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1. INTRODUCTION

1.1 Swiss Legal System

Switzerland provides an excellent infrastructure for companies operating in the greater European area. The regulatory environment is reasonable and business-friendly. Tax rates are very favourable compared with other European countries. New investments and headquarter activities benefit from generous tax incentives.

Switzerland is a federal republic composed of twenty-six states (cantons). Although widely varying in size and population, each canton is equally autonomous. The Federal Constitution (Bundesverfassung) yields all legislative powers to the cantons, unless the law-making is explicitly reserved to the federal authorities. Therefore, the bulk of tax and public laws, for example, is subject to cantonal autonomy, leading to a considerable variety of statutes in those fields. On the other hand, Switzerland’s fundamental body of contract and commercial law as well as antitrust law is almost exclusively governed by federal statutes. The most important statute in this context is the Swiss Code of Obligations (hereinafter ‘CO’). The CO is the relevant statute governing agency and distribution contracts. Restrictions on vertical agreements are contained in the Swiss Cartel Law Act (hereinafter ‘SCL’), in force since 1 April 2004. The Swiss Competition Commission (hereinafter ‘SCC’) regularly refines the SCL in so-called directives. These provisions have a significant impact on distribution agreements.

1.2 Different Means of Selling Locally

Switzerland offers many attractive opportunities for foreign companies wishing to sell their products and services in Switzerland and Europe. Nevertheless, there are certain questions that need to be considered. Generally speaking, foreign companies may market their products and services through employed sales persons, local branches, local subsidiaries, or local agents and distributors. The different methods are subject to different legal frameworks.

If a foreign supplier chooses to sell his products in Switzerland through travelling sales persons or other employees of a foreign nationality, a work permit is required prior to immigrating and/or working in Switzerland. Both, the foreign supplier and his travelling sales person(s) (employees) may become subject to Swiss social security legislation. If travelling sales persons buy products from a stock maintained by the foreign supplier in Switzerland, such activity may qualify as permanent establishment under Swiss tax law, subjecting the foreign supplier to Swiss taxes on his Swiss earnings.

If a foreign supplier chooses to sell his products in Switzerland through a Swiss branch of a foreign company, the branch does not have a legal personality of its own although it may run the business independently. Through the branch, the foreign

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1 Federal Act on Cartels and Other Restraints of Competition. A translation of the revised SCL is available at the Swiss-American Chamber of Commerce; <www.amcham.ch>.
supplier becomes subject to Swiss taxes and Swiss jurisdiction. The foreign head office may be sued and is fully liable for any commitments of the Swiss branch.

If a foreign supplier chooses to sell his products in Switzerland through Swiss subsidiaries, such companies are usually established in the form of corporations (Aktiengesellschaft) or limited liability companies (Gesellschaft mit beschränkter Haftung). A corporation under Swiss law is a company with a predetermined capital that is divided into bearer or registered shares. A limited liability company also has a company capital, divided into partner quotas, but there are no written securities issued for such quotas. An incorporated Swiss subsidiary has its own legal personality and a foreign supplier establishing such company does not himself become subject to Swiss jurisdiction. The supplier neither becomes responsible for the Swiss company’s liabilities, except indirectly as shareholder or quota holder of the Swiss subsidiary. The liability of a shareholder or quota holder is, however, limited to the full payment of the stock capital (corporation) or the nominal capital (limited liability company). The revision of the Swiss company laws in the beginning of 2008 resulted in a number of facilitations for foreign companies doing business in Switzerland. Since the beginning of 2008, one single founder may establish a corporation whereas the former law required a minimum of three founders. There are no specific restrictions as to the nationality of the founder(s). The requirement that the majority of the members of the Board of Directors have to be Swiss citizens or citizens of the European Union (EU) residing in Switzerland, was no longer maintained.

The most important channels of selling locally are agency and distribution agreements to be discussed more thoroughly hereinafter.

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2. AGENCY

2.1 Definition of Various Types of Agencies and Criteria to Distinguish

Agency contracts are governed by CO 418a–418v. Article 418a defines the agent as a person who is contractually obliged, on a continuous basis and without being an employee, either (i) to act as an intermediary on behalf of one or several principals in business transactions (application agent, Vermittlungsagent), or (ii) to conclude such transactions in their names and for their accounts (underwriting agent, Abschlussagent). Although an agent in the aforementioned sense is acting in the name and for account of a third party (the principal), he always performs his work independently, that is in a self-employed capacity. He may organize his work and dispose of his time freely. Since agency contracts are always long term relationships, an agent has fiduciary duties towards the principal but he also benefits from some legal protections. In practice, commercial agents and insurance agents play a decisive role in business. To insurance agents, additional rules of the Swiss Insurance Contract Law apply.

In contrast to an agent, an employee (Arbeitnehmer) is subordinated to his employer and is obligated to strictly perform work according the employer’s instructions. For instance a travelling salesperson (Handelsreisender, CO 347) is an employee. Such person acts as an intermediary or concludes business transactions outside of the premises of the employer, similar to a commercial agent, but he or she is acting under an employment contract and not as an independent businessperson.

If a person or a company acts independently, like an agent, but on a case by case basis or on a single deal basis rather than continuously, such arrangement is not to be qualified as an agency contract but constitutes a brokerage contract (Mäkerei). Brokerage contracts are governed by different legal rules (CO 412 et seq.). On the other hand, even if a commercial agent is working only on a part-time basis, but continuously, the provisions concerning commercial agency agreements (CO 418a et seq.) are applicable, unless the parties have stipulated something different in writing (CO 418a.2).

A person or company undertaking, against payment of a commission, to sell and/or purchase goods in his own name rather than in the principal’s name, although acting on the principal’s account, is not a (commercial) agent, but a commission agent (Kommissionär), again subject to a different legal regime (CO 425 et seq.).

Finally, the legal distinction between agency and distribution also plays an important role. Contrary to an agent, a distributor acts in his own name and on his own account when buying and selling goods. Besides, a distributor acts at his own risk. In spite of their importance in business, the CO does not provide for specific statutory rules on distribution agreements. They will be discussed in detail below (see 3).
2.2 Basic Aspects of Agency Agreements under Swiss Law and Court Practice

2.2.1 Formalities

In Switzerland, contracts are only subject to formalities if the law so requires (CO 11). Therefore, with a few exceptions, contracts may be concluded orally or, under special circumstances, even tacitly.

In general, agency agreements are not subject to any written formalities and may be concluded orally. But, if the parties of an agency contract wish to modify the statutory provisions, they have to put their agreement in writing (CO 418a.2, 418c.2 and 3, 418f.3, 418g.1 and 3, 418k.1, 418q.1, 418t.2). Further, if an agent operates a commercial business of a certain size, he must register the business in the commercial register (Article 36 of Commercial Register Ordinance). In any case, due to the complexity of the relationship between the commercial agent and the principal, written contracts are generally recommended and indeed standard.

The CO defines certain minimal standards regarding agency relationships. Unless explicitly stated in the CO, the parties are allowed to agree otherwise. In the following, we are especially going to focus on the minimal standards provided by law.

2.2.2 Exclusivity

Exclusivity may be granted relating a geographical area or a class of goods. Unless otherwise agreed in writing, a commercial agency agreement is not exclusive and an agent is entitled to work in the territory of his choice. An agent is also entitled to work for several principals, even if they are competitors (CO 418c), if the written contract does not provide otherwise. Conflicting representations, that is representing the principal and the customer in the same business transaction, however, are prohibited (see section 2.2.6 below). The downside of this liberty is that the principal generally is entitled to directly compete with the agent and/or to engage as many other agents for his purposes as he deems necessary. In practice, the parties usually negotiate exclusivity provisions and define a certain scope of exclusivity.

2.2.3 Territory

Notwithstanding the general principle of non-exclusivity, the law presumes that if a certain territory or a clientele is being allocated to an agent, the latter has exclusivity (exclusive agent) in such territory or for such clientele, unless otherwise agreed upon in writing (CO 418f.3).

2.2.4 Commission

An agent is entitled to the agreed or customary brokerage commission (Vermittlungsprovision) or underwriting commission (Abschlussprovision) on all business transactions in which he acted as an intermediary, or which were concluded during the term of his agency agreement. Unless otherwise agreed upon in writing, the agent is also compensated for transactions not directly procured by him/her, but concluded
by the principal with customers that the agent formerly solicited for such transactions (CO 418g.1). Equally, the agent is entitled to commissions which result from follow-up orders of customers that were solicited by the agent during the term of his agency agreement (CO 418t.l).

Commissions are usually based on sales prices and calculated as a percentage of such sales prices. In practice, the parties frequently agree on other forms of remuneration, such as payments per pieces sold, lump sum compensations, fixed fees, etc. If an agent is compensated by a regularly paid, fixed salary, such a relationship qualifies as an employment contract rather than as an agency (see section 2.1 above).

The CO provides special rules for agents to whom a certain territory or a certain clientele is exclusively allocated (see CO 418f.3, see section 2.2.3 above). Such exclusive agents are entitled to the agreed upon commissions on all business transactions that are concluded with customers in that territory or of that clientele during the term of the agency contract, irrespective of whether or not the agents were involved (CO 418g.2).

Besides the ordinary commissions as outlined above, an agent is occasionally entitled to collection commissions (Inkassoprosvisionen) (CO 418l.1) and del credere commissions (Delkrederekommissionen) (CO 418c.3, see section 2.2.6 below). A del credere commission is particularly due if the agent bears the del credere risk of the customers (even if the risk has not been realized). The statutory collection commission for amounts collected by the agent in accordance with special instructions from the principal may be waived, while del credere commissions are the agent’s inalienable right.

While performing his contractual obligations, the agent is confronted with costs such as overhead expenses, telecommunication and mailing costs or travel expenses. Under Swiss law, the agent has no claim for reimbursement of such costs and expenses incurred in the ordinary course of his business (CO 418n.1). However, costs incurred upon special instructions of the principal shall be compensated (CO 418n.1).

Unless otherwise agreed upon in writing, a claim for commissions arises as soon as the business transaction with the customer is legally concluded (CO 418g.3). The agent loses his claim for a commission to the extent that the performance of a concluded business transaction does not occur for reasons for which the principal is not responsible (CO 418h.1). Furthermore, the agent loses his claim for commission if the customer fails to perform, or only insufficiently performs, so that the principal who fulfilled the contract cannot reasonably be expected to pay such commission (CO 418h.2). Finally, a commission claim forfeits, if an agent acts dishonestly towards the principal (e.g., representing the principal and the customer, fraudulent accounting, etc. CO 418b, 415, 433). Unless otherwise agreed upon or customary, a commission becomes due for payment upon the end of each six-month period of the calendar year during which the transaction was concluded (CO 418i).

As a guarantee for being paid, the agent has an inalienable right of retention against the principal up to the amount of his claims arising under the agency relationship. The agent may retain movable property and financial instruments of the principal which are in his possession under the agency agreement (CO 418o.1). Likewise, an agent is entitled to withhold customer payments which he collected for the principal’s account pursuant to a special authority to collect (CO 418e.2). In the event of the principal’s insolvency, the right of retention is granted even for claims not yet due (CO 418o.1). Notwithstanding the above, the right of retention is limited to realizable
property (property which has a market value) and therefore cannot be exercised, for instance, on the principal’s price lists, general conditions of sale, advertising materials, customer lists, and other non-commercial business documents (CO 418o.2).

2.2.5 Obligations of Principal
Subject to other agreements between the parties, the principal basically has the following three duties:

(a) the duty to pay the agreed upon commissions (CO 418g.1);
(b) the duty to support the agent to the extent necessary to enable him/her to successfully perform his/her function (CO 418f.1); and
(c) the duty to refrain from doing anything that could jeopardize the success of the agent’s activity (CO 418f.1).

The duty to pay the agent the agreed upon commission has already been discussed (see section 2.2.4 above). According to CO 418f.1, the principal’s duty to support the agent includes support and information by providing the agent with documents (such as promotional brochures, general conditions of sale, etc.) and other information necessary for the agent’s successful activity. The scope of this duty significantly depends on the circumstances of each case. As a rule, an increased level of support is necessary in case of exclusive agents, underwriting agents and/or agents authorized to collect receivables for the principal. The duty to inform the agent also requires the principal to immediately brief the agent of any actual or potential events or circumstances which may result in a reduction or modification of the agent’s expected or planned turnover (such as restyling or remodelling of products, production stops, design changes, change of promotional material, price changes, etc.). In case an agent acts as an intermediary only (application agent, Vermittlungsagent), the principal has the additional duty to immediately inform the agent whether an offer procured by the agent is accepted or refused.

The scope of the principal’s general duty according to CO 418f.1, not to jeopardize the agent’s success, must be seen in light of every particular case. A principal is in breach of such duty if he does not adequately follow-up on customer contracts which have been solicited by the agent (e.g., due to delivery shortages, late deliveries, etc.). However, the principal’s duty not to jeopardize the success of the agent does not generally prevent him to compete with the agent by making direct sales into the agent’s territory or by appointing other agents. As a matter of course, the principal is only prevented to make direct sales if he granted the agent exclusivity (see section 2.2.2 above).

2.2.6 Obligations of Agent
A commercial agent is obligated to carefully safeguard the interests of the principal with the care of an ordinary merchant (duty of care, CO 418c.1). The scope of authority of an agent is limited (CO 418e.1). An agent is obliged (and authorized) to act as an intermediary in business transactions, to receive notices and other declarations of defect or non-performance by which the customer asserts his right arising out of undue performance of the principal. An agent is, however, not generally authorized to accept payments from customers, to grant or extend payment terms, or to otherwise modify,
alter or supplement contracts between principal and customer (CO 418e.2). Consequently, an agent is not responsible for the payments and the performance of customers, or for debt collection expenses (del credere liability). If an agent shall bear such del credere risks, this must be agreed upon in writing. In this case, the agent has an inalienable right to an adequate special compensation for taking this additional risk (CO 418c.3).

Fiduciary duties play an important role in agency agreements. An agent shall be loyal to his principal. The duty of loyalty prohibits an agent from disclosing the principal’s business secrets to third parties, even after termination of the agency agreement (CO 418d.1). Moreover, as a result of his duty of loyalty, an agent is in general not allowed to represent both the principal and the buyer in the same transaction (conflicting representations). If he still does so, the respective contract, as a rule, yet remains valid, but the agent has to remit to the principal any consideration received from the buyer and shall indemnify the principal for damages, if any. On the other hand, an agent is generally entitled to work for several principals, unless otherwise agreed upon in writing (CO 418c.1, see section 2.2.2 above).

2.2.7 Term

In Switzerland, the principle of freedom of contract is prevailing. Under this principle, the parties may freely negotiate the term and renewal of agency agreements. Although Swiss law does not set specific limits for fixed-term agency agreements, an excessively long duration overly restricts the personal freedom of either party and thus is void (see Swiss Civil Code 27.2). Most courts are likely to treat exclusive agency agreements with excessively long fixed terms (e.g., more than ten years) as unlimited agreements subject to the ordinary termination rules.

If the agency contract was concluded for a limited period of time, or if such period can be deduced from its purpose, the agency contract is terminated without further notice upon the expiration of such period (CO 418p.1). If, in spite of the expiration of the fixed term, the relationship is tacitly continued by both parties, the agreement is deemed to have been renewed. Thereby, the law expressly provides that a renewal shall last for the same period of time, but under no circumstances for longer than one-year (CO 418p.2).

If the agreement does not specify a determined period (unlimited agency agreement), and if such period cannot be deduced from its purpose, the party wishing to terminate the agreement has to send a notice of termination. During the first year of the contract period, the contract may be terminated with a notice period of one month, effective as of the end of a calendar month. An agreement of shorter notice must be in writing (CO 418q.1). If the contractual relationship has lasted for a period of at least one year, it can be terminated with a notice period of two months, effective at the end of a calendar quarter. The parties have the possibility to agree on longer notice periods and/or other effective dates (CO 418q.2), but they cannot validly agree on notice periods shorter than two months. Finally, the stipulation of different notice periods for the principal and the agent is prohibited in all cases (CO 418q.3).

Besides the ordinary termination right according CO 418q, both parties have the right to terminate an agency agreement immediately and without notice. Such a termination without notice is only allowed for so-called valid reasons (termination with cause, see
CO 418r). This provision is compulsory. The law defines valid reasons as any circumstance under which the terminating party, in good faith, cannot be expected to continue the contractual relationship (CO 337.2 by analogy). ‘Valid reasons’ is a very vague concept of law giving a judge wide discretion on the existence of such circumstances (CO 337.3). Notwithstanding, the parties are free to expressly define valid reasons in their agreement. A termination for valid reasons shall be exercised without delay, otherwise the cause is deemed to be forfeited.

Finally, an agency agreement terminates upon the death or incapacity of the agent, or the bankruptcy of the principal. By contrast, upon the death of a principal, the agency agreement does usually not terminate. This is only the case if the contract was entered into essentially with a view to the principal as a person (CO 418s).

2.2.8 Indemnification upon Termination (Goodwill Payment)

All claims of an agent for commissions or other compensations become due at the end of the agency relationship at the latest (CO 418t.2). Unless otherwise agreed upon or customary, an agent has a claim for post-contractual commissions only on such orders which the principal received prior to the termination of the agency relationship and only on transactions solicited by the agent during the agency relationship.

Under certain circumstances, a commercial agent has an inalienable right for a compensation for clientele. This special compensation is not qualified as an additional consideration for the performance of an agent, but it is rather a payment for the goodwill the principal may use after termination of the agency contract. In order to be entitled to such goodwill payment, the following conditions must be met (CO 418u.1): The agent, through his activity, has substantially increased the principal’s clientele so that, even after termination of the agency relationship, the principal benefits substantially from the business relations with the acquired clientele. The claim for compensation is, however, forfeited if the agency relationship is terminated for a reason for which the agent is responsible (CO 418u.3). This does not only apply in the event of a fault on the part of the agent, but also if he terminates the contract without reasonable cause.

The goodwill claim shall not exceed the amount of net earnings derived under the contract for one year. It is calculated on the average earnings of the last five years, or if the relationship has not lasted so long, on the average of the total contract period (CO 418u.2).

Upon termination, the parties have certain obligations of restitution. On the date of termination of an agency relationship, each party shall make restitution to the other of everything it has received during the contractual period from the other party or from third parties on account of the other party. The right of retention of the contracting parties as discussed above remains reserved (see section 2.2.4, CO 418v).

2.2.9 Non-competition

The law does not restrict an agent or a principal from competing with each other during the agency relationship or afterwards. However, the parties are free to stipulate a contractual non-competition obligation during or after the term of the agency agreement (CO 418d.2). The restrictions for post-contractual non-competition clauses are the same as for non-competition clauses during the agency relationship.
In order to be enforceable, such non-competition clause (during or after the contract period) must be reasonably limited with regard to place (usually the agent’s territory), time (at most three years following termination of the agreement), and subject (as a rule, the principal’s business under the agency agreement). If these three limitations are not sufficiently followed, the judge may reduce the scope of the non-competition obligation accordingly (CO 340 by analogy). In case an agent breaches the obligation to not compete, the principal is only entitled to a compensation for damages arising therefrom. The parties have the possibility to further agree on a payment of liquidated damages as a consequence of a breach. In this case, the agent may free himself from the prohibition by paying the penalty. He shall, however, remain liable for any further damage of the principal (CO 340b.2). Specific performance of an obligation not to compete may only be enforced if this is expressly stated in the agreement (CO 340b.3).

If the agent is subject to a post-contractual non-competition clause, he has an inalienable right to an adequate special compensation upon termination of the agency agreement (CO 418d.2, so-called waiting allowance). Such compensation is even owed if the agent terminates the agreement himself.
3. DISTRIBUTION

3.1 Definition

Distribution agreements play an important role in today’s business environment. A supplier of goods may benefit from the know-how and sales & marketing organization of a distributor in a certain territory, which enables the supplier to develop new markets or to optimize his sales and marketing activities.

Under Swiss law, a distributor is defined as a person or a company who is contractually obliged to buy the supplier’s products in order to resell them in a particular territory on an exclusive or non-exclusive basis. A typical duty of the distributor is the duty to perform sales promotions. Therefore, like agency contracts, distribution agreements are often used as sales and distribution instruments by foreign companies. In contrast to an agent who only acts as an intermediary of the principal (see section 2.1 above), a distributor is legally independent and acts on his own behalf and for his own account and risk. Thereby, the ownership of the contractual goods shifts from the supplier to the distributor. Accordingly, the distributor bears the whole marketing risk.

In Switzerland, distribution agreements are neither regulated by the Swiss Code of Obligations nor by any other statute. Therefore, distribution agreements and the obligations of a supplier and his distributor are mainly defined by case law. Additionally, certain provisions of the agency law (CO 418a et seq.) may apply by analogy. The Swiss Antitrust Law embodies certain important restrictions on vertical arrangements which have to be considered (see section 3.2.10 below). In general, we distinguish two different types of distribution relationships: An agreement without or with integration of the distributor into the sales organization of the supplier. In the first case, the supplier has an obligation to supply and the distributor a minimum purchase obligation. In the second case, the parties usually agree on further obligations such as for example a strict compliance of the distribution activities with the set targets of the supplier. Typically, distribution agreements are exclusive as to territory and/or clientele.

For decades, it was a firm assumption of Swiss courts that a distributor was developing a clientele for his own account, and for this reason courts constantly denied any goodwill compensations to distributors upon termination of their distribution agreements. Such practice was likewise heavily criticized for years by legal writers, stating that at least in connection with the sale of branded goods such assumption was not correct. A decision of the Swiss Supreme Court of 22 May 2008 initiated the change by granting to a distributor of branded goods compensation for his clientele upon termination of the contract (BGE 134 III 497; see section 3.2.8 below). This decision by the Supreme Court had a significant impact on Switzerland as business location for foreign companies. Many distribution contracts of the past needed to be updated in order to comply with the decision.
3.2 Basic Aspects of Distribution Agreements under Swiss Law and Court Practice

3.2.1 Formalities
Like an agency agreement, a distribution agreement may be concluded orally. Due to the complexity of the relationship between a distributor and his supplier, and since Swiss law does not provide statutory rules on distribution agreements, written contracts are the standard and highly recommended.

3.2.2 Exclusivity
Exclusivity may motivate a distributor to make the necessary investments of money, time and other resources needed to successfully market a supplier’s products. Since distribution agreements are not regulated by statute in Switzerland, they should (and normally do) explicitly state whether the distributor is granted exclusivity or not. The parties are free to negotiate on exclusivity and eventually to define the scope of it. Unless otherwise agreed upon, exclusivity prohibits the supplier to appoint another distributor or to directly sell products into the exclusive territory or to the exclusive clientele. In order to comply with the Swiss antitrust law, the exclusivity clause shall, however, allow passive sales by other distributors into the exclusive area (SCL 5.4). Accordingly, a distributor is allowed to sell goods outside of his territory, provided that he simply responds to orders reaching him from abroad and he is not actively soliciting sales outside of his exclusive area. Further restrictions on distribution agreements are discussed more thoroughly below (see section 3.2.10).

3.2.3 Territory
See section 3.2.2 above.

3.2.4 Compensation
The compensation of a distributor is usually the difference (the spread) between the purchase price of the products or services and the sales price to the market or to sub-distributors. Since a distributor, by definition, is an independent business entity, buying and selling for his own account, he is normally not entitled to claim compensation for general business costs and expenses. Unless explicitly agreed upon, a distributor may likewise not claim compensation for specific costs triggered by individual obligations under the contract such as the obligation to maintain an inventory, to engage in market analysis, research, etc.

As a security for claims resulting from the distribution relationship, general contract law grants the distributor a right to retain movable property and securities of the supplier which are in the distributor’s possession pursuant to the distribution agreement (Swiss Civil Code 895). However, the right of retention is limited to realizable property (i.e., property with a market value). Therefore, the right of retention may not be exercised, for example, on supplier’s price lists, general conditions of sale, advertising material and/or other business documents without a market value. Unlike the agent’s right of retention.
pursuant to CO 418o.1 (see section 2.2.4 above), the distributor’s right of retention may be waived by agreement in advance.

3.2.5 Obligations of Supplier

A supplier is obliged to sell contractual products to the distributor pursuant to the terms and conditions of the distribution agreement. A supplier shall further refrain from selling contractual products directly or indirectly into the exclusive territory of the distributor, unless such right has been agreed in the written contract. The supplier has an obligation to support the distributor’s efforts to promote sales. He shall particularly provide the necessary assistance and information for a successful resale, for the promotion of the products, for after-sales service, etc. If a distributor has the right to use suppliers’ trademarks or other intellectual property rights, the supplier shall define the use and not interfere with it.

3.2.6 Obligations of Distributor

The main obligations of a distributor are to purchase (exclusively, as the case may be) contractual products according to the terms and conditions of the distribution agreement and to actively promote the resale of such products within the defined territory and/or clientele. The distributor is often contractually obliged to purchase a minimum quantity of products. By fixing minimum purchase requirements, the economic risk is shifted to the distributor. The distributor’s duty to perform sales may be emphasized by a duty to engage in a market analysis or research, to advertise products, to maintain an inventory and to provide after-sales service. The distributor frequently has the obligation to use the trademark or other intellectual property rights of the supplier, thus enhancing the trademark owner’s reputation.

3.2.7 Term

According to the principle of freedom of contract, the parties may freely negotiate the term and renewal of distribution agreements. Agency and distribution agreements are generally treated similarly regarding term and termination. With respect to open-ended distribution agreements, courts usually apply the legal provisions for agency agreements by analogy (CO 418q, see section 2.7.7 above). Fixed-term distribution agreements are terminated without further notice upon expiration of the fixed term (CO 418p.1; see section 2.7.7 above). In connection with fixed-term agency agreements, the law explicitly provides that a tacit continuation at the end of the term entails a renewal of the agency agreement for the same period of time, but not more than one year (CO 418p.2; see 2.2.7). It is uncertain, whether the same rule applies to distribution agreements by analogy. Depending on the actual circumstances, a tacitly renewed distribution agreement may qualify as an open-ended agreement, subject to the ordinary termination rules of partnerships (CO 546.1: termination at any time by giving six months’ prior notice) or it may qualify as a renewed fixed-term agreement, subject to either the fixed term of the expired agreement, or any other term implicitly agreed between the parties.
Like agency agreements, distribution agreements may be terminated immediately for valid reasons (see section 2.2.7 above). Death or incapacity of the distributor as well as bankruptcy of the supplier generally terminate the agreement offhand.

### 3.2.8 Indemnification upon Termination

As already mentioned (see section 3.1 above), the Swiss Supreme Court decided that a distributor may be entitled to a goodwill compensation for his clientele like an agent, if certain conditions are met (BGE 134 III 497). The Supreme Court explained this shift by the fact that the interests of an agent and a distributor are rather similar, although not in every situation. According to the May 2008 Supreme Court decision, the interests of an agent and of a distributor are, indeed, comparable if two conditions are met:

(a) The distributor must be closely integrated into the sales organization of the supplier and the supplier must dispose of an extensive right of supervision. This means that the autonomy of the distributor is rather limited, shifting his position closely to the one of an agent. The Supreme Court considered several criteria in order to decide whether a distributor was autonomous or not: for example minimum purchase requirements, minimum stock requirements, duty to disclose business records, duty to tolerate unilateral changes of prices and conditions and the like.

(b) Additionally, the clientele of a distributor must remain loyal to and thus transfer to the supplier after termination of the distribution agreement. In this connection, ‘transfer’ means that the distributor is not able to maintain the clientele after the distribution contract is terminated. A transfer of customers is particularly assumed in the case of sales of branded goods. Customers of branded good are likely to stick with the brand and not with the distributor. Thus, after termination, the supplier of the goods (owner of the brand) or the new distributor (new seller of the brand) usually benefit from the clientele that was acquired by the former distributor.

Nevertheless, if the two above mentioned conditions are not met, a distributor (still) has no right to a goodwill compensation. If, on the other hand, the preconditions are met, the Supreme Court, in a second step, recommends to examine the respective provisions of the agency laws to determine whether a goodwill compensation is owed (CO 418u, see 2.2.8). The following are relevant factors: The distributor, through his activity, has substantially increased the supplier’s clientele so that even after termination of the distribution relationship the supplier (possibly through his new distributor) benefits substantially from the business relations with the acquired clientele. The claim for compensation is, however, forfeited if the agreement was terminated for a reason for which the distributor was responsible (CO 418u.3 by analogy, see section 2.2.8 above). A goodwill claim is further considered inadequate if the distributor was already compensated above average during the contractual relationship.

The goodwill claim shall not exceed the amount of net earnings derived from the contract for one year. The exact amount is calculated on the basis of the average earnings of the last five years, or if the relationship has not lasted so long, on the average of the total contract period (CO 418u.2, by analogy).
3.2.9 Non-competition

According to the Swiss antitrust laws, non-competition clauses in distribution agreements may not exceed the term of five years (Article 12.f of the SCC on Vertical Restraints, hereinafter ‘Directive’). Therefore, distribution agreements containing a non-competition clause with an infinite term or with a tacit renewal clause may be illegal (SCL 5.1).

Non-competition undertakings for the time after termination of a distribution agreement are only admissible if the non-competition arrangement does not exceed a one-year term (SCL 5.1 and Article 12.g of the Directive). The supplier may, however, restrict the use or disclosure of know-how which is not publicly known for an unlimited time (Article 12.g.2 Directive).

Unlike an agent, according to the Federal Supreme Court, a distributor is so far not entitled to a special compensation in case of a post-contractual non-competition arrangement. The parties may, however, agree otherwise.

3.2.10 Restrictions on Distribution Agreements by the Swiss Antitrust Laws

The purpose of the Swiss antitrust laws is to prevent harmful economic and social impacts of cartels and other competition restrictions and to thereby encourage competition in the interest of a free market system (SCL 1). The SCL applies to any commercial behaviour which has an effect in Switzerland even if it originates from abroad (SCL 2.2).

According to the Swiss Cartel Law, understandings are in general illegal if they substantially impair competition in a market for certain goods or services which cannot be justified by reasons of economic efficiency. Understandings which lead to the elimination of effective competition are also considered to be illegal (SCL 5.1).

The Swiss Cartel Law especially provides for restrictions on vertical agreements, including distribution agreements. According to the Swiss Competition Commission, vertical agreements are defined as coordinated understandings or behaviour patterns between companies of different market levels fixing the terms of trade relating to the purchase, sale, or resale of certain goods or services (SCL 4.1). Such vertical agreements are illegal if they substantially interfere with the competitive environment or eliminate active competition between market actors (SCL 5.1). An elimination of competition is assumed if distribution agreements allocate territories in such a way that passive sales from one territory into the other are prohibited, or if the agreement contains minimum or fixed retail prices (SCL 5.4). Passive sales are defined as unsolicited requests for products of customers located outside the distributors’ territory which the supplier reserved for himself or for other distributors. Violations of SCL 5.4 may result in direct sanctions by the SCC. Fines may amount up to 10% of the turnover realized in Switzerland in the last three years (SCL 49a).

Further, according to the above mentioned Directive of the SCC of 28 June 2010, not only minimum or fixed retail prices are illegal, but also price recommendations. This is particularly the case:

(a) if they are not clearly identified as non-binding;
(b) if they are only granted to resellers/retailers but not to the public;
(c) if the price recommendations are exerted by pressure or incentives;
(d) if the recommended resale prices are maintained at higher levels than in neighbouring countries; or
(e) a significant number of distributors follow the price recommendations.

The Directive defines general criteria under which vertical agreements may be deemed eliminating competition in the sense of Article 5.4 SCL and thus are considered as illegal. Even though the Directive does not officially bind civil courts, the latter are expected to take a close look at its content when considering the admissibility of a vertical restraint in a distribution agreement. The check whether or not a vertical restraint in a distribution agreement is considered to be illegal under the Swiss Cartel law is rather sophisticated. It is therefore advisable to involve a professional advisor at an early stage.

Nevertheless, vertical agreements are not necessarily deemed to be destructive. In some cases, vertical agreements may significantly enhance trade efficiency as a consequence of a better coordination between the involved companies. Such coordination may lead to a decrease of transaction and distribution costs and may optimize the turnover results of the companies.