

CHOICE OF LAW AND JURISDICTION CLAUSES IN CROSS-BORDER AGENCY AND DISTRIBUTION AGREEMENTS FROM AN EU PERSPECTIVE¹

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¹ List of EU member states

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom

I. The negotiations stage

Negotiation strategies in international distribution agreements

The following factors should be taken into consideration in cross-border negotiations:

- Differences in negotiation styles among nations
- Language and cultural differences affect negotiations
- The negotiations should lead to a written contract that is enforceable in the countries of both parties
- Conflicts that result from cross-cultural misunderstandings can be avoided if both parties understand their respective rights and duties
- The dispute resolution system should be completely and fairly addressed

1. - Pre-contractual documents: letter of intent, confidentiality clause, standstill clause

Choice of law and jurisdiction clauses may be inserted in pre-contractual documents, such as letters of intent and similar, as well as in other **agreements governing the terms of future negotiations.**

Documents referred to as *Letter of Intent, Memorandum of Understanding, Heads of Agreement* or similar [*Memorandum of Intent, Protocol, Term Sheet, Comfort Letter, Letter of Awareness, lettre d'intention, lettera d'intenti, carta de intencion, Absichtserklärung*, are frequent in the practice of cross-border deals, particularly when transactions of considerable complexity are involved [FONTAINE, *Les lettres d'intention dans la négociation des contrats internationaux*, in DPCI, 1977, p. 73-122 ; for several examples see DPCI 1977, pp. 499-509; cf. also: FONTAINE, *Droit des contrats internationaux*, p. 5 et seq.; DRAETTA, *Il diritto dei contratti internazionali I*, p. 47 et seq.].

There are various kinds of LOI's

Letters of intent without any binding effect

that reflect the parties' intention not to conclude a binding agreement, or at least to leave open certain margins of uncertainty on the binding nature of their agreement

«.... obscurities and ambiguities are not totally unintentional. [...] Each party, in other words, seems to be preoccupied by the concern of binding the other party not to rediscuss the points of agreement recorded in the letter of intent, while at the same time preserving for itself the freedom to rediscuss said points. Thus, perhaps not always at a conscious level, each party appears to show a tendency to consider a letter of intent as binding only for the other party » [DRAETTA, *The Pennzoil Case and the Binding Effect of the Letters of Intent in the International Trade Practice*, in RDAI, 1988, p. 155 ss]. Cf. DRAETTA, LAKE, *Letters of Intent and Precontractual Liability*, cit., p. 835: «When [...] a letter of intent is properly drafted, it should have no binding effect, except for those provisions to which the parties specifically intend to attribute such an effect.»

This is the case in the parties intend to verify their respective interest in continuing the negotiations, but neither intends to make any commitments as regards the outcome of the subsequent negotiations: the negotiators put together a document that justifies, for their own management, the continuation of expensive and onerous negotiations, or that may serve as a document to submit to third parties (authorities responsible for granting licences, financing institutions), to attest the advanced stage of the negotiations. For example in negotiations with public entities, the private party may press to sign documents that do not raise any doubt as to their non-binding effect, but hope to use them at a future stage as means of psychological pressure. The importance of this aspect is often underestimated by lawyers who are accustomed to considering an agreement solely from the perspective of its legally binding effects. However in business deals these kinds of agreements

may have a considerable moral weight, and this explains why the parties (where they are unable to obtain more) are happy to receive undertakings of this nature.

Another recurrent case is the document where the parties acknowledge the stage that has been reached by the negotiations, and separate the questions that have already been resolved from those that are still open. The conclusion of the contract will be finalised only when all the other open issues have been resolved.

Conditional contracts and similar

Documents named “letters of intent” that in reality are binding agreements the effects of which are made **conditional upon the occurrence of external events, such as governmental authorisations or financing institutions**. Such agreements (“**conditional contracts**”) strictly should have nothing to do with a letter of intent except for the fact that their effect is uncertain until the occurrence of the future event, thus they are often named “letter of intent” although the parties intended to bind themselves subject to the occurrence of the condition. The use of the expression “letter of intent” may be interpreted in the sense that the parties did not intend to conclude a conditional contract, but simply wanted to acknowledge the conditions agreed at that point in time, and reserved to conclude a formal agreement after the occurrence of the said event.

Contracts made conditional upon approval of the Board - «*subject to approval of the board*»

Intermediate situations: agreement on the essential elements

where it becomes difficult to assess whether they are truly binding contracts or rather documents falling within the pre-contractual stage. The situation that is the nearest to a final contract is a letter of intent containing all the conditions, but then providing for the **subsequent drafting of a final agreement or its signing on the occasion of an official ceremony**. In this case, in principle, it appears that the document referred to as “letter of intent” is a fully binding contract.

Under English law a document marked «*subject to contract*» or similar, will be understood as a clear expression by the parties not to undertake any binding obligation.

With reference to the effects of a document carrying the clause «*subject to contract*» or «*subject to a formal contract drawn up by our solicitors*», it is argued that «unless there is cogent evidence of a contrary intention, the courts construe these words as to postpone the incidence of liability until a formal document has been drafted and signed. As regards the enforceability, the first document is not worth the paper it is written on. It is merely a proposal to enter into a contract — a transaction which is a legal nullity — and it may be disregarded by either party with impunity» (CHESHIRE *et al.*, *Law of Contract*, 11th ed., London, 1986, p. 38).

However «in a very strong and exceptional context» even a document «subject to contract» may express the parties’ intention to enter into a binding agreement (*Chitty on Contracts*, 27th ed., London 1994, p. 139, § 2-086): in this way the position is nearer to the more flexible position that exists in the USA (cfr. FARNSWORTH, *op. cit.*, p. 258-259) where the courts appear to follow two different approaches, on some occasions by considering the reference to a future formal contract as evidence that the agreement is merely precontractual, on other occasions by refusing to give any relevance to this aspect.

A further situation which probably is the most common amongst those that give rise to disputes, concerns **agreements that fix the essential terms** (at least the financial terms) of the transaction, **and refer to a subsequent definition of a number of secondary items**.

To avoid unpleasant surprises, a suitably drafted LOI should:

- Clearly indicate that it is not a contract
- Avoid contractual language (words like “agree”, “shall”, “will”) and appearances of contractual status (“IN WITNESS WHEREOF”, signature blocks, etc)

- Be brief, informal and use words referring to the future
- Clarify what the parties mean by the words “good faith”
- Clarify that a party commences performance under the LOI at its own risk and costs
- Clarify that the cost of negotiations shall be borne by the parties respectively and
- **Include a choice of forum and choice of law clause**

Other pre-contractual documents

Letters of intent are not to be confused with agreements governing the terms of future negotiations: such agreements may involve a *confidentiality agreement* in respect of secret information and know-how that is disclosed in the course of negotiations (for example in a number of agreements such as acquisitions, industrial co-operation, know-how licences, the disclosure of information of a confidential nature represents the crucial condition for agreeing upon the future contracts), an undertaking not to deal with competitors (*standstill clauses*), or the granting of a *right of first refusal*: through the latter, the party that is bound remains free not to conclude any agreement, but if it wishes to proceed to concluding one, it has the duty to inform the other party specifying the conditions offered by third parties, and the other party is to be preferred at equal conditions [DRAETTA, *Gli usi del commercio internazionale nella formazione di contratti internazionali*, in Fonti e tipi del contratto internazionale, cit., p.67].

It is also possible to agree the reimbursement of certain expenses sustained in the negotiations (for example to prepare complex plans, or technical documents etc.) in the event that the agreement is eventually not concluded.

The above are agreements that involve specific undertakings by the parties, they are situated at the pre-contractual stages with respect to the agreement that is being negotiated, and often these clauses will be incorporated in a letter of intent; however they are truly binding contractual clauses and a party in breach will be liable for damages for breach of contract

2. - Common law countries vs. civil law countries

The **governing law** will determine

- whether the parties are under a duty to negotiate in good faith and what is the effect of breaking off of negotiations
- whether there are liabilities for negotiating in bad-faith
- what remedies are available
- is there any obligation to continue to negotiate until there is "proper reason" to withdraw?
- Whether a bare agreement to negotiate has legal content

Taking the most important case of obstruction of the agreement, i.e. the breaking off of negotiations, while in most civil law countries a party incurs pre-contractual liability whenever it abruptly and without justification breaks off negotiations at a stage where success was in prospect, common law countries are in general more reluctant to interfere with the freedom of negotiations and only require that a party who no longer intends to conclude the contract inform the other immediately.

According to the common law approach, **the parties have a high degree of freedom in negotiations**, cf. FARNSWORTH, *Precontractual Liability*, cit., p. 221: “As a general rule, a party to precontractual negotiations may break them off without liability at any time and for any reason – a change of heart, a change of circumstances, a better deal – or for no reason at all. The only cost of doing so is the cost of that party’s own investment in the negotiations in terms of time, effort, and expense.” And cit. at p. 279: «... parallel negotiations are so common in practice and so important

to competition that it is hard to see how there can be such a requirement in the absence of an undertaking that negotiations will be exclusive»; hence it can be said that **there is no general rule in common law requiring the parties to negotiate in good faith** [“How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined ‘in good faith.’ However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiation is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.” Lord Ackner in *Walford v. Miles* (1992) 1 All E.R. 453(HL)].

In short, under **English law** it is not only the case that in the absence of agreement by the parties, the law does not impose a duty to negotiate in good faith; even if the parties agree that they will negotiate in good faith, **this is not an obligation to which the law will attach substance**. The position is different in the **United States** (and Australia) that recognizes that if the parties agree that they will negotiate in good faith, this gives rise at least in some cases to an obligation which can be enforced [the Restatements of Contracts (Second) of the United States (§205) and the Uniform Commercial Code of the United States (§1-203) apply the good faith duty only to performance of the agreement that has already been concluded. As the American courts opine: “the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.”].

The **duty to negotiate in good faith** is found practically in all civil law system countries and generally provides a remedy for a wrongful conduct produced by a bad faith act [KESSLER, FINE, *Culpa in contrahendo, Bargaining in Good Faith, and Freedom of Contract: a Comparative Study*, in 77 Col. L. Rev., 1964 p. 401 ss.; DRAETTA, LAKE, *Letters of Intent and Precontractual Liability*, in RDAI, p. 835 ss.. French law: SCHMIDT, *Négociation et conclusion de contracts*, Paris, 1982, p. 105 ss.. German law: SONNENBERGER, *La conclusione del contratto secondo il diritto tedesco*, Padova, 1991, p. 113 ss; cf. the Law On Modernization of Obligations Law (that came into force on January 1, 2002), §311(2) of the German Civil Code establishes that “an obligation in accordance with §213(2) [an obligation to observe other party’s rights and interests] is considered to be imposed as a result of (i) commencement of negotiations, (2) preparation for entering into the agreement if one party lets the other party to affect its rights protected by law or other interests and entrusts them to such other party, or (3) other analogous business relations.”]

3. – What happens in the EU in respect of pre-contractual liability (*culpa in contrahendo*) when no choice of court and no choice of law has been made?

3.1. Jurisdiction from the EU perspective

Judgment of the Court of 17 September 2002. - *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*

Art. 1337 of the Italian Civil Code provides that, in the context of the negotiation and formation of a contract, the parties must act in good faith. On 23 January 1996 Tacconi brought an action against HWS in the Tribunale di Perugia (District Court, Perugia) for a declaration that a contract between HWS and a leasing company B.N. Commercio e Finanza SpA (BN) for the sale of a moulding plant, in respect of which BN and Tacconi had already, with the agreement of HWS, concluded a leasing contract, had not been concluded because of HWS's unjustified refusal to carry out the sale, and hence its breach of its duty to act honestly and in good faith. HWS thereby infringed the legitimate expectations of Tacconi, which had relied on the contract of sale being concluded. Tacconi therefore asked the court to order HWS to make good all the damage allegedly caused, which was calculated at ITL 3 000 000 000.

In its defence, HWS pleaded that the Italian court lacked jurisdiction because of the existence of an arbitration clause and, in the alternative, because Article 5(1) of the Brussels Convention was

applicable. On the substance, it contended that Tacconi's claim should be dismissed and, strictly in the alternative and as a counterclaim, that Tacconi should be ordered to pay it DEM 450 248.36.

The Corte Suprema di Cassazione decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Does an action against a defendant seeking to establish pre-contractual liability fall within the scope of matters relating to tort, delict or quasi-delict (Article 5(3) of the Brussels Convention)?
2. If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Brussels Convention), and if it does, what is "the obligation in question"?
3. If not, is the general criterion of the domicile of the defendant the only criterion applicable?

Findings of the Court

The Court observed at the outset that it has consistently held (see Case 34/82 *Martin Peters Bauunternehmung* [1983] ECR 987, paragraphs 9 and 10, *Reichert and Kockler*, paragraph 15, and *Handte*, paragraph 10) that the expressions matters relating to a contract and matters relating to tort, delict or quasi-delict in Article 5(1) and (3) of the Brussels Convention are *to be interpreted independently*, having regard primarily to the objectives and general scheme of the Convention. Those expressions cannot therefore be taken as simple references to the national law of one or the other of the Contracting States concerned.

Furthermore the Court noted that, according to the Court's case-law, the expression matters relating to contract within the meaning of Article 5(1) of the Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (*Handte*, paragraph 15, and *Réunion Européenne and Others*, paragraph 17).

In view of the circumstances of the main proceedings, the obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations could derive only from breach of rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract.

In those circumstances, it is clear that any liability which may follow from the failure to conclude the contract referred to in the main proceedings cannot be contractual.

In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Therefore the Court ruled as follows:

“In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, *an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention* of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.”

3.2. Governing law from the EU perspective

For the law governing non-contractual obligations, from a EU perspective we have to consider the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 “on the law applicable to non-contractual obligations” (“Rome II”) that is applicable from 11 January

2009. According to the Recitals (30) “*Culpa in contrahendo* for the purposes of this Regulation is an *autonomous concept* and should not necessarily be interpreted within the meaning of national law. It should include the *violation of the duty of disclosure* and the *breakdown of contractual negotiations*. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

The Regulation applies in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters (art. 1). For the purposes of the Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* (art. 2). The general rule is that unless otherwise provided, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law *of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*.

However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated above, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question (art. 4).

Art. 12 deals specifically with *culpa in contrahendo*:

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be *the law that applies to the contract or that would have been applicable to it had it been entered into*.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

Furthermore, the parties may **agree to submit non-contractual obligations to the law of their choice**:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties (art. 14)

II. The contract stage

a) Jurisdiction

Litigation strategies in international distribution agreements

1. - Which are the most appropriate contractual strategies to be implemented when litigation cannot be avoided? Arbitration or ordinary courts?

1.1. Advantages of arbitration

Neutrality

Specific competences

The composition of the tribunal will often be of considerable concern. The parties will normally be able to influence the composition of the arbitral tribunal, and they may thus ensure that the tribunal is made of persons they trust and who possess the requisite professional qualifications for resolving the dispute.

Excluding the other party's courts

The possibility for one party **to exclude the jurisdiction of the ordinary courts of the country in the other party** [in countries that are parties of New York Convention, an arbitration clause will hold, whilst a foreign jurisdiction clause may not hold]

Simple and informal (or less formal) procedure

One instance only

It is not possible to appeal against the arbitral award rendered at the end of the proceedings, upon service upon the parties to the dispute the award acquires force of res iudicata and is enforceable by ordinary courts)

The time element

- a) The time required to conclude proceedings may also be an important consideration. In the vast majority of cases, an arbitration case will only be dealt with by one arbitral tribunal, as opposed to actions before the ordinary courts, which often are dealt with by two courts, and in some cases by three courts.
- b) a few months or even a few weeks only elapse from filing the statement of claim or, as the case may be, from the payment of arbitration fees until the arbitration award is rendered)

Cost considerations

may also favour arbitration, due to savings from not having the case dealt with by several courts - on the other hand, the parties will have to cover all costs of the arbitral tribunal. They may also incur additional costs through provisional security measures which cannot be implemented by the arbitral tribunal itself, but only by the ordinary courts.

Tailor made proceedings

The scope of the parties to agree on how the arbitration shall be conducted gives greater room for tailoring the proceedings to the needs of the parties than is the case with proceedings before the ordinary courts, where there is less or no freedom of choice.

Confidentiality

will in many cases be an important motivation for choosing arbitration. Publicity may more easily be avoided under arbitration than under ordinary legal proceedings.

Good relations

Another factor in favour of arbitration is the need for **maintaining good relations** between the parties. Arbitration will often be perceived as considerably less confrontational than proceedings before the ordinary courts.

Award can be based on fairness

The parties may agree that the arbitral tribunal may base its award on considerations of **fairness**. However, most parties will presumably prefer the award to be based on current law, implying that the option of agreeing that the award be based on fairness is unlikely to be a very significant factor in choosing arbitration.

The language of proceedings

may be agreed under arbitration. It may be convenient for proceedings to be conducted in a different language than the local language, with no requirement as to translation of documents.

Recognition of the foreign award

In international disputes it is important that arbitration be conducted in such a manner that the award may be **recognised** and enforced in other jurisdictions. This is possible by adhering to the provisions of the New York Convention.

- wide scope of enforceability of arbitration award all over the world (on the basis of multilateral international conventions it is possible to enforce arbitral award rendered in inland in more than 130 countries of the world at present).

However, the advantages of arbitral awards over judgements by the ordinary courts in terms of recognition and enforcement is not a relevant argument within the EU

1.2. Circumstances that may lead to prefer ordinary courts

Exporter in a merely defensive position

The exporter believes that if a dispute arises, it is likely that the importer will be the plaintiff, and the exporter will be in a position allowing it to ignore such proceedings in a foreign country, counting on the fact the exporter has no assets in the importer's foreign country and the foreign judgement will not be recognised in the exporters' country in the absence of a recognition convention; whilst the exporter would be forced to defend an arbitration action due to enforceability under the New York Convention.

Non arbitrability of the dispute

On non-arbitrability see hereafter, in respect of non-arbitrable disputes concerning certain special situations (Italian self employed agent – art. 409 n. 3, code of civil procedure reserves disputes between principal commercial agents to the special proceedings before the employment courts; Belgian distributor - Belgian Law of July 27, 1961, art. 27, excludes that any disputes with Belgian distributors can be resolved by arbitration and reserves expressly to the Belgian court's the jurisdiction in respect of any disputes). From the EU perspective an exclusive jurisdiction clause under art. 23 Reg. 44 is a more effective instrument compared to arbitration for the purpose of avoiding the exclusive jurisdiction of the ordinary in these situations.

Limited financial value of the dispute

2. - In which situations arbitration should be preferred and in which not? In which cases arbitration is not effective (e.g. Belgian distributors, Italian self-employed agents) – so-called “arbitrable” matters

2.1. The “arbitrability” of disputes under the 1958 New York Convention

A judicial prerequisite for enforcement of an international arbitration agreement is that the dispute must concern “a subject matter capable of settlement by arbitration”

The “arbitrability” of disputes under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has always been a controversial issue, dividing courts and commentators alike.

According to Article V.2.a of the New York Convention, when a state court is requested to enforce a foreign arbitral award, recognition and enforcement of the award may be refused if the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sought (ie, the *lex fori* of the enforcing court).

According to Article II.3 of the convention, when a state court is seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, it shall, at the request of one of the parties, refer them to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed (ie, the dispute is not arbitrable).

However, in a sharp contrast with Article V.2.a, Article II.3 of the Convention does not state to which law the state court must refer in order to decide whether the dispute is arbitrable, at the stage of recognition of the arbitration agreement (at the outset of a court proceeding, when one of the parties raises an objection to the court's jurisdiction). The Convention's silence on this issue has created legal uncertainty. Some commentators defend the view that a coherent interpretation requires that the arbitrability of a dispute be assessed by reference to the *lex fori*, whatever the stage at which it takes place. Others consider that such assessment must be done by referring to the law chosen by the parties to govern their arbitration agreement (ie, the *lex arbitri* or, more generally, *lex contractus*, as the parties seldom submit their arbitration agreement to a law which differs from the substantive law chosen to govern their main agreement).

2.2. The Belgian Supreme Court judgement of October 15 2004 (*Colvi v. Interdica*)

In a long-awaited decision, Belgium's Supreme Court ruled on October 15 2004 that when a state court is seized of an action in a matter in respect of which the parties entered into an arbitration agreement, the state court may apply its own law (ie, the *lex fori*) to decide whether the dispute is arbitrable and must be referred to arbitration.

This legal uncertainty referred to above reached its climax in Belgium, because of specific legislation protecting exclusive distributors (the Act of July 27 1961). According to a 1979 decision of the Belgian Supreme Court, disputes concerning matters covered by this specific legislation may be arbitrated only to the extent that the arbitrators must apply the mandatory provisions of the 1961 act. Therefore, if the parties have selected another law to govern their exclusive distribution agreement, a dispute in relation thereto may not in principle be submitted to arbitration (unless the arbitration agreement is entered into or confirmed after the dispute arose).

A controversy arose, however, as several authors, followed by several lower courts, defended the position that this 1979 Supreme Court ruling addressed only a request for recognition and enforcement of a foreign award and could not be extended to a preliminary ruling on a denial of jurisdiction, based on the existence of an arbitration agreement (under Article II.3 of the New York Convention). According to these authors and courts, the arbitrability of a dispute, considered at the stage of objection to jurisdiction, must be assessed with regard to the law of autonomy (chosen by

the parties) – in other words when determining whether the courts had jurisdiction over a dispute involving the termination of a distribution agreement, the courts applied the law of the contract (and not the *lex fori*) to determine the issue of arbitrability

Facts

A Belgian distributor sued its Swiss supplier before a Belgian court, seeking compensation for the supplier's unilateral termination of the distribution agreement and invoking the mandatory provisions of the 1961 act.

The supplier objected to the jurisdiction of the state court because the parties had provided for the resolution of any dispute through arbitration in Switzerland under the rules of the *Concordat Suisse sur l'Arbitrage*. For reasons not relevant to this update, the court of first instance found that the Swiss supplier had waived the arbitration provision and it therefore retained its jurisdiction over the dispute.

On appeal, the Antwerp Court of Appeal ruled in favour of the supplier. The court found that the parties had validly entered into an arbitration agreement and had also validly chosen Swiss law to govern their contractual relationship. The court ruled that the arbitrability of the dispute had to be assessed by reference to the law thus chosen. As Swiss law does not prevent disputes concerning the termination of a distribution agreement from being settled by arbitration, the court decided that the Belgian courts did not have jurisdiction to handle the dispute and therefore dismissed the claim.

The Belgian distributor filed an appeal before the Supreme Court.

Belgian Supreme Court Decision

In its decision issued on October 15 2004 (Court of Cassation, 15 October 2004, Colvi v. Interdica) the Belgian Supreme Court allowed the appeal. It ruled that:

"Article II.3 of the New York Convention allows the court to which the issue of arbitrability of the dispute is submitted, on the occasion of an objection to jurisdiction, to decide this issue by reference to its own legal system. By doing so, the court determines the limits within which, in certain matters, private jurisdiction is compatible with the legal order."

The court further stated, in passing, that:

"when the arbitration clause is submitted, by the choice of the parties, to a foreign law, the state court of which the jurisdiction is objected may rule out arbitrability if the public policy of its own legal system is affected by this choice."

In other words, the Supreme Court of Belgium moved away from the lower court decisions mentioned above, and it held that Article II(3) of the New York Convention, although not explicit about the law under which arbitrability is to be decided, allows a national court to decide the question of arbitrability by reference to its own legal system. Thus, where the arbitration clause is governed by a foreign law, a national court may rule against arbitrability if local public policy is offended by the parties' choice of law.

Comment

The Supreme Court clearly upheld the position that a state court may apply its own law (*lex fori*) to decide, at the stage of a denial of jurisdiction, whether a dispute may be referred to arbitrators. The recent decision therefore has the merit of clarifying a long-lasting controversy.

However, the decision does not end the legal uncertainty surrounding the specific issue of arbitrability of disputes relating to the termination of exclusive distribution agreements covered by the 1961 act. Indeed, the Supreme Court ruled that a state court may exclude arbitrability if the submission of a dispute to a foreign law affects the public policy of the *lex fori*. As it is generally considered that the 1961 act is not a public policy law, the Supreme Court might have been expected to dismiss the appeal against the lower court decision that enforced the arbitration agreement, submitted by the parties to Swiss law, and declined its own jurisdiction. However, on the contrary, the Supreme Court accepted the appeal and set aside the decision of the lower court.

It therefore remains to be clearly decided by the Supreme Court whether disputes concerning the termination of an exclusive distribution agreement which falls within the scope of application of the 1961 act may be referred to arbitration, where the parties have selected a foreign law.

In other words, the Belgian Supreme Court stopped short of deciding that Belgian law always applies to determine the arbitrability of disputes relating to exclusive distribution agreements. However, a foreign principal wishing to enter into such an agreement with a Belgian distributor should be aware that an arbitration clause may be ignored by a Belgian court before which it is sued if the agreement is governed by a law of a country other than Belgium. Moreover, simply locating the arbitration proceedings outside of Belgium would not protect the principal from the effect of the 1961 Act if the award is to be enforced in Belgium.

The practice of national Courts in determining arbitrability according to their own law is also supported by Article VI (2) European Convention that provides, in its pertinent part:

“The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration”

3. - What happens in the EU (under Regulation 44/2001) or under the new Lugano Convention when no choice of court has been made? Agents will normally be able to claim before their courts, but for distributors the situation is different in various countries.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

SCOPE

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

...

(d) arbitration.

Section 1

General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

It follows from article 1, para. 2 that persons who are domiciled in any Member State shall be governed by domestic rules of jurisdiction applicable to foreign nationals

With the exception of Italy, that has extended the application of the jurisdiction criteria in civil and commercial matters laid down in the 1968 Brussels Convention (now Regulation 44) to any persons not domiciled nor resident in Italy nor in any other EU Member State, domestic legislation of the EU member states on the issue of jurisdiction applicable to persons who are not domiciled nor resident within the EU, may differ by using a criteria based on and nationality.

For example France:

Article 15 Code Civil : « *Un français pourra être traduit devant un tribunal de France pour des obligations par lui contractées en pays étranger même avec un étranger* »

Article 14 Code Civil : « *L'étranger, même non résident en France, pourra être cité devant les tribunaux français pour l'exécution des obligations par lui contractées en France avec un Français ; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des Français* ».

Article 15 grants jurisdiction based solely on the nationality of the defendant and reserves a privilege to French nationals who have the right to be adjudicated exclusively by a French tribunal. Article 14 allows a French national to institute proceedings in France against a defendant resident abroad and represents a French national a privilege similar to the privilege that the jurisprudence basis of Article 15

These articles have been interpreted extensively by the French Cour de Cassation : « *L'article 14 du Code Civil a une portée générale s'étendant à toutes matières. A l'exclusion des actions réelles immobilières et des demandes relatives à des voies d'exécution pratiquées hors de France* ».

The parties may renounce to the exclusive jurisdiction of the French courts under articles 14 and 15 and validly agree a foreign jurisdiction or arbitration clause

4. - How to make sure that a choice of forum is effective?

4.1. Formal requirements under EC Reg. 44/2001

Article 23 Reg 44/2001

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves;
or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Jurisdiction shall be exclusive unless the parties have agreed otherwise

Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

The European Court of Justice understood the requirement of a writing as drawing attention to the necessity of proving an actual agreement by the parties with respect to the prorogation. In *Estasis Salotti v Ruewa* [ECJ 14 December 1976 – 24/76 – *Estasis Salotti v Ruewa* [1976] ECR 1831, para. 10], the ECJ associated this necessity with a strict construction of the rule because of the derogating effect of the agreement and its ramifications for the procedural position of the parties. This narrow reading essentially led to the need that the consensus of the parties with respect to the prorogation be demonstrated “clearly and precisely”. Particularly in cases where the clause conferring jurisdiction is contained in the general conditions of one of the parties and printed on the reverse of the contractual document signed by the parties, the formal requirement of Article 17, 1968 Brussels Convention, is fulfilled only when the contract signed by both parties contains an express reference to those general conditions. In the case of an orally concluded contract, the decision *Galeries Segoura SPRL v Société Rahim Bonakdarian* [ECJ 14 December 1976 – 25/76 – *Galeries Segoura SPRL v Société Rahim Bonakdarian* [1976] ECR 1851] established that the formal requirements of Article 17(1) are satisfied “only if the vendor’s confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.”

The ECJ then decided in *F.A. Berghoeffer GmbH & Co. KG v ASA SA* [ECJ 11 July 1985 – 221/84 – *F.A. Berghoeffer GmbH & Co. KG v ASA SA* [1985] ECR 2699] that Article 17(1) must be interpreted as meaning “(...) that the formal requirements therein laid down are satisfied if it is established that jurisdiction was conferred by express oral agreement, that written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection”.

In *Elefanten Schuh GmbH v Jacqmain*, [ECR 24 June 1981 – 150/80 – *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, paras 25 and 26] the EU judges stated that Contracting States may not lay down formal requirements for the validity of a clause conferring jurisdiction which deviate from those contained in Article 17. Stricter requirements that might be contained in the laws of individual States are therefore not relevant. Subsequent decisions of the Court of Justice have gone so far as to do away with the requirement of a writing in cases of ongoing business relationships or of contractual conditions enjoying the status of international trade usages of which those involved in the particular trade could normally be aware.

The subsequent amendment to the text of Article 17 and the present art. 23 Reg. 44, finds itself as part of an evolution in Community jurisprudence best described as a move towards the progressive erosion of the written element on one side and the gradual emergence of international trade practices on the other. The centrality of the requirement of a writing has therefore been attenuated, creating room for references to “usages of international trade” – while still perceived as an obstacle to international trade even in the broad sense described above. The problems in interpretation do not seem to have decreased.

Validity of a jurisdiction clause contained in a distributorship agreement tacitly renewed: in a dispute between Iveco Fiat Spa (“Fiat”), a company incorporated under Italian law, and Van Hool nv (“Van Hool”) [ECJ 11 December 1986 – 313/85 – *Iveco v Van Hool* [1986] ECR 4199.], a company incorporated under Belgian law, concerning the validity of a jurisdiction clause inserted in a written agreement granting an exclusive sales concession which stipulated that the agreement

could be renewed only in writing but which continued , after its expiry, to serve as the legal basis for the contractual relations between the parties notwithstanding the fact that it was not renewed in writing . The answer to the question submitted by the Belgian court of cassation was that article 17 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that where a written agreement containing a jurisdiction clause and stipulating that the agreement can be renewed only in writing has expired, but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in article 17 if , under the law applicable , the parties could validly renew the original agreement otherwise than in writing , or if , conversely, one of the parties has confirmed in writing either the jurisdiction clause or the set of terms which has been tacitly renewed and of which the jurisdiction clause forms part , without any objection from the other party to whom such confirmation has been notified .

4.2. Selecting the best jurisdiction clause

“The parties agree to submit to the [exclusive] [non-exclusive] jurisdiction of the [English] courts”

or

“Any legal proceedings instituted against the Distributor by the Principal shall be brought in the courts of the distributor’s country of domicile and any legal proceedings against the Principal by the Distributor shall be brought in the courts of the Principal’s country of domicile and for the purposes of such proceedings the law governing this agreement and such proceedings shall in each case be deemed to be the law of the country in which the relevant proceedings have been instituted in accordance with this clause. For the purpose of proceedings brought against it by the other party under this clause each party agrees to submit to the jurisdiction of the courts of the other party’s country of domicile”

The first clause is a simple clause giving jurisdiction to one Court. The second clause is more complicated. It can sometimes be used to compromise where the parties cannot agree on proper law and court but it is also useful in international situations generally. If the defendant is always on his home ground this means that if judgement is obtained it will be from the court in the jurisdiction where the defendant has his assets, thus removing the problem of enforcing a foreign judgement. Also since the defendant is on his home ground, he is more confident as to what his rights are under his own law, the proceedings will be in his own language, he can use the type of legal representative that he is familiar with, his witnesses will not have to travel, and generally his costs will be less than those of the plaintiff

This means that both parties are unlikely to raise claims as plaintiffs unless they really feel a genuine grievance and think that their claim is likely to result in a judgement in their favour. Since claims of this nature are the ones which the other party is most likely to want to settle, and frivolous claims are deterred, this sort of clause has the merit of cutting down litigation. It also means that neither party can be forced, against his will, to the expense of foreign litigation by the other party. Thus this type of clause gives some certainty to both parties that the costs of litigation can be controlled and that the other is unlikely to institute legal proceedings against them lightly.

[R. Christou, International agency, distribution and licensing agreements, 1996, pp. 33-34]

5 - How to make sure that an arbitration clause is effective?

5.1. Formal requirements under the 1958 New York Convention

An arbitration agreement will deliver the intended result of withdrawing the disputes from a national courts system if it is enforceable. Only if it was validly entered into and covers the dispute in question will state courts deny jurisdiction. The majority of national arbitration laws including the Uncitral model law in line with the international conventions, require arbitration agreement is to be either in writing or at least to be evidenced in writing.

The New York Convention contains a very narrow definition of “writing”, art. II(2): the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”
Of course telefax and e-mail were not thought of in 1958!!

The written requirement, at least interpreted in a strict manner, is widely criticized: parties can agree a multi-million dollar contract which will be considered to be valid, but for the arbitration clause! The arbitration agreement would be invalid irrespective of whether it can be established that the parties actually agreed on arbitration! There is no justification to submit arbitration agreements to stricter formal requirements than other contractual provisions. Arbitration is no longer considered a dangerous waiver of substantial rights. Anyway, the written requirement should be interpreted dynamically in the light of modern means of communication (J DM Lew, L.A Mistelis, AS M Kroll, comparative international commercial arbitration, Kluwer 2003, §7-9 pag. 132)

The Uncitral Model Law on electronic commerce, articles 6, provides that where the law requires information to be in writing that requirement is meant by a data message if the information contained is accessible so as to be usable for subsequent reference

Model law, art. 7 (2)

“The arbitration agreement shall be in writing. An agreement is in writing even if it is contained in a document signed by the parties or in exchange of letters, telex, telegrams *or other means of telecommunication which provide a record of the agreement*, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract”

The Model Law still requires an exchange of documents, more or less as evidence of consent.

5.2 Formal requirements under national laws

Certain national laws have extended somewhat in the meaning of “in writing”, for example German law:

Section 1031 (2) – (4) ZPO

(2) the form requirements of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such documents are considered to be part of the contract in accordance with common usage

(3) the reference in a contract complying with the formal requirements of subsections 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract

(4) an arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party

Switzerland

Article 178 (1) of the Swiss private international law statute:

“as regards its form, an arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text”

England

English arbitration Act 1996 even recognizes certain categories of oral arbitration agreements. Section 5 provides in pertinent part:

(2) there is an agreement in writing

(a) if the agreement is made in writing (whether or not it is signed by the parties)

(b) if the agreement is made by exchange of communication in writing, or

(c) if the agreement is evidenced in writing.

(3) where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) an agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

National differences are also reflected in the judicial interpretation of the writing requirement pursuant to article II (2) of the New York Convention.

Where the consent of both parties to the arbitration clause was clear despite the non fulfillment of formal requirements, courts have sometime resorted to considerations of good faith and estoppel to uphold the arbitration agreement, cf. Swiss Federal Tribunal, January 16, 1995, *Compagnie de navigation et transport v. MSC* – the dispute was between parties which had a long standing business relationship based on general conditions containing the arbitration clause.

5.3. Defective or pathological arbitration clauses

As a general rule courts and tribunals seek to interpret arbitration clauses positively.

“any dispute shall be referred to a Queen’s Counsel of the English Bar” [valid according to the English Court of Appeal, any agreement which refers this Court to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement would constitute an arbitration agreement, *David Wilson Homes Ltd. v. Survey Services Ltd and others* [2001] 1 All ER 449]

Arbitration by the “Official Chamber of Commerce in Paris” [= reference to the ICC, Tribunal de Grande Instance Paris 13 December 1988, *Société Asland v. Société European energy Corporation* Rev Arb. 521 (1990); , the “Arbitration Court at the Swiss Chamber of Foreign Trade in Geneva” [= chamber of commerce and industry of Geneva], or “International Trade Arbitration organized in Zurich” [= Zurich Chamber of Commerce]

- the designation of a non existent appointing authority has also given rise to problems in practice: decisions which have considered these clauses to be void (Cour d’appel de Grenoble 24 January 1996 *sopc. Harper Robinson v. soc. Internationale maintenance et de realisation industrielles (SIMRI)*, 124 Clunet 115 (1997)]

6. - Pre-action injunctions - the ECJ perspective

An anti-foreign-suit injunction is controversial because it constrains judicial proceedings in another sovereign country. It does so indirectly by controlling the actions of private parties. The enjoining court in one country (F1) orders a private litigant before it to suspend or terminate a legal proceeding in another country (F2) – on pain of sanctions that F1 will impose on the private party for disobedience. Although formally there is no direct interference with, or order addressed to,

foreign judicial power, as a practical matter the effect in the foreign jurisdiction can be substantial. If the enjoined party has assets in F1, or a thriving business there, or just attractive future business prospects in F1, it will not want to risk transgressing the F1 order. Thus, the litigant will comply and terminate (or not initiate) legal proceedings in F2.

As is well known, civil-law jurisdictions generally find anti-foreign-suit injunctions offensive, even violative of international law.

See judgment of the Oberlandesgericht [OLG] Düsseldorf [German Court of Appeal of Düsseldorf] Jan. 10 1996 in *Re the Enforcement of an English Anti-Suit Injunction* (quoted in relevant part in *West Tankers, Inc. v. Ras Riunione Adriatica de Sicurta SpA*, (2005) 2 Lloyd's Rep 257; (2005) 2 All E. R. (Comm) 240; 2005 WL 699582 (QBD (Comm Ct)). See also Emmanuel Gaillard, *Il Est Interdit d'Interdire: Réflexions sur l'Utilisation des Anti-Suit Injunctions dans l'Arbitrage Commercial International*, 2004 Rev. Arb. at 47-62; Marco Stacher, *You Don't Want to Go There—Antisuit Injunctions in International Commercial Arbitration*, 23 ASA Bulletin, at 644 – 645 (2005). Cf. Emmanuel Gaillard, ed., *ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION* (2005).

On the other hand common-law jurisdictions, especially courts in the UK and US, consider an anti-foreign-suit injunction appropriate under some circumstances.

The potential ambit of the ECJ's judgment has been made all the more interesting by the recent decision of the Irish Supreme Court to refer to the ECJ the question of whether the Brussels I Regulation has mandatory application in circumstances where there are pre-existing proceedings in a non-Member State.

This reference raises the interesting question: could EU Member State courts potentially be enjoined from issuing anti-suit injunctions in respect of proceedings in non-EU Member States alleged to have been brought in breach of an arbitration agreement? One would think this unlikely, but perhaps it ought not to be discounted entirely?

The ECJ judgment 10 February 2009 in the *West Tankers/Front Comor* case –

1. "...It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.
2. In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.
3. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.
4. Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from

ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

5. It follows, **first**, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, Gasser, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C 351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 24, and *Turner*, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (*Overseas Union Insurance and Others*, paragraph 23, and *Gasser*, paragraph 48).

6. **Further**, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, *Turner*, paragraph 24).

7. **Lastly**, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

8. Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001....”

7. - Looking into the future: the Hague Convention

The Hague Convention of 30 June 2005 on Choice of Court Agreements will be highly welcomed by the business community as a complementary instrument to the *1958 New York Convention on the Enforcement of Foreign Arbitral Awards*. While the Convention is yet to enter into force, there is significant interest from many States in the benefits the Convention affords, and significantly the Convention has been signed by the EU (April 1, 2009) and by the United States of America (January 19, 2009) and has been ratified by Mexico (October 26, 2007)

European Community Declaration under Article 30: “The European Community declares, in accordance with Article 30 of the Convention on Choice of Court Agreements, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community. For the purpose of this declaration, the term "European Community" does not include Denmark by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community

The Convention is limited to “exclusive choice of court agreements concluded in civil or commercial matters,” with an optional extension of the chapter on recognition and enforcement to judgments given by a court designated in a non-exclusive choice of court agreement.

The Convention excludes consumer and employment contracts and other specific subject matters.

An *exclusive choice of court agreement* that falls within the scope of the Convention is defined as “an agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts in one Contracting State to the exclusion of the jurisdiction of any other courts.”²

² **Article 3 - Exclusive choice of court agreements**

For the purposes of this Convention

- a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
- b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
- c) an exclusive choice of court agreement must be concluded or documented
 - i) in writing; or
 - ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 3, paragraph *c*) provides the Convention's form requirement: the exclusive choice of court agreement must be "entered into or documented *i*) in writing; or *ii*) by any other means of communication which renders information accessible so as to be usable for subsequent reference." This text is drawn from the UNCITRAL Model Law on Electronic Commerce of 1996. No additional form requirements may be established by national law. The Convention also contains an important presumption – where a choice of court agreement has designated one or more specific courts in a Contracting State the court/s shall be deemed to be exclusive unless the parties have expressly provided otherwise.

The Convention contains *three main rules* addressed to different courts:

1. The *chosen court* must hear the case if the choice of court agreement is valid according to the standards established by the Convention (in particular there is no discretion/*forum non conveniens* in favour of courts of another State);³
2. Any *court seized but not chosen* must dismiss the case unless one of the exceptions established by the Convention applies;⁴ and,
3. Any judgment rendered by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the standards established by the Convention must be *recognised and enforced in other Contracting States*⁵ unless one of the exceptions established by the Convention applies.

³ **Article 5 - Jurisdiction of the chosen court**

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
3. The preceding paragraphs shall not affect rules -
 - a) on jurisdiction related to subject matter or to the value of the claim;
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

⁴ **Article 6 - Obligations of a court not chosen**

- A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless
- a) the agreement is null and void under the law of the State of the chosen court;
 - b) a party lacked the capacity to conclude the agreement under the law of the State of the court seized;
 - c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized;
 - d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
 - e) the chosen court has decided not to hear the case.

⁵ **Article 8 - Recognition and enforcement**

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

8. – The Alternative of Mediation

The 20th century lawyer	The 21st century lawyer
expresses desires	satisfies needs
threatens	warns
stamps feet	choreographer
tough shell	tough core
legal expert	legal entrepreneur
claims positions	satisfies interests
well trodden path	beats new trails
process oriented	obsessed by outcomes
single-minded	Kaleidoscopic
< 50% successful	> 80% value generation
Eye wateringly costly	worth every cent

Source: Michael Leathes, based on Richard Susskind's "The End of Lawyers?" (2008)

On 23 April 2008 the European Parliament adopted a Directive on certain aspects of mediation in civil and commercial matters [EU Mediation Directive 25 June 2008, OJ L136/3]. The purpose of the Directive is to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.

The Directive:

- obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conducts and other effective quality control mechanisms concerning the provision of mediation services;
- gives every judge in the European Community the right to suggest that the parties attend an information meeting on mediation and, if he deems it to be appropriate, to invite the parties to mediate. This is without prejudice to any national rules which make mediation obligatory;
- enhances the enforceability of any agreement reached following a mediation. This can be achieved, for example, by way of judicial approval or notarial certification, thereby allowing such an agreement to be enforceable in other Member States under existing Community rules;
- states that mediation must be confidential and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. The Directive also provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties; and
- preserves the parties' access to justice should mediation not succeed by ensuring that time spent in mediation will not count for the purposes of limitation and prescription periods.

Member States (except for Denmark) will be given 36 months to convert the new rules into national law.

b) Choice of law

Choice of law strategies in international distribution agreements

1 - What choices are available?

Party autonomy is the rule: "A contract shall be governed by the law chosen by the parties" (Rome Convention on the law applicable to contractual obligations of 19 June 1980 (80/934/EEC), art. 3 -

Freedom of choice ; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Examples of the options available are as follows:

- the national law of either of the parties to the contract
- the national law of a neutral third country (Swiss law)
- a combination of two national laws, i.e. different laws to govern different aspects of the contract (depeçage)
- principles common to two or more specified legal systems will govern; cf. Clause 68 of the Channel Tunnel contract: “common principles of English and French law, and in the absence of such common principles, by such principles of international trade law as have been applied by national and international tribunals” [cited in Channel Tunnel Group v. Balfour Beatty Ltd. [1993] 1 All ER 664, 673]
- a moveable or changing body of rules (“floating choice of law clause”) providing that one system of law applies assuming an agreed jurisdiction, but some other law if proceedings are brought in another jurisdiction [floating choice of law clauses have been upheld in the US: Bremen & Zapata Offshore Co. 407 US 1 (1972); England: Black Clawson Int.l Ltd. V. Papierwerke Waldorf Aschaffenburg AD [1981] 2 Lloyd’s Rep. 446; start shipping AS v. China National foreign trade transportation Corp. (the star Texas) [1993] 2 Lloyd’s Rep. 445; Austria: Oberster Gerichtshof 20 October 1993 and 23 February 1998, Kajo-Erzeugnisse Essenzen GmbH (Austria) v. DO Zdravilisce Radenska (Slovenia) XXIVa YBCA 919 (1999)]
- “saving clause” providing for the application of law A or law B, but giving preference to the law that saves a claim (such clauses are common in bills of lading)
- “general principles of law”, “transnational law” or “international commercial law” (*lex mercatoria*)
- - the Convention on international sale of goods (CISG)
- the UNIDROIT principles of international commercial contracts

“Stabilisation clause”: it is not unusual, since the law changes, that the parties may agree between themselves that the law at the time of the agreement shall apply; if no such agreement is made, as a general rule the law is applied as it stands at the time when it is being applied

Common errors

A reference to “US law” may well be problematic – the Tribunal will help to determine which state law governs the contract

A reference to “British law” will need to be interpreted as either a reference to English or Scottish or Northern Ireland law, although an express choice of British law has been interpreted as a choice of English Law [Vimar Seguros j Reaseguos SA v. M/V Sky Reefer et al, 115 S Ct 2322, 132 L Ed 2d XXI YBCA 773 (1996) (US Supreme Court, 19 June 1995), where reference to British law was understood as a reference to English COGSA.

“The law of the member states of the European Union” may be valid if there is such law harmonised by the EU

2 - How to make sure that a choice of law is effective?

“The choice must be **expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case**” (art. 3.1 second sentence Rome Convention).

“The choice shall be made **expressly or clearly demonstrated by the terms of the contract or the circumstances of the case**” (art. 3.1.second sentence Reg. Rome I)

2.1. Limits to the effects of choice of law clauses laid by mandatory rules of law

The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules". (Rome Conv. Article 3.3)

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract. (Article 7 - Mandatory rules, Rome Convention)

Rome I Reg

Article 3.3

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

A national court will normally apply its mandatory laws, whatever the applicable substantive law it applies to the issues before it. As regards arbitration, there can be little argument that arbitrators must apply the mandatory rules of the law chosen by the parties, subject only to compliance with international public policy [ICC case no. 8385 (1995) 124 Clunet 1061 (1997) application of RICO as mandatory rule of the chosen New York law]. However as international arbitrators have no national forum, all national mandatory rules are "foreign" to them. Therefore other than that of the chosen applicable law, there is no mandatory law for international arbitration (Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, Kluwer 2003, 17-27, p. 420)

Mandatory rules can displace or restrict party autonomy in certain situations: in particular arbitrators have shown hesitation in applying international mandatory rules not belonging to the proper law of the contract. However there are sufficient examples of cases where arbitrators have allowed *loi de police* to displace the proper law of the contract as chosen by the parties, adopting the position that arbitrators are also ready to set limits on the scope of the proper law even if by so doing they do not strictly abide by the parties' will (cit. 420-421)

Even when applying the Rome Convention, an arbitral tribunal with its seat in an EU member state does not have to apply the mandatory law of another country with which the contract has some

connection [art. 7(1); similarly cf. Swiss PIL art. 19; cf. ICC award n. 6379, 1990, Principal (Italy) v. Distributor (Belgium), XVII YBCA 212 (1992) where neither the Rome Convention nor foreign mandatory rules were considered applicable.

The question is what mandatory law should international arbitration apply: this could be the law of the place of arbitration or the place where the contract was to be performed or the law of the place of enforcement. There is no basis for a tribunal to ignore all the express choice of the parties because it determines that there is a contrary mandatory rule in one of these national laws (Lew etc. cit. 421)

2.2. Limits to the effect of choice of laws clauses in respect of agency agreements

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents

Article 17

1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and

- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;

(c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

3. The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.

Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities,

- and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.

4. Entitlement to the indemnity as provided for in paragraph 2 or to compensation for damage as provided for under paragraph 3, shall also arise where the agency contract is terminated as a result of the commercial agent's death.

5. The commercial agent shall lose his entitlement to the indemnity in the instances provided for in paragraph 2 or to compensation for damage in the instances provided for in paragraph 3, if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

6. The Commission shall submit to the Council, within eight years following the date of notification of this Directive, a report on the implementation of this Article, and shall if necessary submit to it proposals for amendments.

Article 18

The indemnity or compensation referred to in Article 17 shall not be payable:

- (a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;
- (b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities;
- (c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person.

Article 19

The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.

Ingmar judgment [9 November 2000, case C-381/98, *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, in ECR 2000, I- 9305]

In 1989, Ingmar and Eaton concluded a contract under which Ingmar was appointed as Eaton's commercial agent in the United Kingdom. A clause of the contract stipulated that the contract was governed by the law of the State of California.

11. The contract was terminated in 1996. Ingmar instituted proceedings before the High Court of Justice of England and Wales, Queen's Bench Division, seeking payment of commission and, pursuant to Regulation 17, compensation for damage suffered as a result of the termination of its relations with Eaton.

12. By judgment of 23 October 1997, the High Court held that the Regulations did not apply, since the contract was governed by the law of the State of California.

13. Ingmar appealed against that judgment to the Court of Appeal of England and Wales (Civil Division), which decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Under English law, effect will be given to the applicable law as chosen by the parties, unless there is a public policy reason, such as an overriding provision, for not so doing. In such circumstances, are the provisions of Council Directive 86/653/EEC, as implemented in the laws of the Member States, and in particular those provisions relating to the payment of compensation to agents on termination of their agreements with their principals, applicable when:

- (a) a principal appoints an exclusive agent in the United Kingdom and the Republic of Ireland for the sale of its products therein; and
- (b) in so far as sales of the products in the United Kingdom are concerned, the agent carries out its activities in the United Kingdom; and
- (c) the principal is a company incorporated in a non-EU State, and in particular in the State of California, USA, and situated there; and
- (d) the express applicable law of the contract between the parties is that of the State of California, USA?'

§ 21-26

The purpose of Articles 17 to 19 of the Directive, in particular, is to protect the commercial agent after termination of the contract. The regime established by the Directive for that purpose is mandatory in nature. Article 17 requires Member States to put in place a mechanism for providing reparation to the commercial agent after termination of the contract. Admittedly, that article allows the Member States to choose between indemnification and compensation for damage. However, Articles 17 and 18 prescribe a precise framework within which the Member States may exercise

their discretion as to the choice of methods for calculating the indemnity or compensation to be granted.

22. The mandatory nature of those articles is confirmed by the fact that, under Article 19 of the Directive, the parties may not derogate from them to the detriment of the commercial agent before the contract expires. It is also borne out by the fact that, with regard to the United Kingdom, Article 22 of the Directive provides for the immediate application of the national provisions implementing the Directive to contracts in operation.

23. Second, it should be borne in mind that, as is apparent from the second recital in the preamble to the Directive, the harmonising measures laid down by the Directive are intended, inter alia, to eliminate restrictions on the carrying-on of the activities of commercial agents, to make the conditions of competition within the Community uniform and to increase the security of commercial transactions (see, to that effect, Bellone, paragraph 17).

24. The purpose of the regime established in Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained.

25. It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

26. In the light of those considerations, the answer to the question must be that Articles 17 and 18 of the Directive, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country.

Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country.

2.3. Mind your Belgian Distributor!

The Belgian law of 27 July 1961 on the unilateral termination of exclusive distribution agreements of indefinite duration.

Belgium is one of the very few countries in the world with a specific legal regime for the termination of certain distribution agreements, in addition to a law on agency contracts. In other countries, the Belgian Law of 27 July 1961 on the unilateral termination of exclusive distribution agreements of indefinite duration (“the Law”), which is – in contrast to legislation on agency contracts – not harmonised at a European level, often gives rise to surprise, disbelief and specific questions.

The Law provides that

- distribution agreements to which it applies, in the absence of a serious breach, may only be terminated by giving reasonable notice or by paying compensation in lieu of notice

- provided certain conditions exist, distributors are entitled to claim additional compensation from manufacturers, irrespective of whether or not reasonable notice was given. This additional compensation is to cover (i) goodwill, (ii) costs and investments incurred by the distributor and (iii) distributor staff redundancy costs

Scope of the Law

The Law defines a distributorship as an agreement under which a principal grants one or more distributors the right to sell, in their own name and for their own account, products manufactured or distributed by the principal. For the Law to apply, the distribution rights should be (i) exclusive, (ii) for a territory including (part of) Belgium and (iii) for an indefinite duration.

Following an amendment to the Law made in 1971, all fixed-term distribution agreements are, as from their third renewal, considered to have become agreements of indefinite duration.

Reasonable notice

The Law does not define “reasonable” notice. However, case law has established that the notice period must be long enough for the distributor to find an alternative distributorship offering the same commercial advantages as the former one, or more generally, to allow the distributor to find an alternative source of income, whether or not this involves a reorganisation.

The notice period should be agreed between the parties upon termination. If the parties fail to reach an agreement, the court will define a “reasonable” notice period. Except for the principle of equity, the Law does not provide any guidelines in this respect. Generally, the courts take into account the following criteria:

- o the length of time the distributorship has existed;
- o the size of the investments made by the distributor
- o the amount of the distributor’s turnover generated by the contract products as part of the distributor’s overall sales;
- o market share and sales growth during the distributorship;
- o the rarity and specificity of the products;
- o the existence of other distributorships for the same product;
- o the extent of the territory allocated to the distributor.

In practice, reasonable notice tends to be between 3 months and 3 years, depending on the specific circumstances of the case and on the weight given by the court to each of the above criteria.

If no notice, or insufficient notice, is given, the terminated party is entitled to compensation in lieu of notice under Article 2 of the Law.

There is no formula or rule for calculating the amount of the compensation in lieu of notice. It is generally calculated on the basis of the semi-gross profit (i.e. the net profits which would normally have been made by the distributor during the reasonable notice period, plus the amount of fixed overheads incurred during the notice period. Fixed overheads include rent, heating, lighting, maintenance of premises and equipment and insurance). The reference period taken into account is usually limited to a maximum of three years preceding the termination date. In most cases, the courts will appoint an expert to make the calculations.

Additional compensation

Additional compensation covers (i) goodwill (ii) costs incurred and investments made by the distributor and (iii) redundancy costs for the distributor for staff dismissed as a result of the termination. No other heads of claim can be introduced.

Additional compensation will be due if certain conditions apply, irrespective of whether or not reasonable notice was given. No additional compensation is due if the distribution agreement is terminated on the basis of a serious breach by the distributor.

In order to be entitled to additional compensation, the distributor has to demonstrate that

1. in respect of goodwill:

- there had been a significant increase in the number of customers during the term of the distribution agreement; AND
- this increase was a result of its marketing efforts; AND
- the customers are likely to continue to purchase the contract products after termination;

2. in respect of costs and investments incurred:

- he made investments or incurred costs that will continue to benefit the principal after termination;

and/or

3. in respect of redundancy costs:

- he had to dismiss members of staff as a direct result of the termination of the distributorship.

In most cases the only parameter to generate significant compensation is goodwill.

The courts set the amount of additional compensation in equity. In the absence of a formula, this is usually fixed at between six months' and two years' net profits, between three months' and one year's semi-gross profit or gross profit, or alternatively, a percentage of average sales (e.g. 10%).

Other issues

Even though the Law does not expressly specify an obligation for the principal to take back the remaining stock at the end of the distributorship, case law considers this to be a duty of the principal. Nevertheless, the parties may agree otherwise in the distribution agreement.

Issues to be taken into account when drafting a distribution agreement

The simplest way to ensure that a distribution agreement does not fall within the scope of the Law is to make it non-exclusive or for a fixed term. However, such contractual provisions may not suffice to avoid the Law, since it also applies to "quasi-exclusive" distributorships and from the third renewal of fixed-term agreements

Another way to avoid the scope of the Law would be for the parties **to agree to submit disputes to non-Belgian courts or arbitration, and to agree that a foreign law applies. However**, it should be noted that such provisions are not always watertight in the light of Article 7.1 of the Rome

Convention of 19 June 1980 on the law applicable to contractual obligations (or Article 9.3 of EU Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (“Rome I”).

The Law only allows the parties to agree on the consequences of the termination once the contract is actually terminated. Therefore, any waiver of rights under the Law is invalid and unenforceable, unless given after the actual termination. Neither the general principles of Belgian contract law nor the Law specify any formal requirements for entering into a distribution agreement. It is, of course, advisable to have a written agreement rather than a verbal one. However, the Belgian Law of 19 December 2005 on pre-contractual information in the context of commercial co-operation contracts specifies a specific and formal duty of information and a “stand-still” period before the co-operation agreement is signed. This law may apply to distribution agreements to the extent that the distributor is given the right to use a specific commercial formula when selling the products (i.e. a common sign board or trade name or the transfer of know-how or commercial or technical assistance) and if the distributor has to pay (direct or indirect) compensation of any kind in this respect.

3. - What happens in the EU (under the 1980 Rome Convention and from December 17, 2009 under the Rome I Regulation) when no choice of law has been made?

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may, by way of exception, be governed by the law of that other country.
2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".
(1980 Rome Convention, Article 4 - Applicable law in the absence of choice)

The Rome Convention will be replaced effective December 17, 2009 by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Rome I Reg., Article 4 - Applicable law in the absence of choice:

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
 - (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
 - (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
 - (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

4. - Does the CISG apply to distribution agreements?

The effect of the choice of a national law as the law governing a distribution, franchising or agency agreement opens the question as to whether it may lead to the application of the 1980 Vienna Convention (CISG) if the country in question is a party to the Convention:

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

Peter Schlechtriem Uniform Sales Law in the Decisions of the *Bundesgerichtshof*, suggests that the decisions of the *Bundesgerichtshof* have led to a clear distinction between framework agreements and sales contracts concluded in the performance of such agreements. In one of the well-known Benetton cases, [BGH of 23 July 1997, NJW 1998, 3309 (Benetton II) [case presentation also at <<http://cisgw3.law.pace.edu/cases/970723g2.html>>] the disputed claims concerning the purchase price were based on the CISG while the framework agreement on the cooperation of the parties was classified as a "franchising contract or at least similar to a franchising contract," which was to be treated separately. Due to a covenant not to compete, the invalidity of the framework agreement had to be considered pursuant to the German GWB [*Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition)] and Art. 85 of the EEC Treaty, but this had no effect on the individual sales contracts. A first possible combination of the framework agreement, which is subject to domestic law, and the sales contracts made in the performance of this agreement, which are to be judged under the Convention, becomes clear here.

The borderline between framework agreements together with the sales contracts concluded in their performance on the one hand, and requirement contracts, on the other hand, can be fluid. For instance, without going further into the question of the legal nature of the parties' relationship, an American federal district court confirmed an arbitration award in which the CISG was applied to the contract between an American distributor and an Italian supplier. 39. *See* Medical Marketing Int'l Inc. v. Internazionale Medico Scientifica, S.r.l., 1999 WL 311945 (E.D.La. 17 May 1999) [case presentation also at <<http://cisgw3.law.pace.edu/cases/990517u1.html>>]; Schlechtriem, *Vertragsmäßigkeit der Ware und öffentlich-rechtliche Vorschriften*, IPRax 1999, 388.

But see Helen Kaminski Pty. Ltd. v. Marketing Australian Products Inc., 1997 WL 414137 (S.D.N.Y. 1997) [case presentation also at <<http://cisgw3.law.pace.edu/cases/970721u1.html>>] (the CISG not applicable to distribution contracts

U.S. District Court, Southern District of New York 21 July 1997, Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc. d/b/a Fiona Waterstreet Hats Australia (plaintiff)

"The CISG and the Distributor Agreement

...the dispositive issue is whether the CISG applies to the Distributor Agreement. Helen Kaminski maintains that it does, since the agreement, in addition to laying out the terms for the parties' commercial relationship, also governed the disposition of identified goods. Although it does not say so explicitly, it appears that Helen Kaminski is referring to the amendment in February 1996 which addressed specified goods already in the United States. MAP maintains that the Distributor Agreement is merely a "framework agreement" and that such agreements are not covered by the CISG. The Distributor Agreement requires MAP to purchase a minimum quantity of total goods, but does not identify the goods to

be sold by type, date or price. In contrast, the CISG requires an enforceable contract to have definite terms regarding quantity and price.

While both sides cite various secondary sources, there appears to be no judicial authority determining the reach of the CISG and, in particular, whether it applies to distributor agreements. The parties do agree, however, that whether or not the CISG applies turns on whether the Distributor Agreement can be characterized as a contract for the sale of goods -- that is, that it contained definite terms for specified goods. In this respect, the only contract for a specified set of goods to which Helen Kaminski points is the February 1996 amendment. As MAP correctly notes, however, these goods were not the subject of the breach. Rather, Helen Kaminski is claiming a breach for goods ordered but not shipped. Helen Kaminski makes no claim that these goods were identified in the Distributor Agreement.

For this reason, although I find that there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG, Helen Kaminski's rationale for why the CISG applies to the debate about the breach for goods ordered but not shipped is not supported by the facts of the case. The identification in the Distributor Agreement of certain goods -- about which there is no claim of breach -- is insufficient to bring the Distributor Agreement within coverage of the CISG when the dispute concerns goods not specifically identified in the Distributor Agreement. Thus, while the question does present a controlling issue of law over which there may be substantial disagreement, it does not appear that a determination of the issue would materially advance the litigation as Helen Kaminski does not maintain that the general Distributor Agreement -- absent the February amendment which does not concern the goods at issue -- is definite enough to constitute a contract for the sale of goods.

Decisive in this issue is the determination of what rights and duties besides the purchase of goods the distributor has undertaken. In order to avoid possible doubts, the parties are quite at liberty to agree to the application of the CISG for the framework agreement as well. However, in this case, as with any broadening of the Convention's sphere of influence, one must carefully consider whether the Convention's provisions envisaged for the delivery of goods are actually suitable for service-character obligations and their breach.