Distribution Law Center
DRIVEN BY CONTRAST

Modzelewska & Paśnik
COMPETITION REGULATION LITIGATION

Q&A DOCUMENT | 8 June 2023

Q&A on Distribution Agreements

Part I: Legislative framework

Q1. Please specify the legislative framework generally applicable to the conclusion and execution of distribution agreements (a)? Please include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and, if available, to the English translation of the legislative framework (c).

a. Legislative framework:

Distribution agreements are not specifically regulated under Polish law, which means they fall into the broader category of the so called "unnamed agreements". They are thus governed by the general provisions on agreements provided in the Polish Civil Code ("CC"), in particular the provisions on the conclusion of agreements (Art. 66-72 CC1) and the performance of obligations (Art. 353-396 CC). However, depending on the features of a distribution agreement concerned, the provisions on certain regulated (specified or "named") agreements may apply, in particular the provisions on the sale (Art. 535-602 CC), supply (Art. 605-612 CC), contract farming (Art. 613-626 CC) and consignment (Art. 765-773 CC) agreements.

b. Link(s) to official publication:

The Polish version of the CC is accessible via the Internet System of Legal Acts (ISAP).

c. Link(s) to English translation:

No official English translation available.

Q2. Other than for agency agreements pursuant to Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents, are there specific rules depending on the distribution format (e.g. franchising, exclusive distribution)?

Yes.

If yes, which specific rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and, if available, to the English translation of the legislative framework (c).

a. Specific rules depending on distribution format:

Many distribution systems will be structured based on the standard terms of sale, mandate or agency agreements. However, in certain particular circumstances the parties may, depending on the type of the intended relationship, decide to provide for additional commitments falling under other type of contract, namely: the (1) supply agreement (pol. *umowa dostawy*), (2) consignment agreement (pol. *umowa komisu*) and (3) contract

farming agreement (pol. *umowa kontraktacji*). These three types of agreements are specifically governed by the Polish Civil Code (the 'named' agreements).

There are also two other types of agreements that should be mentioned in this context: (4) a distribution (dealership) agreement and (5) a franchising agreement. These agreements have not been named in the Polish Civil Code, however, the features of those agreements have been set out in case law.

1. Supply agreement

Under the terms of a supply agreement the supplier undertakes to manufacture goods of a specified kind and delivers them in parts or periodically to the customer, and the customer undertakes to accept the delivery of the goods and to pay the price. The supply agreement can only cover future goods – goods which are yet to be produced – and which will be delivered in parts or periodically, as opposed to a one-time delivery.

The supply agreement allows the customer to have a degree of influence over and to participate in the production process. The customer can monitor the production, choose the source of materials and the packaging, provide guidance and supervise the enforcement of certain standards or guidelines.

The supply agreement is regulated by Art. 605 to 612 CC.

2. Consignment agreement

Under the terms of a consignment agreement the consignee undertakes, within the scope of his business activity, to buy or sell certain goods for the benefit of the consignor, but on his own behalf. In return, the consignee receives a commission. The agreement is most commonly used for the purpose of selling valuable second-hand goods such as vehicles and home appliances. It can prove useful in certain distribution models as it allows the consignee to pay the price of the goods only after reselling them. It is regulated by Art. 765 to 773 CC.

3. Contract farming agreement

Under the terms of a contract farming agreement, the agricultural producer undertakes to produce and deliver to the contracting party a specified quantity of agricultural products of a specified type, and the contracting party undertakes to take delivery of the products within a specified time, pay the agreed price and perform certain additional obligations specified by the agreement or law. The contracting party has the right to supervise the performance of the contract by the agricultural producer. If the producer is unable to deliver the contract products due to circumstances for which neither party may be held responsible, then the producer shall be obliged only to reimburse advances and bank credits.

The contract farming agreement is regulated by Art. 613 to 626 CC.

4. Distribution (dealership) agreement

A dealership agreement is not specified in the Polish Civil Code (i.e. it is an unnamed agreement). While legal provisions relating to sale and agency will often apply, the parties will have considerable freedom in structuring their relationship. As explained by the Supreme Court, “the distribution agreement consists in one party - the supplier - agreeing to supply a designated good on an ongoing basis and the other party - the distributor - agreeing to buy that good from the supplier and then sell it to third parties in his name and for his account.” (Supreme Court judgment of 8 December 2016, I CSK 825/15).

In a 2005 judgment the Supreme Court considered additional elements of a distribution agreement, including: (i) the exclusivity for the benefit of the distributor, (ii) the fact that the distributor must resell the goods for his own benefit and in his own name; and (iii) that the resale is supervised by the supplier (judgment of the Supreme Court of 6 July 2005, III CK 3/05). The case-law has, however, also developed towards characterizing the distribution agreement by the obligation of the distributor to resell and promote the goods (judgment of the Supreme Court of 15 June 2018, I CSK 494/17).

A distribution agreement should be distinguished from a supply agreement. As explained by the Supreme Court, “the dealership agreement differs significantly from the supply agreement primarily in that its purpose is not only that of a periodical supply of specific goods by the manufacturer for the agreed price to the buyer, but first of all, the sale of these goods by the buyer in a specific way, promotion in a specific area or to specific buyers. A significant difference between these two agreements is also the fact that in the case of a supply agreement, it is the customer who has the right to control and supervise the production of goods (Art. 608 CC), while in the case of a dealership agreement, as a rule, it is the manufacturer who controls the sale of goods by the dealer and establishes its principles. Proper performance of the agreement by the dealer requires good cooperation with the manufacturer, which above all means [the supplier] refraining from the direct sales of the contract goods to the dealer’s customers.” (judgment of the Supreme Court of 6 July 2005, III CK 3/05)

5. Franchising agreement

Like in the case of a distribution agreement, a franchising agreement has not been specifically regulated in the Polish Civil Code. Such an agreement will typically have the elements of other specified agreements (in particular mandate agreement, services agreement and licensing agreement). However, the parties are largely free to determine the contents of the agreement (judgment of the Supreme Court of 7 February 2008, V CSK 397/07, see also the judgment of the Court of Appeal in Katowice of 22 December 2017, I ACa 707/17).

A franchising agreement is based on the relationship of trust. As such, a franchising agreement with elements of a mandate agreement can be terminated without notice where such trust has been irreparably damaged (see judgment of the Court of Appeal in Kraków of 30 March 2017, I ACa 711/16).

b. Link(s) to official publication:

The Polish version of the CC is accessible via the Internet System of Legal Acts (ISAP).

c. Link(s) to English translation:

No official English translation available.

Q3. Other than general contract law and competition law, are there other rules which may generally restrict the parties when drafting and concluding distribution agreements (e.g., rules in relation to unfair contract terms in B2B contracts, specific requirements in the context of a prohibition of abuse of economic dependence)?

Yes.

If yes, which general rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and to the English translation of the regulatory framework (c).

a. General rules

In the context of distribution agreements, there are three major pieces of legislation that restrict the parties' freedom of contract in addition to the provisions of the Civil Code:

- the Act of 8 March 2013 on preventing excessive delays in business transactions ("PEDA 2013", pol. *ustawa z dnia 8 marca 2013 r. o przeciwdzia?aniu nadmiernym opó?nieniom w transakcjach handlowych*);
- the Act of 17 November 2021 on preventing unfair use of contractual advantage in trade of agricultural products and food ("UCAA 2021 ", pol. *ustawa z dnia 17 listopada 2021 r. o przeciwdzia?aniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spo?ywczymi*); and
- the Act of 16 April 1993 on combating unfair competition ("CUCA 1993", pol. *ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji*).

A summary of the key provisions of these acts is provided below.

- Key provisions of PEDA 2013

The provisions of the PEDA 2013 apply only in B2B transactions. Slightly different provisions apply to public authorities. The key provisions are as follows:

- Art. 5: where the parties have fixed a payment term longer than 30 days, then the creditor who is not a large undertaking can demand statutory interest (currently at 10,25%) 30 days after performing his obligation and delivering the invoice/receipt. The interest will accrue from the day of the creditor's performance until payment, but no later than until the payment is due (under the contract);
- Art. 6: where the parties have not fixed a payment term, then the creditor has a right, without requesting it, to statutory interest for the late payment in commercial transactions (currently at 16%; announced periodically by the Minister responsible for economic affairs) accruing from the day when he performed his obligation until

payment;

- Art. 7(1): if the creditor (i) performed his obligation and (ii) was not paid within the deadline set in the agreement, then he will have a right to statutory interest for late payment in commercial transactions (currently at 16%, see above) accruing from the day of the performance until the date of payment;
- Art. 7(2)-7(3a): payment deadline can only exceed 60 days from the date of delivery of invoice/ receipt only if (i) the parties explicitly agree to a longer deadline in the agreement; (ii) the debtor is not a large undertaking, while the creditor is a micro, small or a medium undertaking; and (iii) agreeing on such a longer deadline would not be blatantly unfair. If a longer deadline is agreed in breach of conditions (i), (ii) or (iii), then the creditor has a right to statutory interest for late payment in business transactions, accruing from the date of delivery of the receipt/invoice until payment. If a deadline longer than 120 days has been agreed in breach of conditions (i), (ii) or (iii) then the creditor can terminate the agreement.
- Art. 13: contract provisions which limit the rights of the creditor and duties of the debtor with regard to, in particular, the interest, are void and the provisions of the Act apply.
- Art. 13b: prohibits excessive late payments. An excessive late payment is defined as a situation where over a period of 3 months, the sum of outstanding or late payments amounts to at least PLN 2,000,000 (approx. EUR 430,000).

The President of the Office of Competition and Consumer Protection can launch proceedings against a business which excessively delays in its payments (Art. 13c PEDA 2013). PEDA 2013 gives the President of the Office as well as the Commercial Inspection the right to carry out inspections (Art. 13j PEDA 2013). Obstruction of an inspection as well as failure to provide the requested information can result in a fine of up to 5% of income obtained in the previous financial year (but no more than the equivalent of EUR 50,000,000).

If the President of the Office finds that an undertaking excessively delayed its payment(s), it can impose a fine calculated on the basis of the amount of payment that was outstanding or late, the number of days when the payment was outstanding and the statutory interest rate for late payment in commercial transactions. As of November 2022, the highest fine imposed in proceedings concerning excessive late payments was more than PLN 4 million (approx. EUR 850,000) (decision addressed to Polska Grupa Farmaceutyczna, not yet published).

- Key provisions of UCAA 2016

ACAA 2016 prohibits unfair use of contractual advantage in relations between suppliers and purchasers of foodstuff, where such an abuse has or could have effects on the territory of Poland (Art. 1 and 2 UCAA 2016).

The UCAA 2021 adopts the definition of agricultural products by reference to the products listed in Annex I to the Treaty on the Functioning of the European Union as well as products not listed in that Annex, but processed for

use as food using products listed in that Annex (Art. 3(4) UCAA 2021).

Contractual advantage is understood as “considerable disproportion in the economic potential” between the parties (Art. 7(1) UCAA 2021).

The use of a contractual advantage will be unfair where it is contrary to good commercial conduct and it threatens or violates an important interest of the other party (Art. 6 UCAA 2021). Examples of unfair trading practices (Art. 8(1) UCAA 2021, which corresponds to Art. 3 of the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain) include:

- the buyer cancels orders of perishable agricultural and food products at short notice;
- the buyer requires payments from the supplier that are not related to the sale of the agricultural and food products of the supplier;
- the buyer requires the supplier to pay for the deterioration or loss, or both, of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier;
- the buyer pays for delivered products with delays.

The President of the Office of Competition and Consumer Protection can launch proceedings against a business that has engaged in a prohibited trading practice. UCAA 2021 gives the President of the Office the right to request information and documents (Art. 18 UCAA 2021) and carry out inspections (Art. 19-28 UCAA 2021). Obstruction of an inspection as well as failure to provide the requested information can result in a fine of up to the equivalent of EUR 50,000,000 (Art 43 UCAA 2021).

The President of the Office can also impose a fine for the infringement of the prohibition on the unfair use of a contractual advantage in the amount of up to 3% of turnover generated in the preceding financial year (Art. 42 UCAA 2021). As of November 2022, the largest fine for unfair use contractual advantage imposed on Jeronimo Martins Polska (the owner of one of the largest discount and convenience chains) amounted to over PLN 723 million (approx. EUR 150,000,000).

- CUCA 1993

The CUCA 1993 is a private enforcement act relating to unfair competition. It lays down the framework for seeking compensation or other measures in court against businesses that engage in unfair practices. An act of unfair competition is defined as an act contrary to the law or accepted principles of morality which threatens or violates the interests of another entrepreneur or the customer (Art. 3(1) CUCA 1993). The Act provides a non-exhaustive list of examples of unfair competition practices which includes in particular: misleading indication of the

geographical origin of the goods or services, false or fraudulent indication of the geographical origin of the goods or services, infringement of business secrets, inducement to dissolve or breach a contract, imitation of products, slander or unfair praise, hindering of access to the market, bribery of a person exercising a public function, unfair or prohibited advertising, as well as organising a system of pyramid selling, operating or arranging activities in a consortium system and unreasonably extending the payment period for goods or services supplied.

In the context of distribution agreements one provision of the CUCA 1993 is particularly relevant. Art. 15(1)(4) prohibits charging fees other than the margin for accepting a product for the purpose of reselling it. This provision has been extensively litigated in circumstances where retailers and cash & carry markets charged their suppliers a fee for placing the product in a manner more visible to the customer (e.g. on the eye-level shelf, by the till or at the end of any aisle).

b. Link(s) to official publication:

The Polish version of the PEDA 2013, the ACAA 2016 and the CUCA 1993 is accessible via the Internet System of Legal Acts (ISAP).

c. Link(s) to English translation:

No official English translation available.

Part 2: Pre-contractual phase

Q4. Are there mandatory provisions in relation to the disclosure of pre-contractual information prior to concluding and/or executing distribution agreements?

No.

If yes, which mandatory provisions apply (a) and which information must be disclosed (b)? Where available, please also include a link to the official publication of the applicable rules (c) and, if available, to the English translation of the regulatory framework (d).

a. Mandatory provisions:

No, not specifically (distribution agreements are not specifically governed by the CC). However, the sale contract requires that certain information be provided prior to the conclusion of the contract (see below).

b. Information to be disclosed:

See point a) above.

c. Link(s) to official publication:

The Polish version of the CC is accessible via the Internet System of Legal Acts (ISAP).

d. Link(s) to English translation:

No official English translation available.

Q5. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

No.

Q6. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

Yes.

If yes, which sanctions apply (e.g., nullity of contract, penalty payment)?

According to Art. 546 CC the seller is under duty to provide the necessary clarifications on the legal and factual situation concerning the item (product(s)) prior to the conclusion of the contract. The seller must transmit the documents concerning the item that are in his possession. An instruction should also be provided and a clarification on the use of the item, in case that this is necessary to ensure the proper usage of the item, in accordance with its intended purpose.

If the parties have not by contract excluded the application of Art. 546 CC, then failing to provide the required information may result in:

- A claim for compensation for loss incurred by the non-infringing party (under Art. 471 CC);
- rescission of the contract by the non-infringing party (under Art. 84 or 86 CC);
- a claim for compensation by the buyer (Art. 415 et seq., 471, 556^1 CC).

Q7. Can a party be held liable if it terminates the pre-contractual negotiations?

Yes.

If yes, on what grounds (a); under what conditions (b); and what consequences are generally linked to such liability (c)?

a. Grounds for pre-contractual liability:

Art. 72 § 2 CC relating to negotiations ethics.

b. Conditions for pre-contractual liability:

A party to the negotiations will be liable if he/she commenced or conducted negotiations in breach of good morals, in particular without the intention to conclude an agreement.

Thus, the first requirement of liability is commencing or conducting negotiations. As a minimum, negotiations are understood as interactions (communications) between the parties.

The second condition of precontractual liability is breach of good morals. This will in principle include any acts of disloyalty towards the other party. This on a case-by-case basis could include the following: (i) withdrawal from advanced negotiations without giving any reason or for an insignificant reason; (ii) intentional delay of negotiations; (iii) hindering negotiations by misleading the counterparty; (iv) deliberate submission of proposals that are unacceptable to the other party; (v) unreasonable refusal to disclose information essential for the negotiations. This condition will be fulfilled also where the liable party entered into the negotiations in compliance with good morals, but these circumstances changed while the negotiations were ongoing. By contrast, this condition will not be met where a party makes clear at the outset of the negotiations that he/she does not intend to conclude an agreement but rather seeks to explore the possibility of reaching such an agreement or its terms.

There is some controversy as to whether culpability is a condition for precontractual liability. It seems that the subjective element will be relevant at least in some cases of disloyalty, e.g. intentional delay or deliberate submission of unacceptable proposals.

c. Consequences of pre-contractual liability

The infringing party shall be obliged to compensate the damage incurred by the other party due to the fact that the latter expected to conclude an agreement. In other words, the non-infringing party should be compensated for the damage resulting from failed negotiations. Importantly, the damages are not intended to compensate for the fact that the agreement was not concluded, but rather for the costs or expenses incurred as a result of the negotiation process.

Q8. Are there other relevant rules and/or restrictions that apply during pre-contractual negotiations between supplier and distributor?

No.

Part 3: Contractual phase

A. Form of distribution agreements

Q9. Must a distribution agreement be executed in writing to be valid and enforceable?

Only in certain instances.

If only in certain instances, please explain when a written agreement is required.

Sale of goods does not require a written form, but the parties are free to agree on a written or other particular form. In such cases, in order for the agreement or any amendments thereof to be effective, the agreed form must be kept. However, if a written, document or electronic form is reserved, but the parties do not provide in their

contract for the effect in the case of failure to keep the agreed form, it will be construed that the form was only stipulated for evidentiary purposes. This means that failure to execute the agreement in the agreed form will not render the agreement void but rather prevent the parties from producing witness testimony as evidence of the agreement in court (Art. 74 § 2 CC). However, under Art. 74 § 4 CC this effect does not extend to agreements in B2B relations, therefore the agreement is effective and there are no limitations as to witness evidence basis in the case of non-adherence with the stipulated form in B2B relations.

A contract farming agreement should generally be executed and signed in writing (Art. 616 CC), however, failure to execute the agreement in writing will not render the agreement void, but will be associated with evidentiary limitations (see above, reference to Art. 74 CC). In practical terms, there is no requirement of a written form for a contract farming agreement in B2B relations and there are no limitations as to witness evidence basis in the case of non-adherence with the stipulated form.

A supply agreement needs to be made in writing (Art. 606 CC). There is no general consensus, but most legal scholars agree that this requirement will effectively not apply in B2B relations.

Q10. Are there any (other) requirements as to the form of the distribution agreement for it to be valid and enforceable?

No.

B. Content of distribution agreements

Q11. Other than restrictions imposed by EU competition law (including Regulation (EU) 330/2010), do specific rules and/or restrictions apply in distribution agreements with respect to

- the territory in which or the customers to whom the goods/services will be sold;
- an exclusivity granted to the distributor;
- (exclusive) sourcing/purchasing obligations;
- resale prices;
- non-compete clauses?

None of the above are applicable.

If yes, what do these specific rules and/or restrictions entail?

See, Q4 for rules applicable in the food and agricultural sector and payment deadlines.

The Parties are in general free to determine their obligations as they see fit, as long as the content or purpose of the agreement does not contradict the nature of the relationship, the law or the principles of social coexistence (Art. 3531 CC). For example, where the supplier is granted extensive rights to supervise and instruct the

distributor, this could be contrary to the very nature of a distribution agreement which presupposes that the distributor will resell the contract goods in his own name and for his own benefit. As a result, the agreement could be construed as e.g. an agency agreement, with the relevant provisions of the Polish Civil Code being applicable. Equally, it would be contrary to the nature of a relationship to impose a non-disclosure obligation with respect to information that is publicly available.

Per Art. 56 CC, a legal action has not only the effects expressed in it, but also those arising from law, the rules of social coexistence and established customs. Moreover, under Art. 355 § 1 CC, the debtor is obliged to act with the care customarily due in relations of the particular kind. These two provisions give rise to a general obligation of the contract parties to act loyally. The detailed scope of this obligation will depend on the circumstances of each case. For example, it may translate into an obligation to keep the other party informed or to protect the reputation of the product distributed.

In addition, where distribution is carried out based on a sale agreement, the following mandatory provisions are relevant:

- under Art. 551 CC if a distributor is delaying the collection of the item sold, the supplier can put that item into storage at distributor's cost and risk and, after setting an additional deadline for the distributor, sell the item at the distributor's cost;
- under Art. 5761 CC a distributor who compensated a consumer for a product which was not fit for purpose, did not comply with publicly announced qualities or was handed over incomplete, then that distributor can seek compensation from the supplier (or another undertaking in the supply chain) that is responsible for the product being defective.

Furthermore, unless agreed otherwise, the parties are obliged to keep confidential the information obtained during negotiations and refrain from using it for their own purposes (Art. 721 § 1 CC). Failure to comply with this obligation will give the non-infringing party the right to seek compensation or to demand the benefits thus obtained by the infringing party (Art. 721 § 2 CC). In addition, failure to protect confidential information of the other party can constitute an act of unfair competition under Art. 11 of the Act for the combatting of unfair competition (CUCA 1993). The infringing party would be liable for compensation for the loss resulting from the publication of the information.

For statutory rights and obligations of the parties to a consignment agreement, see Art. 766-772 CC.

Otherwise, rights and obligations commonly included in distribution agreements (e.g. the distributor's obligation to follow supplier's reasonable instructions or the supplier's right to inspect and supervise the distribution) will have to be explicitly provided for in the agreement.

Q12. Do specific rules and/or restrutions apply in distribution agreements with respect to

- obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor;
- obligations of the distributor vis-à-vis the supplier or vice versa;
- a non-solicitation clause during and/or after the term of the distribution agreement;
- minimum sales quota imposed on the distributor;
- specific sector rules?

Yes, there are specific rules regarding (i) obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor, (ii) obligations of the distributor vis-à-vis the supplier or vice versa and (iii) specific sector rules.

What do these specific rules and/or restrictions entail?

See, Q21.

C. Term and termination

1. Term

Q13. Is an oral or written distribution agreement that does not specify the term always considered to be an agreement of indefinite duration?

No.

If only in certain instances, please explain when a distribution agreement that does not specify the term is considered to be a contract of indefinite duration.

In the absence of a defined term or duration, either provided in the contract or in the relevant provisions of law, the assessment as to whether a contract should be considered to be a contract of indefinite duration is assessed on a case-by-case basis, depending on the features of a given relation and the facts of a given case.

Q14. Does a distribution agreement of definite duration that is continued after its expiry turn into a distribution agreement of indefinite duration?

No.

2. Termination

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of definite duration

Q15. Can a distribution agreement of definite duration be terminated for convenience?

Yes.

If yes, is an express provision allowing for termination for convenience necessary?

Yes.*

*Please note that there are divergent views in the Polish case-law and literature as regards the issue of termination for convenience of fixed term contracts. Three main views emerge: 1) termination for convenience in relation to contracts of definite duration is not effective, even if such a possibility is stipulated in the contract; 2) termination of a definite duration contract is only possible on grounds specified in the contract itself, which do not, in principle, include a simple termination for convenience, but rather strictly specified instances; 3) termination for convenience is possible, however, the parties must ensure to provide for this possibility in the contract.

Q16. Must a reasonable notice period be observed in order for the termination to be valid even if the distribution agreement provides for the immediate termination for convenience?

No.

Q17. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

In the absence of specific contractual provisions governing the consequences thereof, the notice of termination is subject to assessment on the basis of the provisions applicable to a given contract (depending of the features of a given distribution contract) and rules applicable to all declarations of will. It should be construed in light of the circumstances of its submission, the rules of social co-existence and the settled customs. Depending on the facts of a given case, in principle, a notice of termination may be considered ineffective.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

In certain circumstances, for instance when termination requires a just cause, the terminated party may be entitled to damages by the terminating party. The right to compensation depends on the circumstances of a given case.

As regards the damages, the general principle under CC is the right to full compensation, so as to recover both incurred losses and lost profit. However, depending on the facts of a given case, full compensation may not be awarded.

The relevant premises must be demonstrated to the requisite legal standard.

There is no pre-determined or universal way of calculating the damages. The state pre- and post- the occurrence giving rise to the damage is typically analyzed.

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of indefinite duration

Q18. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement does not provide for termination for convenience?

Yes.

If yes, must a reasonable notice period be observed?

Yes.

If a reasonable notice period must be observed, how is this reasonable notice period calculated (e.g. 1 month per year) (a)? Should a minimum notice period be observed (b), is there a maximum notice period (c)?

a. How is this reasonable notice period calculated (e.g. 1 month per year)?

In accordance with Art. 365^1 CC, a continuous liability of an indefinite duration expires upon termination by the debtor or creditor with observance of the contractual, statutory or customary notice periods, or in the absence of such periods, immediately upon termination. There are no statutory methods of calculating a reasonable notice period for distribution agreements. Consequently, in the absence of contractual provisions, the notice period is to be assessed on a case-by-case basis, and customary notice periods may apply.

b. Should a minimum notice period be observed? If yes, how long is this minimum notice period and are the parties allowed to contractually deviate from this minimum notice period

There are no specified statutory minimum notice periods. The parties may agree on a minimum or minimum notice periods may be customary.

c. Is there a maximum notice period? If yes, how long is this maximum notice period and are the parties allowed to contractually deviate from this maximum notice period?

There are no specified statutory maximum notice periods. The parties may agree on a maximum or maximum notice periods may be customary.

Q19. Is a contractual notice period always legally valid and enforceable?

No.

If not, which rules of mandatory law can have an impact on this?

Depending on the features of a given contract, termination notice periods may be laid down by mandatory provisions of law. Also, general rules of civil law apply, in particular the notion of the misuse of rights (Art. 5 CC) or the voidness of legal actions that are contrary to the rules of social coexistence (Art. 58§ 2 CC).

Q20. What are the consequences for the terminating party if it does not comply with prescribed (statutory,

contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

In the absence of specific contractual provisions governing the consequences thereof, the notice of termination is subject to assessment on the basis of the provisions applicable to a given contract (depending on the features of a given distribution contract) and rules applicable to all declarations of will. It should be construed in light of the circumstances of its submission, the rules of social co-existence and the settled customs. Depending on the facts of a given case, in principle, a notice of termination may be found ineffective.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

In certain circumstances, for instance when termination requires a just cause, the terminated party may be entitled to damages by the terminating party. The right to compensation depends on the circumstances of a given case.

As regards the damages, the general principle under CC is the right to full compensation, so as to recover both incurred losses and lost profit. However, depending on the facts of a given case, full compensation may not be awarded.

The relevant premises must be demonstrated to the requisite legal standard.

There is no pre-determined or universal way of calculating the damages. The state pre- and post- the occurrence giving rise to the damage is typically analyzed.

Q21. Must the terminating party comply with certain formalities?

Yes.

If yes or only in certain instances, when is a written notice required (a), must the notice contain a motivation in order for the termination to valid (b) and what are the consequences if any of the formalities are not observed (c)?

a. Is a written notice required? If yes, is a registered letter (or similar) required?

The form of a termination notice and the consequences of failure to observe it may be governed by the contract. In the absence of the relevant provisions in the contract, the general rules for the form of declarations of will laid down in the CC will apply. A written notice may be required in cases where the parties to a contract have stipulated a specific form for the conclusion of the contract and any amendments thereof. Otherwise, a written form will typically not be required for the notice of termination to be valid.

There is no requirement as to any particular method of delivering a termination notice. The general rules regarding the submission of declarations of will laid down in Art. 61 CC will apply, and namely that it is only required that the declaration of will is submitted in a manner that allows the other party to get acquainted with its

contents.

b. Must the notice contain a motivation in order for the termination to valid?

In principle, termination for convenience does not require a motivation or justification. However, depending on the features of a given contract and the requirements that may apply by law, a just cause or other specific conditions may need to be satisfied. Thus, this may translate into an obligation on the part of the terminating party to state the reasons for the termination

c. What are the consequences if any of the formalities are not observed?

In the absence of specific contractual provisions governing the consequences thereof, the notice of termination is subject to assessment on the basis of the provisions applicable to a given contract (depending on the features of a given distribution contract) and rules applicable to all declarations of will. It should be construed in light of the circumstances of its submission, the rules of social co-existence and the settled customs. Depending on the facts of a given case, in principle, a notice of termination may be found ineffective.

Q22. Can the parties stipulate the formalities in the distribution agreement?

Yes.

If yes, what are the consequences if those formalities are not observed?

The consequences of failure to observe certain formalities are typically also stipulated in the distribution agreement. Those may include, e.g. ineffectiveness, a contractual penalty or additional commitments.

Q23. Is the terminated party entitled to damages or another type of compensation even if the correct notice period has been observed?

Only in certain instances.

If yes, does this concern goodwill compensation or another type of compensation? Do the legal consequences vary depending on the type of agreement (definite/indefinite duration; exclusive/non-exclusive; franchise etc.)?

The legal consequences of termination must be analyzed in the context of a given case and may vary depending on the features of a given agreement. For instance, in the case of a mandate contract, a termination by the contractor without an important cause may give rise to damages claims (Art. 745 §2 CC), therefore observance of the notice periods does not determine the right to compensation. The contract itself may also provide for certain conditions for termination (other than related to notice periods), as well as consequences of failure to satisfy them.

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q24. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

Depending on the features of a given contract, specific provisions of law may provide for a possibility for an early extrajudicial termination and the conditions for exercising this right.

The case-law, although generally scarce, seems to accept the possibility of extrajudicial termination of a broadly defined distribution agreement on the basis of certain, rather extraordinary, circumstances (for instance, in its judgment of 15 May 2015 VI ACa 1937/13 the Warsaw Court of Appeal ruled on a case in which immediate termination was based on the breach by the distributor of an exclusivity clause).

b. Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement?

No.

Q25. Will an (extrajudicial) termination continue to have effect if the court rules that the agreement was wrongfully terminated on account of serious breach and/or exceptional circumstances?

No.

If not or only in certain instances, what are the consequences of the termination not being upheld?

In general, even if the Court ruled that termination was ineffective, the contract may not be possible to execute anymore (which is typically the case due to lengthy proceedings). The parties are more likely to submit damages claims rather than seek the continuation or performance of the contract.

Q26. Does the terminated party have a right to compensation if it appears that the agreement was wrongfully terminated or dissolved on account of serious breach and/or exceptional circumstances?

Yes.

If yes, is this right based on statute or case law (a) and how is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill) (b)?

a. Is this right based on statute or case law and what this right entail?

If a contract is wrongfully terminated, a terminated party is, in principle, entitled to compensation. The compensation may be enforced under the general rules, i.e. on the basis of general statute regime for contractual (and/or delict) liability relating to the non-performance or improper performance of a contract (liability).

b. How is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill)?

The general rule under CC is right to full compensation, which includes incurred losses and lost profit. Damage to goodwill may be subject to enforcement on the basis of rules of liability for the infringement of company rights such as right to business name. Under Art. 43[10] CC an undertaking whose right to business name has been threatened by someone else's action, may demand that this action be ceased, unless it is not unlawful. In the event of an infringement, it may also demand the removal of its effects, the submission of a statement(s) in the appropriate content and form, compensation for material damage under the general rules or the recovery of benefits obtained by the party who committed the violation.

Q27. If a party believes that the distribution agreement has been wrongfully terminated or dissolved, can it apply to the judge in interim relief proceedings to have the effects of the termination suspended?

Yes.

Part. 4: Post-contractual phase

Q28. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

No.

Q29. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

No.

Part 5: Dispute resolution

Q30. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

No.

Q31. Can the parties opt for arbitration?

Yes.

If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

No.

If yes, what do these specific rules and/or restrictions entail?

There are no rules on arbitration clauses specific to distribution agreements. To be enforceable, an arbitration

clause must comply with the general requirements set out in the Code of Civil Procedure ("CCP"):

- the parties must agree to arbitration and that agreement must specify the subject matter of the dispute or the legal relationship from which the dispute arise or may arise (Art. 1161 § 1 CCP);
- the clause cannot infringe the principle of equality of parties, in particular it cannot grant the right to seek arbitration only to one party (Art. 1161 § 2 CCP);
- it should be made in signed writing or in documents exchanged via means of distance communication (Art. 1162 CCP).

Q32. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

The applicable limitation period will depend on how the distribution agreement is qualified depending on its features and obligations of both parties (Supreme Court judgment of 19 January 2012, IV CSK 201/11). Where the agreement is dominated by features typical to a sale agreement, Art. 554 CC will apply (Supreme Court judgment of 14 January 2010, IV CSK 319/09). Accordingly, the limitation period will be 2 years. The same limitation period will apply in supply agreements by virtue of Art. 612 CC.

Claims based on a contract farming agreement will become time-barred 2 years after the agricultural producer performed his obligation or, if the obligation has not been performed, 2 years after he should have performed it.

The general limitation periods provided in Art. 118 CC shall apply to a consignment agreement. Under that provision, claims arising out of business commercial activity become time-barred after 3 years.