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# International Commercial Agency and Distribution Agreements

Case Law and Contract Clauses

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Series Editor:

**AIJA**

Volume Editors:

***Cristelle Albaric***

***Marianne Dickstein***

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Association Internationale des Jeunes Avocats  
International Association of Young Lawyers  
and



**Wolters Kluwer**

Law & Business

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## Editors

### **Cristelle Albaric**

**Cristelle Albaric** is an international lawyer practicing M&A, corporate and commercial law. Based in Paris, she was admitted to the Paris Bar in 1999, and has been with YMFL law firm since 2005. In France, she received her Doctorate in Private Law from the University of Montpellier with a thesis on 'Master franchising'. In Germany, she got her LL.M. at the University of Heidelberg. In the US, she was a one-year Visiting Scholar at the University of California – Boalt Hall at Berkeley. Cristelle keeps writing about Business Law and serves as a lecturer on franchising topics at the University of Montpellier Law School.



As a member of the International Association of Young Lawyers (AIJA), she is Co-President of the Publications & Edition Section and is a member of the Executive Committee.

### **Marianne Dickstein**

**Marianne Dickstein** is an international lawyer based in Belgium-Brussels. She graduated from the Université Libre de Bruxelles, and is admitted to practice at the Brussels Bar. After working for Coudert Brother LLP Brussels, she launched her own law firm Dickstein-Lawyers & Mediators, which is fully dedicated to the practice of the commercial and corporate law. Marianne Dickstein is a mediator in civil and commercial matters, appointed by the Belgian Federal Commission for Mediation. She is the author of various publications



## *Editors*

on her area of expertise.

Marianne is a former member of the Legislation Commission of the Brussel's Chamber of Commerce and Industry, and of the International Association of Young Lawyers—AIJA (Distribution Commission).

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### **Miklós Boronkay**

Dr. Miklós Boronkay, associate, joined Szecskay Attorneys at Law in 2007. He received his JD, cum laude, from the Pázmány Péter Catholic University in 2007. In 2004–2005, he studied at the University of Salzburg on a scholarship. During his studies, Dr. Boronkay was intern at an international law firm in Budapest and at the Hungarian Constitutional Court. He is member of the Hungarian Competition Law Association and the Competition Law Research Centre and is lecturer of civil law at the Pázmány Péter Catholic University. He specializes in dispute resolution, intellectual property and competition law and has written a number of articles on these fields. Dr. Boronkay is fluent in English and German.

### **Eva Bukowski**

Eva Bukowski, attorney-at-law, joined Koch/Christensen Law Firm in 1999 after having graduated from the University of Copenhagen (LL.M.). In 2001 Ms. Bukowski joined KromannReumert, was admitted to the Danish Bar in 2002, and in 2003 rejoined Koch/Christensen Law Firm. In 2006 Ms. Bukowski was seconded to a leading international law firm in Warsaw. As of 2010 Ms. Bukowski moved to Switzerland with her family and is not practicing law at the moment.

Ms. Bukowski's main areas of practice included corporate and commercial law, competition and intellectual property law, mergers and acquisitions and negotiations and drafting of contracts.

Eva Bukowski was, until 2010, a member of the Danish Law Society and the International Association of Young Lawyers (AIJA).

### **Manoj K. Chhabra**

Manoj K. Chhabra is a fully qualified Lawyer (Advocat) and is admitted in India to the Bar Council of India. Mr. Manoj Chhabra currently works with Astra Law Office in Dehli.

### **Jean-Louis Collart**

Mr. Collart graduated with a degree in Law from the University of Geneva in 1988, and was admitted to the Bar in the same year.

After initially serving with the Legal Department of the Cantonal University Hospital of Geneva in 1988-1989, he worked in Radcliffes and Co., Solicitors, Westminster, London, in 1989, Mayor Balser & Heyer, Geneva, in 1989-1991, Homburger, Zurich, in 1991-1992, the Legal Department of the Union Bank of Switzerland, Geneva, in 1992-1995, back to Mayor Balser & Heyer, Geneva, in 1995-1997, Cabinet Mayor, Geneva, in 1997-2002, Alves de Souza Houman Collart, Geneva, in 2003-2006, and has been with Mentha & Associés since 2007.

His primary practice areas are inheritance and estate law, commercial contracts, telecommunication law, commercial and civil litigation.

Apart from being a member of the Lawyers Supervisory Board of Geneva, he is also a member of the Geneva and Swiss Bar Associations, Association Genevoise de Droit des Affaires, Union Internationale des Avocats (UIA), the Association of International Business Lawyers, honorary member of Association Internationale des Jeunes Avocats (AIJA) and is a former Chairman of the Human and Procedural Rights and Responsibilities Commission.

He has co-authored works such as *Guide pratique du recouvrement des créances en Belgique et à l'étranger*, under the head of Marianne Dickstein, Anthemis, 2009, *Planning and Administration of Offshore and Onshore Trusts*, Society of Trust and Estate Practitioners, Tolley's, London 2001, *Commercial Agency and Distribution Agreements*, G. Bogaert and U. Lohmann (eds.), Kluwer Law International, London 2000, and *Anti-Money Laundering Guide*, CCH Editions Limited, Bicester 1999.

### **Raimond Emde**

Dr. Raimond Emde is a partner at the firm of Graf von Westphalen, Hamburg [www.grw.com](http://www.grw.com).

He studied at Hamburg, London and Wisconsin, and after serving as a research assistant at the University of Hamburg between 1991 and 1993, served as a lecturer until 1995.

His main areas of focus are Mergers & Acquisitions, Distribution Law (commercial agency law and the laws governing insurance representatives, authorized dealers and franchising), Company Law and Commercial Law.

He is fluent in both English and German and is a member of the German-American Lawyers' Association, the International Bar Association (IBA), the International Association of Young Lawyers (AIJA), the Hamburg Arbitration Circle e.V. (HAC) and Überseeclub Hamburg.

He is credited with numerous publications, especially on distribution and company law.

### **Cemile Demir Gökyayla**

Dr. Cemile Demir Gökyayla, partner, joined AKINCI in 2001. She graduated from Dokuz Eylul University Faculty of Law in 1998. Cemile's main areas of practice include international arbitration, construction arbitration, investment arbitration and distribution agreements.

In 2000 she published her first book on the public policy in enforcement of the foreign judgments. In 2005, Cemile obtained PhD and published her second book on the distribution agreements. Cemile is coauthor of the International Family Law published in 2010. She is author of several article published in Turkey.

She has lectured international private law, international arbitration law, foreign investment law and international commercial law at Istanbul Bilgi University Faculty of Law.

Cemile Demir Gökyayla is a member of the ICC National Committee in Turkey.

### **Orsolya Görgényi**

Dr. Orsolya Görgényi, partner, joined Szecskay Attorneys at Law in 1998 after having received her JD, summa cum laude, from the Eötvös Loránd University. Dr. Görgényi completed postgraduate business consulting and supervision studies at the International Business School in cooperation with Oxford Brookes University in 2005. Dr. Görgényi was appointed partner of Szecskay in 2007. She has written a number of articles, speaks at various seminars and is an active member of several Hungarian and international professional organizations, such as the Budapest Bar Association, the Hungarian Mediation Association (OME) and the International Association of Young Lawyers (AIJA's National Representative for Hungary in 2003–2007, Congress Organizer 2009 and Law Course Committee member as of 2010).

Dr. Görgényi's main areas of practice include M&A, corporate and commercial law, and she is active in business mediation utilizing the innovative techniques of supervision. She is fluent in English and German, conversational in French.

### **Isabelle Hajjar**

Isabelle Hajjar, graduated from the University of Grenoble (France) and was admitted to the French Bar in 1997. She started her carrier with Thieffry & Associés, before joining Oppenheimer, Wolff & Donnelly LLP in 2002. In 2007, Isabelle decided to join a client, Groupe onePoint, an IT Company, and move to Shanghai, China. She acts as the Legal Manager of the Group. She furthermore acts as off counsel for Bilalian Avocats.

Isabelle's main areas of practice include Business law, contractual practice, IT and IP law.

### **Anne-Marie Jenkinson**

Anne-Marie is a solicitor in the Commercial Department at Mason Hayes & Curran Solicitors, Dublin. Ms. Jenkinson studied at University College Dublin and



## *Author Biographies*

University of Westminster, London. Having completed her training at a leading London law firm, Ms. Jenkinson joined Mason Hayes & Curran in January 2010.

### **Tanja Jussila**

Tanja Jussila, partner, joined Waselius & Wist in 1999 after having completed her court practice. She graduated from the University of Helsinki in 1997 (LL.M.) and was admitted to the Finnish Bar in 2002. In 2006, Ms. Jussila was seconded to a leading international law firm in London. Ms. Jussila was appointed partner of Waselius & Wist in 2009.

Ms. Jussila's main areas of practice include dispute resolution, mergers and acquisitions and corporate and commercial law. She has frequently acted as an arbitrator, is an author of various articles in international professional publications and has lectured on several fields of law including international arbitration.

Tanja Jussila is a member of the Finnish Law Society, the Finnish Arbitration Association and the International Association of Young Lawyers (AIJA National Representative for Finland 2003–2006, Vice-President for the Litigation Commission 2005–2008, President for the Litigation Commission 2008–2010 and First Vice-President 2010–2011).

### **Suzan Lap**

Suzan Lap has been working as a lawyer since 2000. From her original practice in competition law, she developed a specialization in distribution issues.

She advises clients on various distribution methods, such as exclusive and selective distribution, franchise, consignment and agency. She helps in assessing and drawing up contracts and supports businesses in terminating and amending such agreements.

In addition, Ms. Lap continues her practice in competition law. She helps companies to structure their business practices and joint ventures in such a way that they are in line with national and European competition rules and assists in the notification of mergers and acquisitions with the Netherlands Competition Authority and at the European Commission. In all these areas, Ms. Lap represents enterprises in proceedings before the competition authorities and the civil courts. Ms. Lap is the author of various articles on the subject of commercial contracts and teaches this subject at the Kluwer course for experienced in house lawyers.

### **Elena Marangoni**

Graduated at the Law school of Bologna-Italy and specialized in IP and Entertainment Law; managing partner of a major IP and legal office in Venice area Italy FINPATENT SRL until 2005 she actually runs her own legal office in Padua- Italy. IP Expert for the Court of Venice, for the Chamber of Commerce of Venice and Padua and for the Venice Industry Association. She has been Member of the IP Group at Confindustria—Rome, the National Industry Federation with

consultation functions in IP issues both for the Italian Government and the Industry Federation. Member of the following IP and legal Associations as LES, AIJA, IDI. Avv. Ms. Marangoni teaches and writes on IP law for various Italian institutions and specialization schools as CONVEY, CUOA, SIVE FORMAZIONE. She relates with a network of specialized professionals worldwide and speaks fluently four languages- English, French and Spanish and Italian, the mother language.

### **Maite Mascaro**

Maite Mascaro, is a Partner at ECIJA in Barcelona, Spain. She studied her Bachelor's at the University of Barcelona and obtained a Master's in European Law at the Institut d'Études Européennes, Université Libre de Bruxelles, in Brussels, Belgium. Her practice focuses primarily on M&As, Corporate re-structuring operations, Private Equity, Corporate Law and Finance and Mercantile Litigation, in particular in franchising, distribution and competition litigation.

She has a consolidated experience in providing legal assessments to national and international clients in distribution, agency and franchising networks, competition issues and corporate finance, as well as acting as an advocate in corporate proceedings.

Maite is counsel and non-board member Secretary on the boards of various Spanish companies and associations. She is the author of several articles in professional magazines, and a publisher and guest lecturer in different conferences and courses.

She is a member of the Barcelona Bar Association (ICAB), International and European Law Commission, International Association of Young Lawyers (where she has served as the Honorary Treasurer and is a former national vice-president for Spain) and the IBA.

### **Michael Meyenburg**

Dr. Michael Meyenburg, is partner of Sladek & Meyenburg, Vienna.

He graduated from University of Graz (Doctor of Jurisprudence,) in 1980, from New York University School of Law (MCJ) in 1982 and was admitted to the Vienna Bar in 1987.

Dr. Meyenburg's main areas of practice include Commercial Law, IP and Unfair Competition, Labour Law, and Agency. He acted as President of the UIA Labour Law Commission, 2003–2005 and as Representative of the UIA from 2005–2010. He was member of the Board of ÖV ("Österreichische Vereinigung für gewerblichen Rechtsschutz und Urheberrecht" Association for IP-Protection and Copyright-Law) from 2007 to 2010 and since then acts as President of ÖV.

### **Athena Moraiti**

Ms. Moraiti is a lawyer in Athens, Greece, since 2006. She practices law in various areas of public, civil and commercial law. She has the right to appear and she tries cases as a lawyer before the Greek courts.

## *Author Biographies*

She teaches public and civil law in institutions and universities (such as the Police Academy, and Centers of Vocational Training).

She holds an LLM in public law (Aix Marseille III University, France) and she is a PhD candidate (Athens University, Greece) in public law.

She is the author and coauthor of various books (including the Commentary of Greek Civil Code) and articles in law periodicals (in Greek and in French).

### **Marita Dargallo Nieto**

Studied at the University of Barcelona and obtained a Diploma on EC Law at the College of Europe (Brugges, Belgium). Worked at the EC Commission in Brussels and in two law firms Based in Brussels practising EC Law for a period of four years. She joined the Barcelona Bar Association in 1985. She has been practising in Barcelona since 1989 mostly dealing with international clients. Joined the law firm of SOL MONTAÑOLA & ASOCIADOS on January 2001 and became partner in 2005. Specializes in International Business Law, Competition, EC law, distribution and IP related matters. Member of the EC and International Law Commission of the Barcelona Bar where she taught for five years the section on “Merger Control” as part of the Competition Law Course taught at the Barcelona Bar. Previously taught the section on State Aids also in a course organized by the Barcelona Bar Association for three consecutive years. Currently teaches a class on IP and Publishing as part of the masters course organized by the University of Barcelona “Assessorament lingüístic Gestió del multilingüisme Serveis editorials.”

National Vice-President for Spain of the Association International de Jeunes Avocats (AIJA). She has co-organized a seminar on Community Trademarks in Alicante in 1996 and another on “Intellectual Property rights in Labour Relations and Service Provision” in Madrid October 2004, both within AIJA.

She has given conferences on trademarks, franchising and distribution and has published articles and contributed to books on competition law, such as “Antitrust and the New Media,” “Transporte marítimo y Derecho comunitario: Normas de competencia y prácticas de tarifas desleales,” en *Anuario de Derecho Marítimo*, volume VII (1989), franchising “Los contratos de franquicia y el Derecho Comunitario” in *Revista Jurídica de Catalunya* 1987, and enforcement of trademarks abroad.

### **Philip Nolan**

Mr. Nolan is a partner and head of the Commercial Department at Mason Hayes+Curran Solicitors, Dublin. Having studied at University College Dublin, De Paul University, Chicago and at the University of Oxford, Mr. Nolan joined Mason Hayes+Curran where he completed his training.

Mr. Nolan advises both public and private clients in relation to communications, information technology, intellectual property and competition law. He has also developed a focused regulatory advisory practice which includes public procurement law, data protection law and energy law.

### **Guillermo Jaime Nudenberg**

Guillermo Nudenberg is a founding partner of the law firm HLB Raguza Nudenberg. Mr. Nudenberg focuses his practice in business and commercial law. He also has extensive experience in the drafting and negotiation of civil and commercial contracts, contractual conflict resolution, and mergers and acquisitions.

### **Mikko Peltoniemi**

Mikko Peltoniemi joined Waselius&Wist in 2006 after having obtained his LL.M. from the University of Turku in the same year. His main areas of practise include Mergers and Acquisitions, Corporate and Commercial law and he also regularly advises corporate clients in the field of Labor law.

### **Harry Stamelos**

Harry Stamelos, LL.M. (Essex University, UK) in EU law and a PhD (Athens University, Greece) in EU law. He practices law in various areas of EU, civil, public and commercial law (company law, banking law, aviation law, securities).

He teaches civil, public and criminal law in various institutions and universities (Police Academy, Fire Academy, Nomiki Bibliothiki).

He is the author and coauthor of various books (including the Commentary of Greek Civil Code) (1. English Legal Terminology, Nomiki Bibliothiki, 2006, 2. After the collision, abandon the ship, A comparative study of UK and Hellenic Marine Insurance Law, Peter Lang, 2007) and articles in law periodicals (in Greek and in English) (1. Les Essais Nucléaires par la Corée du Nord et le Droit International, Revue Hellénique de Droit International (Hellenic Review of International Law) 2007, 371, 2. Both to blame: legal issues of comparative fault and shared liability in the Hellenic Republic, the UK, and the USA, Review of Maritime Law (in Greek) 2007, 273, 3. Developments of competition law in the USA and the EU after 2005, in specific the USA-Russia Memorandum of Understanding and the criminalization of the competition law in Ireland (in Greek), Law of Enterprises and Companies, 2010, 156.

Dr. Stamelos currently runs his own law office.

### **Bart Van den Brande**

Bart Van den Brande is a Belgian lawyer admitted at the Brussels Bar. He is Assistant at the Vrije Universiteit Brussel. Mr. Bart Van den Brande currently works with Koan Law Office in Brussels.

## Note to the Reader

Many books on the market already provide legal practitioners with theoretical sources regarding distribution agreements.

Nevertheless, practitioners are always looking forward to having access to practical support while drafting international distribution agreements.

### **1. Concept**

Accordingly, the purpose of this book is to provide the reader with a practical tool containing:

- relevant case law on issues with financial consequences which appear to be generally issues from which disputes arise, and
- examples of clauses illustrating the above and useful while drafting international distribution agreements. The proposed clauses are given for information purposes and shall in all events be subject to review by local counsel in order to adapt to the specific case.

### **2. Agreements covered**

The following international distribution agreements shall be covered:

- agency;
- exclusive distribution;
- franchising.

### **3. Geographical coverage**

The list of the participating countries in this edition, was determined in light of the world report of foreign direct investments edited by the United Nations Conference on Trade and Developments.

## Note to the Reader

AMERICA (1)	ASIA (2)	EUROPE (14)	
		Current EU Members	
Argentina	China India	Austria Belgium Denmark Finland France Germany Greece Hungary Ireland Italy	Netherlands Spain
		Non-EU Countries	
		Switzerland Turkey	

## LAST MINUTE

Since June 1st, 2010 a new European Union regulation regarding certain distribution arrangements and other vertical restrictions entered into force (EU Regulation N° 330/2010) which is summarized hereafter.

### 1) Franchising agreements

Franchising agreements have been regulated on the European Union level, over the past decades years, by different sets of rules:

- EEC Regulation N° 4087/1988 of November 30th, 1988 to categories of franchise agreements on the application of the article 85§ 1 of the EC Treaty until 2000;
- EC Regulation N° 2790/1999 of the application of the article 81§ 1 of the EC Treaty to categories of vertical agreements applicable until May 31st, 2010;
- EU Regulation N° 330/2010, dated **April 20th, 2010**, block exempting, under Article 101(3) of the Treaty on the Functioning of the European Union, certain distribution arrangements and other vertical restrictions, among which franchising agreements. Regulation N° 330/2010 entered into force on June 1st, 2010 and shall expire on May 31st, 2022.

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from June 1st, 2010 to May 31st, 2011 in respect of agreements already in force on May 31st, 2010 which do not satisfy the conditions for exemption

provided for in this Regulation but which, on May 31st, 2010, satisfied the conditions for exemption provided for in Regulation (EC) N° 2790/1999.

Pursuant to new Regulation 330/2010, manufacturers cannot have a market share in excess of 30% in order to benefit from the block exemption. Moreover, manufacturer's distribution or supply agreements must not contain any so-called "hardcore restrictions of competition", such as, e.g., (i) price-fixing or (ii) re-creating barriers to the EU single market.

The new provisions set out by Regulation 330/2010 introduce the same 30% market share threshold for manufacturers and distributors for the purposes of taking into consideration the fact that some buyers may also have market power, with potentially negative consequences on competition. Said change is perceived, by the EU the Commission, as being positive for small and medium-sized enterprises ("*petites et moyennes entreprises*"), which could otherwise be excluded from the distribution market.

Distribution agreements entered into between companies with a share higher than 30% of the relevant market are, in principle, subject to the prohibition set out by Article 101 § 3 TFEU and are thus illegal, save as if such agreements can be exempted, individually, pursuant to Article 101 § 3 TFEU.

The following issues are interesting regarding franchising agreements:

1) **Requirements for know-how** have changed: whereas pursuant to Regulation 2790/1999 know-how was indispensable for the purposes of setting up a franchise agreement, pursuant to Regulation 330/2010 know-how must now only be significant and useful for the use, sale or resale of the contract goods or services.

As a consequence, it may be expected that more franchisors will fall more clearly into the new Regulation provisions;

2) **Market share:** in order to take into account that some buyers may also have market power with potentially negative effects on competition, the Regulation 330/2010 provides that the "safe harbor" threshold of 30% will apply to both (i) the market share of the franchisor and (ii) the market share of the franchisee.

- The market share of the franchisor shall be calculated on the basis of market sales value data, and
- the market share of the franchisee shall be calculated on the basis of market purchase value data.

3) **Internet:** Regulation 330/2010 (and accompanying Vertical Guidelines), take into account the development of the Internet as a force for online sales and for cross-border commerce. Every franchisee shall be free to use Internet for advertising or selling products, but the franchisor may require its distributors, for the purposes thereof, to have one or more brick and mortar shops as a condition of becoming a member of its network. Manufacturers may also require distributors to submit any online sales outlets to equivalent quality requirements or make at least a minimum quantity of sales offline;

4) **Resale price maintenance** remains classified as a “hardcore” restriction. Nevertheless, pursuant to Regulation 330/2010, exceptionally, this resale price maintenance may be exempted from the article 101 § 1 of Treaty on the Functioning of the European Union<sup>1</sup>:

e. g.:

- when a supplier introduces a new brand or a new product.
- It may also be necessary to organize in a franchise system a coordinated short term low price campaign (paragraph 225 of the Vertical Guidelines).

As opposed to EU Directives, EU Regulations take direct effect on EU state members. As a consequence, EU Regulation 330/2010 is applicable to franchising agreements executed in France.

The European Commission issued Guidelines for the purposes of interpreting the above regulations. The current Guideline in force is the 2010 edition<sup>2</sup>.

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1. The treaty on the Functioning of the European UE has been ratified the November 13th, 2009 and has come into force the December 1st, 2009  
2. Guidelines on Vertical Restraints, Official Journal C 130, 19.05.2010, p. 1



# Themes

## Commercial Agency Agreement Themes

### General Preliminary Note

**1. The purpose of this manuscript is to provide the reader with a practical tool when drafting distribution agreements. As consequence, the current manuscript does not aim to cover all the issues when drafting and negotiating a commercial agency, franchising, or concession agreement, but only to deal with a selection of potential sensitive themes. In the event a major topic is not covered in one of the following themes, please let us know by email which themes you consider should be added.**

**2. For each theme, please provide us with:**

- **specific applicable law;**
- **major current case law;**
- **a drafted clause you suggest.**

#### **I. Introduction**

1. The general legal provision applicable to said contract
2. The eventual administrative formalities to be fulfilled by the agent: does your legislation require registration obligations with a given authority or any other specific formality for the purposes of conducting its business (e.g., registration with the court?)
3. The eventual existing professional bodies: federations, etc.

#### **II. Purpose: Agent's Status – Subagents**

1. Purpose
2. Independence