Distribution Law Center
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Pérez-Llorca

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Q&A on Distribution Agreements

Part 1: 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:

In Spain, distribution agreements are not explicitly regulated. Therefore, the general contractual system contained in the Spanish Commercial Code and the Spanish Civil Code and, in certain circumstances, the Spanish Agency Contract Law ("ACL") may apply by analogy and contractual integration.

Also, distribution agreements shall comply with Competition Law and, where applicable, with specific sectorial regulations (*e.g.*, in the food sector).

b. Link(s) to official publication:

The Law 12/1992 on Agency Contracts is accessible via this link.

The Royal Decree of 24 July 1889 publishing the Spanish Civil Code is accessible via this link.

The Royal Decree of 25 August 1885 publishing the Spanish Code of Commerce is accessible via this link.

The Law 7/1996 of 15 January 1996 on the Regulation of Retail Trade Act is accessible via this link.

The Royal Decree 201/2010, of 26 February 2010, which governs the exercise of commercial activity under the franchising regime and the communication of data to the register of franchisors is accessible via this link.

The Organic Law of the Judiciary 6/1985, 1 July 1985 is accessible via this link.

The Law 1/2000 of 7 January 2000 on Civil Procedure is accessible via this link.

The Act 29/1998 of 13 July, regulating the jurisdiction of Judicial Review is accessible via this link.

The Act 60/2003 of 23 December on Arbitration is accessible via this link.

The Law 15/2007, of July 3, 2007, on the Defense of Competition is accessible via this link.

The Law 12/2013, of August 2, on measures to improve the functioning of the food chain is accessible via this link.

c. Link(s) to English translation:

A free translation of Royal Decree 201/2010, of 26 February 2010, which governs the exercise of commercial

activity under the franchising regime and the communication of data to the register of franchisors is accessible via this link.

An official translation of the Royal Decree of 25 August 1885 publishing the Spanish Code of Commerce is accessible via this link.

An official translation of the Royal Decree of 24 July 1889 publishing the Spanish Civil Code is accessible via this link.

An official translation of the Law 1/2000 of 7 January 2000 on Civil Procedure is accessible via this link.

An official translation of Act 29/1998 of 13 July, regulating the jurisdiction of Judicial Review is accessible via this link.

An official translation of Act 60/2003 of 23 December on Arbitration is accessible via this link.

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.

Q3. 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:

In Spain, distribution agreements are atypical. In any case, some regulations specifically govern certain aspects of some agreements, such as the franchise agreement.

Specific rules apply to franchise agreements: Art. 62 Regulation of Retail Trade Act and Royal Decree 201/2010 of 26 February, regulating the exercise of commercial activity under the franchise system and the communication of data to the register of franchisors.

b. Link(s) to official publication:

The specific rules are accessible via this link.

c. Link(s) to English translation:

A free translation of Royal Decree 201/2010 of 26 February, regulating the exercise of commercial activity under the franchise system and the communication of data to the register of franchisors is accessible via this link.

Q4. 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.

Q5. 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 Spain, no rules limit the parties' freedom to negotiate and conclude distribution agreements. However, the abuse of economic dependence is regulated by Art. 16.2 of Law 3/1991 on Unfair Competition. The scope of application of this rule is general and applies to all types of agreements, in particular, distribution agreements.

A situation of economic dependence would arise when (i) the affected entity does not have equivalent viable alternatives to carry on with their business activity; and (ii) the relevant party abuses such a situation of economic dependence. The first condition, as interpreted by Spanish case law, arises when the distributor does not find real, effective, viable and sufficient alternatives to the supplier in order to carry on with its business, and thus would encounter difficulties to readapt upon a potential termination of the business relationship (e.g. when a manufacturer depends on a distributor that has a relevant position towards consumers or users in the relevant market). The second element, i.e. the abuse of such a situation, would come into play when the abusive entity carries out unjustifiable acts that it would not have been able to perform had the situation of economic dependence not existed (e.g. when the distributor sets arbitrary or unjustified commercial terms in its agreements with its counterparts). The existence of such conditions would encroach the parties' freedom to draft and conclude distribution agreements.

b. Link(s) to official publication:

The specific rules are accessible via this link.

c. Link(s) to English translation:

No official English translation is available.

Part 2: Pre-contractual phase

Q6. Are there mandatory provisions in relation to the disclosure of pre-contractual information prior to concluding and/or executing distribution agreements?

Yes.

Q7. 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:

As mentioned above, in Spain, distribution agreements are atypical, and the general rules and principles of contract law apply. In distribution agreements, therefore, the principles of good faith and mutual trust govern the preliminary negotiations. According to Spanish Supreme Court's case law, the disclosure of pre-contractual information must be sufficient and accurate so as to allow the parties to form their will to conclude the contract in light of its elements, being the limit the causes that would generally render contracts null and void. The duty of confidentiality must be stated expressly or tacitly.

In the specific case of a franchise agreement, the obligation to provide pre-contractual information is governed by Art. 62.2 Regulation of Retail Trade Act and by Art. 3 Royal Decree 201/2010 of 26 February 2010, which regulates the exercise of commercial activity under the franchise system and the communication of data to the register of franchisors. Such pre-contractual information includes the franchisor's proof of identification, proof of having a license of use of the trademark and other distinctive signs belonging to the franchisor, the object and scope of the franchise agreement, the structure of the franchise network in Spain, or the basic features of the franchise agreement, among others.

b. Information to be disclosed:

Art. 62.2 of Law 7/1996 of 15 January on the Regulation of Retail Trade:

"At least 20 days prior to the signing of any franchise agreement or pre-contract or the delivery of any payment by the future franchisee to the franchisor, the franchisor must have delivered the necessary information in writing to the future franchisee so that he/she may decide to join the franchise network freely and with full knowledge of the facts and, in particular, the main information identifying the franchisor, a description of the sector of the franchised business, content and features of the franchise and its operation, the structure and size of the network and the essential elements of the franchise agreement. The other basic conditions for the franchising activity will be established by regulations."

Art. 3 of Royal Decree 201/2010 of 26 February 2010: Pre-contractual information to the potential franchisee:

"At least twenty working days prior to the signing of the franchise agreement or pre-contract or the delivery by the prospective franchisee to the franchisor of any payment, the franchisor or principal franchisee shall provide the prospective franchisee with the following truthful and non-misleading information in writing:

a) Identification data of the franchisor: name or corporate name, registered office, as well as, in the case of a trading company, the equity capital stated in the most recent balance sheet, with a statement of whether it is fully paid up or in what proportion, and registration data in the Commercial Registry, where applicable.

In the case of a principal franchisee, the above circumstances with respect to its own franchisor shall also be included.

b) Proof that the title of ownership or licence to use the trademark and distinctive signs of the franchisor has been granted for Spain and is in force, and proof of any legal appeals filed that may affect the ownership or use of the trademark, if any, stating, in any case, the duration of the licence.

c) A general description of the sector of activity that is the object of the franchise business, which shall include the most important data of the same.

d) The experience of the franchising company, which shall include, among other data, the date of establishment of the company, the main stages of its development and the growth of the franchised network.

e) Content and features of the franchise and its operations, which will include a general explanation of the system of the business that is the object of the franchise, the features of the know-how and of the permanent commercial or technical assistance that the franchisor will provide to its franchisees, as well as an estimate of the investments and expenses necessary for the start-up of a typical business. In the event that the franchisor provides the potential individual franchisee with forecasts of sales figures or operating results of the business, these must be based on sufficiently substantiated experiences or studies.

f) The structure and size of the network in Spain, which shall include the form of organisation of the franchise network and the number of establishments in Spain, distinguishing those operated directly by the franchisor from those operating under the franchise assignment regime, stating their location and the number of franchisees who have ceased to belong to the network in Spain in the last two years, specifying whether the termination occurred due to the expiration of the contractual term or other circumstances.

g) Essential elements of the franchise agreement, which will include the rights and obligations of the respective parties, the duration of the agreement, the conditions of termination and, if applicable, of renewal thereof, economic considerations, exclusivity agreements, and limitations on the franchisee's free use of the franchised business."

c. Link(s) to official publication:

The Law 7/1996 of 15 January on the Regulation of Retail Trade Act is accessible via this link.

The Royal Decree 201/2010 of 26 February 2010 is accessible via this link.

d. Link(s) to English translation:

A free translation of Royal Decree 201/2010 of 26 February, regulating the exercise of commercial activity under the franchise system and the communication of data to the register of franchisors is accessible via this link.

Q8. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

Yes.

Q9. If yes, what does this standstill obligation entail (how long, specific procedural requirements, etc.)?

The pre-contractual phase in distribution agreements is not expressly provided for since they are atypical agreements.

However, specifically in relation to franchise agreements, Art. 62.2 Regulation of Retail Trade Act and Art. 3 Royal Decree 201/2010 of 26 February 2010 established that at least twenty working days prior to the signing of the franchise agreement, pre-contract, or the delivery by the prospective franchisee to the franchisor of any payment, the franchisor or principal franchisee shall provide the prospective franchisee with all the required information for the franchisee to be able to freely and willingly decide to conclude the contract, including the franchisor's proof of identification, proof of having a license of use of the trademark and other distinctive signs belonging to the franchisor, the object and scope of the franchise agreement, the structure of the franchise network in Spain, or the basic features of the franchise agreement (see Question 7 in this regard).

Q10. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

Yes.

Q11. If yes, which sanctions apply (e.g., nullity of contract, penalty payment)?

In distribution agreements, the system of ineffectiveness or nullity is governed by the general rules of obligations and agreements.

As mentioned above, the Regulation of Retail Trade Act governs certain aspects (the obligation to provide pre-contractual information) relating to the franchise agreement in particular. Breach of the provisions of this legislation will result in the imposition of sanctions provided for in Art. 68 Regulation of Retail Trade Act and subsequent articles (fines ranging from €6,000 to €900,000 depending on the severity of the offence) by the competent regional authorities within each Autonomous Community.

Q12. Can a party be held liable if it terminates the pre-contractual negotiations?

Yes.

Q13. 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:

The grounds are based on non-contractual liability, case law and Art. 1902 Spanish Civil Code, which states*: "A person who, as a result of an action or omission, causes damage to another through his fault or negligence shall be obliged to repair the damaged caused."*

b. Conditions for pre-contractual liability:

According to doctrine (among others, *Díez Picazo, L., "Fundamentals of civil property law I. Introduction, contract*

theory, Pamplona, 2007". *(Fundamentos del derecho civil patrimonial I. Introducción, teoría del contrato, Pamplona, 2007)* and Spanish case law (among others, Supreme Court Judgment of 14 June 1999, which has been followed in subsequent judgments) the necessary conditions for pre-contractual liability are the following:

1. A situation of reasonable confidence in the conclusion of the frustrated agreement must have been created.

2. The breakdown of the negotiations must be unjustified.

3. The breakdown of the negotiations must have caused actual damage to the other party.

4. There must be a causal link between the breakdown of the preliminary negotiations and the damage suffered by the other party.

c. Consequences of pre-contractual liability:

In cases of pre-contractual liability, the compensable damage would be limited, in principle, to the so-called negative interest or interest of trust, which would include the reimbursement of the expenses incurred (i) as a consequence of the conduct attributable to the party that breaks off the negotiation (not arising from the injured party's own activity) and (ii) in relation to the conclusion of the agreement that was not finally concluded.

Q14. 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

Q15. Must a distribution agreement be executed in writing to be valid and enforceable?

No, never.

Q16. 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

Q.17 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

No specific rules apply.

Q18. Do specific rules and/or restrictions 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?

No specific rules apply.

C. Term and termination

C.1 Term

Q19. Is an oral or written distribution agreement that does not specify the term always considered to be an agreement of indefinite duration?

Yes.

Q20. Does a distribution agreement of definite duration that is continued after its expiry turn into a distribution agreement of indefinite duration?

Yes.

Q21. If yes, what is meant by ‘continuation’ (a) and what should a party do to avoid this (b).

a. What is meant by 'continuation':

It is considered “continuation” when the parties, once the agreed term has expired and while fully exercising their freedom, continue performing the agreement despite the initially established time limit (“tácita reconducción”).

With regard to the conversion of fixed-term distribution agreements into indefinite-term agreements upon the expiration of the initial term, legal doctrine maintain that Art. 24.2 of the ACL applies analogously. That provision states:

2. Notwithstanding the provisions of the preceding paragraph, fixed-term agency agreements that continue to be

performed by both parties once the initially agreed period has lapsed shall be deemed converted into agreements of indefinite duration.

However, this conversion does not occur *ope legis*. The statute uses the term "shall be deemed" converted, not "shall be converted," which allows the conclusion that this continued performance constitutes a rebuttable presumption (*iuris tantum*) of conversion into an indefinite-term agreement. Nonetheless, the parties may agree on anything that neutralizes the conversion, such as establishing a new fixed term or reaching any other agreement indicating their intention not to convert the fixed-term agreement into one of indefinite duration.

b. What should a party do to avoid this:

Parties should draft distribute agreements to explicitly address renewal and termination provisions in their agreements to avoid ambiguity or misunderstandings about the duration of their business relationship.

In any case, as indicated in the previous section, the presumption of the transformation of the agreement into an indefinite-term agreement is *iuris tantum* and admits proof to the contrary.

C.2 Termination

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

Q22. Can a distribution agreement of definite duration be terminated for convenience?

Yes.

Q23. If yes, is an express provision allowing for termination for convenience necessary?

Yes.

Q24. 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?

Only in certain instances.

Q25. If only in certain instances, please explain when a reasonable notice period is in any case required?

If the distribution agreement provides for immediate termination for convenience, the parties may terminate the agreement without any notice period.

However, please note that, when the terms of the agreement clause are unclear as to the requirement of a reasonable notice period, Spanish case law has applied analogously Art. 25 of the ACL, provided that certain conditions were met –in particular, in view of the long-term relationship of the parties– and in light of the principle of good faith. Art. 25 of the ACL requires parties to observe a notice period amounting to one month for each year of the contract term, with a maximum of six months.

Therefore, it is recommended that parties be specific as to the required notice period. If the parties agree on the possibility of immediate termination –or termination with a short notice period–, such an agreement would be, in principle, valid and enforceable.

In any case, if the agreement provides for a specific notice period, it should be respected by both parties. Failure to comply with such a notice period could result in legal liability and damages.

Q26. 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?

If the terminating party does not comply with prescribed rules for termination, such as providing proper notice, the termination may be considered wrongful. The Spanish Supreme Court has stated that, when a party terminates the agreement in a surprising or unexpected manner, with no margin for reaction in the form of reasonable notice, it may be considered an abusive exercise of rights, which would amount to wrongful termination of the agreement, even though it does not prevent the effective termination of the relationship. Accordingly, the termination would still be effective, although the terminating party may be held liable for wrongful termination.

In certain cases, the agreement may provide precise consequences for failure to comply with the prescribed rules for termination. For instance, the agreement may provide for the continuation of the agreement or the payment of damages in the event of wrongful termination.

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

If the terminating party is found to have wrongfully terminated the agreement, it may be required to pay compensation to the non-terminating party, should damages have followed as a result of the wrongful termination.

The calculation of damages may depend on the specific circumstances of the case, such as the nature and duration of the agreement, the goods or services being distributed, the extent of the harm caused by the wrongful termination, and any mitigating or aggravating factors.

The damages awarded aim to compensate the non-terminating party for any losses or harm suffered due to the wrongful termination. This may include direct losses, such as lost profits or expenses incurred in connection with the distribution agreement, and indirect losses, such as damage to reputation or loss of goodwill. The calculation of damages can be complex and may require the assistance of legal and financial experts. In some cases, the agreement may also provide specific rules or limitations on damages in the event of wrongful termination.

Finally, Art. 1124 of the Spanish Civil Code establishes that the party who breaches an agreement is liable for damages caused to the other party unless the breach is due to a cause beyond their control. This provision applies to commercial agreements as well.

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

Q27. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement does not provide for termination for convenience?

Yes.

Q28. If yes, must a reasonable notice period be observed?

Yes.

Q29. 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)?

Under Spanish law, a distribution agreement of indefinite duration may be terminated for convenience even if the agreement does not provide for termination for convenience. However, the terminating party must comply with the legal provisions and any contractual provisions governing the termination of the agreement.

Legal doctrine and case law are inclined to apply by analogy to distribution agreements the time periods set forth in Art. 25 of the ACL.

Either party may terminate a distribution agreement for an indefinite period at any time, provided that the terminating party gives the other party reasonable notice. Therefore, even if the distribution agreement does not explicitly provide for termination for convenience, the parties may still terminate the agreement by giving the required notice.

However, if the distribution agreement includes specific provisions regarding the termination of the agreement, such as notice periods or grounds for termination, the parties must comply with these provisions. Failure to comply with

these provisions may result in the terminating party being liable for damages caused to the other party, as provided for in Art. 1124 of the Spanish Civil Code.

Under Spanish law, the reasonable notice period that must be observed for the termination of a distribution agreement of indefinite duration is not specified by law. Rather, what is considered reasonable will depend on the specific circumstances of the case, such as the length of the business relationship, the nature of the products or services involved, and the customary practices in the relevant market.

In practice, parties to a distribution agreement may specify the notice period in the agreement itself. If the agreement does not provide for a notice period, the parties may be guided by industry customs or by previous dealings between them.

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 is no minimum notice period set by law. However, case law has established that a notice period of less than one month is generally considered unreasonable and applies to the termination of commercial agency agreements (Art. 25 of the ACL applies by analogy).

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 is no specific maximum notice period set by law. However, parties should be aware that an excessively long notice period may be deemed unreasonable and may be subject to challenge by the other party as an unfair contractual clause.

Art. 25 of the ACL is deemed to apply by analogy and, therefore, the maximum notice period is 6 months.

It should be noted that if the distribution agreement includes specific provisions regarding the termination of the agreement, such as notice periods, the parties must comply with these provisions. Failure to comply with these provisions may make the terminating party liable for damages caused to the other party.

Q30. Is a contractual notice period always legally valid and enforceable?

No.

Q31. If not, which rules of mandatory law can have an impact on this?

A contractual notice period is legally valid and enforceable as long as it does not contradict any mandatory law or public policy provisions. For instance, Spanish courts have considered that the termination in a surprising or unexpected manner, with no margin for reaction in the form of reasonable notice, may be considered an abusive exercise of rights, or may amount to bad faith in the exercise of rights. On the other hand, notice periods that are so excessive that they prevent the other party from terminating the agreement in practice may be considered to amount to a perpetual debenture, which is prohibited by Article 1583 of the Spanish Civil Code.

In any case, if a party wishes to rely on a contractual notice period to terminate a distribution agreement, they need to ensure that the notice period is clearly and specifically set out in the agreement and that it complies with any applicable legal requirements or guidelines.

Q32. 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?

If the terminating party does not comply with prescribed rules for termination, such as providing proper notice, the

termination may be considered wrongful. The Spanish Supreme Court has stated that, when a party terminates the agreement in a surprising or unexpected manner, with no margin for reaction in the form of reasonable notice, it may be considered an abusive exercise of rights, which would amount to wrongful termination of the agreement, even though it does not prevent the effective termination of the relationship. Accordingly, the termination would still be effective, although the terminating party may be held liable for wrongful termination.

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

If the terminating party is found to have wrongfully terminated the agreement, it may be required to pay compensation to the non-terminating party, should damages have followed as a result of the wrongful termination.

The calculation of damages will rely on various factors, such as the specific circumstances of the case and any applicable laws or contractual provisions. Typically, the damages aim to compensate the other party for any losses suffered because of the improper termination, for instance, lost profits, expenses incurred, and damages to the other party's reputation or goodwill. The damages need to be proven by the other party and could be subject to negotiation or litigation if the parties cannot agree on a settlement.

Q33. Must the terminating party comply with certain formalities?

Only in certain instances.

Q.34 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?

Art. 25 of the ACL is deemed to apply by analogy and, therefore, a written notice is required.

The only controversial aspect, hence, would be to prove that the notice has been duly served on the recipient, and the specific contents of the notice. For this reason, it is quite common to use a special notification instrument called ‘burofax’, which works as a registered letter in practice and allows to have a certified copy of the letter. An alternative option would be to serve the letter through a public notary. More recently, other ways of notifications using third-party independent trustee services have been gaining acceptance.

Notwithstanding the above, distribution agreements may be terminated with no previous notice under certain circumstances. This is particularly true in cases of material breach by the other party, if one party to the agreement attempts to impose unilateral conditions that are not possible to be fulfilled or when the general principle of good faith is in conflict. Thus, the non-breaching party is entitled to terminate the agreement by means of a simple communication.

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

No motivation is required for the notice so as to validly terminate a distribution agreement of indefinite duration. Following Art. 1.255 of the Spanish Civil Code, the parties shall freely agree the terms of the agreement – termination included. However, when the distribution agreement is agreed for an indefinite term, termination cannot be immediate, unexpected or unjustified, which may be considered an abuse of right or an exercise of the rights in bad faith.

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

Failure to give notice gives rise to the corresponding claim for damages.

Q35. Can the parties stipulate the formalities in the distribution agreement?

Yes.

Q36. If yes, what are the consequences if those formalities are not observed?

As stated in 34 c) of this document.

Q37. Is the terminated party entitled to damages or another type of compensation even if the correct notice period has been observed?

Yes.

Q38. 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.)?

There are no legal provisions on goodwill compensation under Spanish Law. Nevertheless, case law has frequently recognised goodwill compensation to the distributor as a remuneration for his activity by analogical application of the ACL (Art. 28) only if specific circumstances and special characteristics of the market are taken into account. For this reason, compensation has been refused in certain cases (i.e. distributor is not sole distributor, distribution is not exclusive, etc.)

In any case, the Spanish Supreme Court has upheld that goodwill indemnity does not apply to distribution agreements automatically only by virtue of contract termination. Agency agreement's requirements must be fulfilled to obtain compensation: that the distributor has increased the number of clients or increased the sales to the existing ones, that the supplier could still benefit from the 'clientele' created by the distributor, reasonability of the claim…

Goodwill compensation can be freely excluded, but it must be clearly agreed under the agreement.

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q39. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

Q40. If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

When a breach occurs, the aggrieved party has the following options: (i) to demand performance of the obligation or its termination, with compensation for damages and payment of interest in both cases; or (ii) to request termination of the agreement, even after having opted for performance, if performance proves impossible.

Case law has established the following requirements that must be met for the breach to allow exercise of this remedy:

- The party invoking the right to terminate must not likewise be deemed in breach, unless such breach results from the other party's prior default.
- The breach must be attributable to the debtor, not to the claimant or a third party.
- The breach must concern the principal obligation, that is, the main subject matter of the contractual relationship, rather than purely accessory or ancillary obligations.
- The breach must be serious or substantial in nature, meaning it frustrates the purpose of the agreement and gives rise to dissatisfaction of the parties' expectations. Merely defective performance or a failure to perform accessory or ancillary duties is insufficient to warrant termination.

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

Yes.

Q41. 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?

Only in certain instances.

Q42. If not or only in certain instances, what are the consequences of the termination not being upheld?

If a distribution agreement has been (extrajudicially) terminated, the party that terminated the agreement may argue that the termination was justified based on the other party's breach. However, if a Court subsequently finds that the termination was wrongful and the agreement should be reinstated, the extrajudicial termination may be considered ineffective, and the agreement may be reinstated in the same terms that existed prior to the termination. Specific circumstances shall inform the case, as well as the terms of the distribution agreement itself.

Q43. 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.

Q44. 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?

In Spain, if an agreement is wrongfully terminated or dissolved due to serious breach or exceptional circumstances, the terminated party may have a right to compensation.

Under Spanish law, when an agreement is terminated due to a breach, the non-breaching party may be entitled to compensation for any damages suffered as a result of the breach, including any loss of profits or other economic harm caused by the breach.

In addition, if the agreement is terminated due to exceptional circumstances, such as force majeure, the party who suffers damages as a result of the termination may be entitled to compensation under the terms of the agreement or under Spanish law.

It is important to note that the specific terms of the agreement and the circumstances surrounding the termination will be crucial in determining whether the terminated party is entitled to compensation. Therefore, it is advisable to seek legal advice in order to determine the specific rights and remedies available in a particular case.

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

Q45. 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

Q46. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

No.

Q47. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

Yes.

Q48. If yes, which obligations apply?

In Spain, distribution agreements are atypical and the parties must comply with the obligations expressly provided

for in the post-contractual phase. If nothing has been agreed in this respect, the general contractual principles and rules will apply, particularly the principle of contractual good faith.

In any case, it is common for the parties to have agreed post-contractual obligations in the distribution agreements, such as, for example, duties of confidentiality, non-competition obligations and the allocation of surplus stock and spare parts. Sometimes, when there is an abusive termination of the agreement by the supplier, case law and doctrine have considered that even if there is no repurchase agreement, it may be recognised on the basis of the principle of good faith (Supreme Court Judgments of 12 December 1990 and 3 March of 2008).

Part 5: Dispute resolution

Q49. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

Yes.

Q50. If yes, what do these specific rules and/or restrictions entail?

Disputes regarding judgments under private law: Art. 51 Spanish Law 1/2000 of Civil Procedure establishes the forum, which provides that a legal person must be sued at the place of its registered office. Spanish jurisdiction corresponds to the commercial courts. The Spanish commercial courts are authorised to resolve this type of dispute under Art. 86ter Law on Judicial Power.

Antitrust disputes under public law: Art. 11 Spanish Law 29/1998 on the Judicial Administrative Jurisdiction establishes the forum and jurisdiction for the hearing of appeals by the Spanish National Court arising out of administrative procedures of the Spanish National Markets and Competition Commission. Access to the courts will be granted once the administrative procedure before the Spanish National Markets and Competition Commission has been completed.

Q51. Can the parties opt for arbitration?

Yes.

Q52. If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

Yes.

Q52. If yes, what do these specific rules and/or restrictions entail?

For arbitration in Spain under Spanish Arbitration Law legislation, under Art. 2 Spanish Law 60/2003 of 23 December on Arbitration, disputes on freely available matters which are not public policy pursuant to law may be

subject to arbitration.

The Spanish Law 60/2003 of 23 December on Arbitration does not offer a solution for the extension of arbitration to non-signatory third parties to the agreement, which sometimes occurs in the context of distribution agreements (vertical agreements), particularly within corporate networks or in franchise agreements. This should be resolved by: (i) excluding public policy for arbitration; (ii) defining the subjective scope of the arbitration clause; and (iii) applying international standards according to the nature of the arbitration procedure and the chosen substantive law.

However, the extension of the subjects must be analysed and ruled out on a case-by-case basis.

Q53. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

The general system is that according to Art. 1964 Spanish Civil Code, the limitation period for personal actions (e.g. contractual damages) is five years.

If the dispute involves an action for customer indemnity and should circumstances for the analogue application of the ACL concur, unless otherwise agreed by the parties, any claim for compensation for the clients ("*indemnización por clientela*") or for compensation for loss and damage shall be time-barred after the expiry of one year from the termination of the agreement (Art. 31 ACL).