duration of the contract of agency is less than five years, the average amount for the whole duration of the contract shall be taken into consideration when calculating the compensation. An agent will not be entitled to the compensating performance in the following cases: (i) the principal terminated the contract owing to circumstances for which the agent is liable and that justify the termination of contract without notice; (ii) the agent terminated the contract, unless the termination is justified by the circumstances for which the principal is liable or by the agent's age, disability or illness and the good reasons do not allow for demanding that he or she continue performing the duties of agent; (iii) the agent, on the principal's consent, transferred his or her rights and duties arising under the contract onto another person.

There are no similar rules regarding the other distribution related contracts.

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

In general, the transfer of the rights arising out of the contract requires the consent of the other party thereto (only the transfer of the receivables is permitted without consent, if the contract does not provide otherwise). It means that there is no need to provide in the distribution contract concluded under the Polish law a ban on the transfer of rights.

However, there are situations where the rights and duties provided in the distribution contract are transferred automatically to the third party: the Polish Code of Commercial Companies provides for the

universal succession after the acquisition of the company. Where the company (distributor) is acquired by the other company, the latter steps into all rights and duties of the company being acquired automatically and the supplier cannot oppose it. This means that the provision of a distribution contract prohibiting the transfer of all or part of the ownership of the distributor or agent or the distributor or agent's business to a third party would be ineffective. Instead of the ban on transfer, the contract may provide that it automatically expires provided that some circumstances (such as transfer of particular distributor's rights or business) appear.

The distribution contract may reserve the pre-emptive right or the right of priority to purchase a distributor's business to the supplier, but unless the distributor notifies the supplier of the sale contrary to the terms of the distribution contract, the distributor is only liable for damages and the sale made in breach of the distribution contract (and the pre-emptive right) is effective.

Regulation of the distribution relationship

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

The confidentiality provisions are common not only in distribution agreements concluded under Polish law. In practice, it is necessary to provide not only the obligation to keep the information confidential, but also the contractual penalty as the sanction for disclosure, instead of general rules of liability for damage, since it is very difficult to prove the amount of the damage.

The limitations in enforcing the confidentiality provisions arise out of the mandatory provisions. The obligation to disclose information covered by secrecy arises, for example, from criminal proceedings rules. Eligible authorities, such as the police or prosecutor's office, have the right to demand disclosure of such information and courts have the power to waive the obligation to keep it confidential.

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

In principle, the obligation not to market competing products cannot be implied from the distribution contract itself and shall be expressly agreed between the parties. Consequently, the fact of having entered into a distribution agreement is not sufficient for implying that the distributor has to avoid selling competitive products. In accordance with the rule of freedom of contract, there are, in general, no limitations regarding the extent of a non-competition clause. However, the Polish government's regulation equivalent to EU Regulation 330/2010 sets some restrictions in this respect, if the contract affects competition on the Polish market.

It is, in principle, possible to provide in the contract that the distributor is not allowed to sell the competing products during a period not longer than five years. However, the Polish regulation regarding vertical restraints provides some exceptions, similar to those provided for in EU Regulation 330/2010.

According to Polish competition law, there is no space for clauses providing the ban of competition after the contract's expiry except for the protection of know-how. However, the Polish regulation regarding vertical restraints provides some exceptions, similar to those provided for in EU Regulation 330/2010.

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

Polish competition law prohibits resale price maintenance. It is prohibited to establish minimum and fixed prices. It is allowed to establish maximum and suggested prices, provided that the market share of the supplier and the market share of the distributor does not exceed 30 per cent.

The provisions of the contract providing the prohibited resale price maintenance are null and void; the Act on Competition and Consumer Protection provides for large fines (up to 10 per cent of annual turnover), if such clauses appear in the contracts. Fines may also be imposed on the members of the management board of the party or parties that violated the rules.

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

The supplier may suggest resale prices unless the provisions of the contract or other agreements between the supplier and the distributor would actually lead to price fixing, which is prohibited. Even if the fixing of prices does not result directly from the terms of the contract, but results for example from a discount or bonus policy, such actions are prohibited.

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

It is difficult to answer this question unequivocally. The president of the Office of Competition and Consumer Protection in 2015 examined the conditions for cooperation of hotels with owners of online accommodation reservation platforms. The president questioned the 'extensive most-favoured clause', under which the booking platform was guaranteed that the price, availability of rooms and other terms and conditions offered by it would be no less or as advantageous as those offered in any other online and offline channel. There were no objections, however, to the narrow clause according to which the price, availability of rooms and other conditions offered by the platform could not be less favourable than those offered on the hotel's website. The question has to be answered in the circumstances of the particular case.

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

Polish competition law prohibits discriminatory agreements. They occur when one counterparty is offered less favourable terms of sale, supply, provision of services among others than another counterparty with a similar market position. Additionally, the obstruction of market access to other entrepreneurs through unreasonably different treatment of certain clients is considered as an act of unfair competition. This does not mean that the supplier must apply identical terms and conditions in all contracts with all distributors. However, these conditions must be uniform and not privileged to any distributor without justification. The assessment of whether an agreement is discriminatory depends on the circumstances of the case. In general, the more significant restraints concern dominant market players (having more than 40 per cent market share).

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

In general, agreements that have as their object the restriction of the territory or the circle of customers on which the distributor may sell the supplier's goods are prohibited. However, the following restrictions are explicitly permitted: (i) concerning the premises or land on which the distributor operates; (ii) restrictions on active sales to a particular territory or group of customers reserved for the supplier or allocated by the supplier to another buyer, where those restrictions do not prevent customers from selling the contract goods; (iii) restrictions on sales to end users by a wholesale distributor; (iv) restrictions on resale of the contract goods to buyers not belonging to a selective distribution system by distributors operating in a selective distribution system; and (v) restrictions on the distributor's right to resell the components to other traders who would have used them for the manufacture of goods which, by reason of their intended use, price and properties, including quality, are regarded by their purchasers as substitutes for the goods sold by the supplier.

It means that, under some circumstances, the supplier may restrict the geographic areas or categories of customers and may reserve certain customers to itself. Active sale means the active action of the seller (ie, distributor) to increase sales or attract new customers, in particular through advertising and promotional activities, the establishment

of branches or the organisation of distribution centres in a particular territory. There is no legal definition of passive sales; however, passive sales shall mean, for example, responding to unsolicited requests from individual customers, including delivery of goods or services to such customers. It is commonly accepted that a sale through an internet store is passive sale. Passive sales cannot be prohibited in the distribution contract.

19 May a supplier restrict or prohibit e-commerce sales by its distribution partners?

Polish rules do not differ from European rules, as far as restrictions on e-commerce sales is concerned. The prohibition of e-commerce sales is admitted in exceptional circumstances only (see C-230/16 *Coty Germany v Parfümerie Akzente*) so in general a supplier may neither restrict nor prohibit e-commerce sales by its distribution partners.

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

The sole reason for refusing to sell the goods to a particular distributor or customer may not be the intention to discriminate against them. If the supplier has had a bad business experience with the customer in the past (eg, the customer did not pay invoices on time, did not place orders contrary to the terms of the contract, etc.) it may refuse to supply him or her. Insofar as a particular distributor's customer has engaged in activities that harm the interests of the supplier (eg, by infringing its trademark rights, disseminating false information about the supplier or its products), a prohibition on selling goods to such a customer could be justified. It is difficult to give a general answer to this question.

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

The notification duty regarding the transaction shall apply to any intent to (i) merge two or more independent entrepreneurs; (ii) have direct or indirect control of one or more entrepreneurs taken over – whether by acquisition or by taking up shares, other securities, interests or otherwise – by one or more entrepreneurs; (iii) have a joint entrepreneur created by entrepreneurs; or (iv) an entrepreneur acquires part of assets of another entrepreneur (the entirety or part of an enterprise), where a turnover generated by these assets in either of the two financial years preceding the notification exceeded in the territory of Poland an equivalent of €10 million. In general, a concentration shall not be subject to notification where the turnover of the entrepreneur to be acquired control of or the turnover of the entrepreneur participating in another above-mentioned form of concentration did not exceed in the territory of Poland, in either of the two financial years preceding the notification, an equivalent of €10 million.

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

There are special Polish regulations concerning protection of competition in the agri-food products market. A special law provides the prohibition of use of the 'contractual advantage' by purchasers of agricultural or food products or suppliers of those products, if such use causes or may cause effects in the territory of Poland. A contractual advantage within the meaning of the Act is a buyer's position vis-à-vis a supplier where there is no sufficient and effective possibility for the supplier to sell the agricultural or food products to other purchasers, and there is a significant imbalance in economic potential for the benefit of the buyer or supplier vis-à-vis a buyer where there is no sufficient and effective possibility for the buyer to purchase the agricultural or food products from other suppliers and there is a significant imbalance in economic potential for the benefit of the supplier. Unfair use of a contractual advantage is prohibited, and may consist, for example, in the unjustified termination or threat of the termination of the contract, granting only one party

the right to terminate or withdraw from the contract, making the conclusion or continuation of the contract conditional on the acceptance or performance by one of the parties of another service which does not have a material or customary connection with the subject-matter of the contract, or unjustified extension of the payment periods for the agricultural or food products supplied. The agency, before which the proceedings regarding the prohibited use of a contractual advantage are pending, is the Office of Competition and Consumer Protection, which may impose a fine up to 3 per cent of the annual turnover for use of the 'contractual advantage' in the agri-food products market.

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

Parallel imports on the European Economic Area are allowed and may not be prevented. However, a distributor or agent may prevent 'grey market' imports based on trademark law. Both the Polish trademark law and the law of European Union provide that a trademark's holder is entitled to prohibit the use of his or her trademark in relation to goods that have been put on the market in the EEA neither by the trademark holder nor with his or her consent. Therefore, a distributor having licence to the trademark may prevent importing to the EEA goods under the trademark, which are not intended for the EEA.

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

Restrictions on the advertising of products have their origin in regulations applicable to particular industries. For example, advertising of tobacco products and strong alcohols is completely prohibited and the advertising of beer or medicines is severely restricted. The Polish provisions regulating the combatting of unfair competition provide also the definition of unfair advertising. There are no limitations in passing on the costs of advertising or sharing them between the supplier and the distributors, if it is contractually provided.

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

Distribution agreements do not have to contain provisions on the use of trademarks or know-how, but these matters should of course be regulated between the parties. The supplier may charge licence fees for the distributor's use of his or her intellectual property rights or these fees may be included in the supplier's general fee, which is common in franchise agreements. The right holder may demand the cessation of infringements of his or her exclusive rights, prohibition of certain actions in the future, damages, publication of a statement of specified content and so on. The nature of the claim depends in part on the type of right that has been breached; sometimes the amount of damages depends on the amount of the royalty that the right holder could charge in the event of lawful use of his or her rights by the infringer and the conclusion of the relevant contract. It is also recommended to register rights or extend the registration already made to Poland. Copyright is not registered in Poland.

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

Most consumer protection rules do not apply to the supplier but to the distributor, insofar as it concludes contracts with consumers. In Poland, the use of prohibited contractual terms in model contracts concluded with consumers is prohibited. It is also prohibited to engage in practices that harm the collective interests of consumers (eg, breaches of the obligation to provide consumers with fair, true and complete information, unfair market practices or acts of unfair competition). Unfair market practices, that is, unfair practices that are contrary to accepted principles of morality and materially distort or are likely to distort the market behaviour of the average consumer before, during or after the conclusion of a contract relating to a product, are also prohibited. Consumer protection laws that will apply directly to suppliers are, for example, rules on product liability or the withdrawal of unsafe products from the market.

Update and trends

The difficult political situation in Poland and the fact that the parliament violated the constitution and the rule of separation of powers (trias politica principle) may lead to a crisis in the Polish common courts. It is not easy to assess whether and what impact this situation will have on the way foreign entrepreneurs will be treated in Polish courts.

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

According to Polish law, both the manufacturer and the distributor are obliged to market safe products. If they have been informed that the product placed on the market is not safe, they are obliged to notify the president of the Office of Competition and Consumer Protection immediately. The president keeps a register of unsafe products. Even if a distribution contract would impose on the distributor all the obligations relating to the withdrawal of dangerous products from the market, the president could impose a penalty on the supplier for failure to comply with its obligations. However, the distribution contract may specify who will bear the cost of a possible recall.

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

The entrepreneurs (such as, for example, supplier and distributor) may limit or even exclude the warranty liability of the seller in the contract. This means that the distribution contracts may provide any limitations and exclusions of warranty liability of the supplier. The limitations in the downstream relationships depend on the status of the parties to the resale contract: if both parties (eg, the distributor and its customer) are entrepreneurs, the same rule applies. The rules of warranty liability towards the consumer are provided in the Civil Code; the liability cannot be excluded and the consumer may request that the defective product be repaired or replaced with a new, defect-free one. In special circumstances, the seller may refund the price for the defective product.

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

The transfer of personal data to a third country (eg, by a Polish distributor to a foreign supplier) may take place if the country of destination ensures an adequate level of protection of personal data in its territory. An 'adequate level of protection' shall be assessed taking into account all the circumstances surrounding the data-transfer operation, in particular taking into account the nature of the data, the purpose and duration of the proposed data processing operations, the country of origin and the country of final destination of the data, the legal provisions in force in the third country concerned and the security measures in force in that third country. The transfer of personal data to a third country that does not provide adequate protection is possible only if one of the conditions set out in the law is fulfilled (eg, consent of the data subject). The data owner is a party that is considered as data controller in the meaning of the Polish provisions, that is, who decides on the purposes and means of the processing of personal data.

It is common that, in distribution-related contracts, the rules concerning the processing of the distributor's customers' personal data are provided.

At present, Poland has not yet adopted a new law on the protection of personal data, which would take into account the provisions of the new Regulation (EU) 2016/679.

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

The rule of freedom of contract applies accordingly; distribution contracts may provide the key personnel rules. However, the rejection of an individual from the distributor's management team by the supplier should not be a result of discrimination based on gender, age, religion, belief and so on.

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

The activity of a commercial agent cannot be carried out by employees. An agency contract can be concluded only by a registered enterprise acting as an agent. Polish labour courts are authorised to consider whether a given legal relationship between a natural person and her or his mandate may be considered as an employment contract and – in consequence – be subject to labour law. Pursuant to article 22 paragraph 1 of the Polish Labour Code, the features of the employment relationship are: (i) performance of specific work for the employer; (ii) under the supervision of the employer; (iii) at the time and place specified by the employer; and (iv) for remuneration. The legal relationship on the conditions specified above shall be considered employment within the scope of an employment relationship regardless of the name of the contract between the parties (article 22 paragraph 1(1) of the Polish Labour Code). The supplier may neither specify the time and place of the distributor's or agent's activity nor supervise his or her activity and it should be strictly provided in the distribution contract. If one of the employment relationship's features is missing, the distribution or agency contract will not be considered as an employment agreement.

It should be noted that not only the agent would be authorised to claim an agency contract as an employment contract before the court. The labour inspectors are also entitled to sue in such case.

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

There are no rules in Polish law limiting the parties' freedom to agree upon the rate of commission. If the parties do not agree on the rate, the contract will be valid and the amount of the commission fixed by the court should be 'commonly accepted in the relationships of a given type'. The agent may demand commission for the contracts concluded within the duration of the agency contract, if their conclusion was effected as a result of his or her activities or if they were concluded with the clients acquired by the agent for the contract of the same type. If the agent was granted the exclusive right with respect to a designated group of clients or a geographical area and, within the duration of the agency contract, a contract with the client from that group or area was concluded without the agent's participation, the agent shall have the

right to demand commission for that contract. The principal shall be obliged to notify the agent, within reasonable time, of the conclusion of that contract. If the principal sells directly in the exclusive territory of the agent, the agent will have the right to commission.

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

The provisions on the agency contract provide the general loyalty rule according to which each of the parties shall be obliged to remain loyal to the other party. It is also provided in the Polish Civil Code that the agent shall be obliged to submit any and all information that is significant to the principal and to abide by his or her instructions that are justified in given circumstances, likewise to undertake, within the scope of the affairs managed, any acts necessary to protect the principal's rights. The principal shall be obliged to submit to the agent documents and information required for due performance of the contract.

There are no special rules regarding the sale-resale contract or the franchising contract but the Civil Code provides the rule regarding the ban on misuse of own rights (it is not allowed to exercise a right in a manner that would contradict its socio-economic purpose or the principles of community life; such an act or omission on the part of the person entitled shall not be considered the exercise of that right and shall not be protected), the general rules on the proper performance of the contract (the parties must perform their obligations in accordance with its contents and in a manner complying with its socio-economic purpose and the principles of community life and, if there are established customs in that respect, also in a manner complying with those customs) and expected due diligence (the party shall be obliged to act with diligence generally required in the relationships of a given kind and the due diligence of the party being the entrepreneur shall be assessed with the consideration of the professional nature of its activity).

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

In principle, the distributor may use the trademark for advertising the purchased products if he or she has been authorised by the supplier in writing. There is no need to sign any separate licence agreement. However, it is advisable to register the exclusive licence to use the supplier's trademark by the distributor in the trademarks register in the Polish Patent Office to guarantee the distributor the possibility of eliminating the infringements from the market effectively. In the case of registration of the exclusive licence in the Polish Patent Office, the distributor (licensee) may claim infringements of the trademark in the same way as the supplier (licensor) unless the licence agreement states otherwise.

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

There are two types of anti-corruption crimes in the Polish Criminal Code that could be applicable to relationships between supplier and the distributor. These are abuse of trust and corruption of managers. The penalty of deprivation of liberty threatens the person obliged to deal with the affairs of a particular entity (eg, an entrepreneur) who causes material damage to that entity through abuse of the rights granted to him or her or failure to fulfil his or her duty. The same penalty of deprivation of liberty shall be imposed on a person who, while being a manager of an entrepreneur (eg, distributor) or remaining with him or her in an employment relationship, a contract of mandate or a contract for work demands or accepts a financial or personal benefit or a promise thereof, in exchange for an abuse of the rights granted to him or her or a failure to fulfil an obligation incumbent on him or her, which may cause material damage to the entrepreneur or constitute an act of unfair competition or an inadmissible preferential act for the benefit of the buyer or recipient of goods, services or performance (eg, for the supplier).

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

The Polish Civil Code provides for the maximum percentage of the interest and that the contractual provisions shall neither exclude nor limit the provisions on maximum interest, even in the case of choosing a foreign law jurisdiction. In such event, provisions of the Civil Code shall apply. Furthermore, the Polish Bankruptcy Law provides that the provisions of a contract, which provide, in the event of filing a bankruptcy petition or of the declaration of bankruptcy, for a revision or for the termination of a legal relationship to which the bankrupt is a party, shall be invalid. Both above-mentioned rules are general, that is, they refer not only to distribution contracts.

Governing law and choice of forum

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

Pursuant to article 28 of the Polish International Private Law, the Regulation of the Parliament and the Council (WE) 593/2008 dated 17 June 2008 (Rome I) provides the applicable law for the contract. The general rule is that the parties are free to choose the law governing their contract.

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

Disputes arising from distribution contracts can be a subject to arbitration, according to Polish law. There is no limitation in this respect.

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

There are common courts, arbitration courts (permanent or ad hoc) and mediation centres in Poland. Within common courts, there are commercial courts but the proceedings before them are not conducted according to special rules; the Polish Civil Procedure Code applies. Permanent arbitration courts act in accordance with their rules of procedure. If the dispute is pending before a common court, the judge is obliged to convince the parties to settle the dispute and may, with the consent of the parties, refer them to mediation. The rules of proceedings are basically the same for Polish entities and foreigners; however, if the plaintiff has no place of residence or seat in Poland or in another Member State of the European Union, the plaintiff is obliged to provide a deposit to secure the costs of the proceedings at the defendant's request. Before an action is brought, the claimant may request that the action be secured by a specific order, the imposition of a ban, the seizure of a bank account or any other interim injunction by the court. However, obtaining an interim order is not easy. So far, the foreign business may expect fair treatment (see 'Update and trends'). The Polish Civil Procedure Code does not provide for the disclosure but the parties should make statements and supporting evidence in the first pleadings; if they are submitted later, the court may disregard them. No party may be compelled by the court to testify or submit documents but the court, on the basis of a comprehensive consideration of other evidence gathered, has the right to assess a party's refusal to produce evidence. The Polish common courts demand the documents in the sworn translation and it increases the costs of proceedings. When it comes to the speed of cases, Polish courts are in the middle of the European stakes.

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

An agreement to mediate or arbitrate disputes will be enforced in Poland. There are no limitations as to the arbitration tribunal, the location of the arbitration or the language of the arbitration on the terms of an agreement to arbitrate. Sometimes, however, the approach of arbitrators (including professional lawyers) to litigation before the arbitral tribunal is formal and they forget about the function of arbitration and the need to take business reasons into account.

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