

**MAIN THEME**  
**FRIDAY 6 JUNE 2008**

**DISTRIBUTION AND INTERNET**

**The Impact of Internet on Agency, Distributorship and Franchising Agreements**

*The main tools used at present for organizing a distribution network (agency contracts, distributorship contracts, franchising, selective distribution agreements) have been set up before the birth of the Internet.*

*Now that the parties (principals, agents, distributors, franchisors and franchisees) are beginning to use this tool, several new problems arise. Can the supplier/principal sell through Internet without infringing the exclusive rights of his agents or distributors? And, on the other side, should distributors be left free to sell on Internet or should such sales be prohibited or submitted to control by the supplier?*

*A further issue regards EU antitrust rules, according to which a reseller must be free to make «passive» sales to customers established outside his contractual territory. Since the European Commission considers sales through Internet as «passive» sales, a prohibition to sell through Internet would be considered as being an infringement of Article 81 and would deprive parties from the benefit of block exemption 2790/1999.*

*Finally, there are more general issues regarding the possible use of Internet when negotiating and concluding contracts and in the context of litigation (conciliation on line).*

*The purpose of the session is to discuss the various issues, to verify the lawfulness of possible solutions and to discuss the most appropriate contractual alternatives.*

**DRAFT PROGRAM**

**1. Use of Internet by the principal/supplier/franchisor**

1.1 A first general problem arises when the principal/supplier advertises his activity through an Internet website. The information given must be coordinated with the sales network (e.g. sometimes mere resellers are named "distributors" for a country on the site).

1.2 A second issue regards possible sales through Internet.

A first, less common, possibility is that the principal/supplier sells to the end-users through his own website. In this case there may be a "commercial" problem of not interfering with the existing network and a "legal" problem of violating the exclusivity of the members of the network.

A second possibility is that the principal/supplier sells to (or through) shopping portals. Also in this case there may be a possible conflict with the sales network, to be considered as well from the commercial point of view as from the legal point of view.

- 1.3 Where the principal decides to sell through Internet in competition with his network, he must adapt the contracts with his agents/distributors/franchisees in order to avoid a violation of their exclusive rights.

However, in certain cases (to be discussed in detail) even reserving the right to sell in competition with a franchisee may be considered as being against good faith (e.g. sales at a price lower than the recommended price provided for the franchisee).

Furthermore, if the after-sale service is given by distributors, there may be a problem of making sure that they will provide the service for products they have not sold.

- 1.4 Possible clauses in the distribution contracts which deal with this problem:

- the principal/supplier reserves the right to sell through Internet (as an exception to possible exclusive rights of his agents/distributors);
- compromise solutions which take into account the interests of both parties (e.g. commission on sales made to customers of the distributor's territory; the supplier undertakes only to sale through its website to final customers: e.g. sale of wine to end users);

## **2. Use of Internet by agents, distributors (importers), selective distributors, franchisees**

The main problems which arise are the following:

- a possible interference with the trademark and image strategies of the principal;
- a possible interference with the exclusive rights of other members of the network.

While the first aspect mainly concerns the protection of the principal's image and trademark, the second one will often conflict with antitrust rules (particularly in Europe) which favour the free circulation of products between the member states.

The following issues might justify a specific presentation:

- Limitations imposed upon distributors (importers)
- Limitation imposed upon selective distributors/franchisees

### **2.1 Internet sales by distributors (resellers)**

In the EU a clause prohibiting the distributor to sell through Internet would be a limitation of «passive sales», which is considered restrictive and which would exclude the agreement from the benefit of block exemption 2790/1999.

Which are the conditions that the supplier may impose without limiting passive sales

- Control of the use of his trademarks?
- Prohibition of means (e.g. language, product specifications) implying promotion outside the contractual territory?

## **2.2 Internet sales by selective distributors and franchisees**

Under EU competition rules (and especially Regulation 2790/1999) selective distributors (i.e. who are bound not to sell the contractual products to traders who do not belong to the network) must remain free to make active sales to any end user in the EU. The only limitation that may be imposed on them is the obligation to sell from their outlet.

This means that distributors belonging to a selective network (i.e. a "closed" network where sales to outside traders are prohibited) should in principle be free to use Internet for the purpose of promoting sales to end users wherever in the EU.

There are very interesting developments in case law regarding selective distribution networks by the EU Commission and the French anti-trust authority, which determine the conditions that may be imposed upon members of a selective distribution network.

It is at present discussed if and to what extent such case law is applicable to franchising networks which can be considered to be "selective" (i.e., networks where the franchisees are not authorized to sell to traders not belonging to the network).

## **3. Use of Internet when dealing with counterparts: contract negotiation and conclusion; dispute resolution**

Concluding fully effective written contracts through Internet:

- The UN Convention on the use of Electronic Communications in International Contracts
- The digital signature system introduced by the Italian Chambers of Commerce
- The conciliation on line of the Chamber of Commerce of Torino

## **4. Rules applicable to distribution and Internet outside the EU**

The situation in the US

Japan ?

Other countries ?

**IT WOULD BE VERY IMPORTANT TO INCLUDE TESTIMONIALS FROM THE BUSINESS ON SOME OF THE ABOVE TOPICS, SUCH AS, FOR INSTANCE:**

*2008 IDI Annual Conference*

- A practical experience of direct sales to consumers through Internet by the principal/supplier and the coordination of such activity with the existing network.
- Dealing with distributors who sell outside their territory through Internet. Looking for antitrust-compatible solutions.
- Organising the flow of orders from distributors through Internet (Intranet?). A practical experience (??)

**WORKSHOPS**  
**SATURDAY 7 JUNE 2008**

On Saturday morning we will have three parallel workshops chosen with the aim of dealing with specific themes of particular interest for our members.

**WORKSHOP I**  
**CALCULATION OF GOODWILL INDEMNITY FOR AGENTS AND DISTRIBUTORS IN VARIOUS COUNTRIES**

The aim of this workshop is to give a practical information about the calculation of the goodwill indemnity for agents (and for distributors, where applicable).

The speakers will not tell us what the rules on the calculation of the indemnity say, but how these rules are actually applied by the courts and what amounts have been granted in the past.

They will also give some information (where possible) about possible means for limiting the amount in question.

**WORKSHOP II**  
**M&A AND DISTRIBUTION NETWORKS**

The aim of this workshop is to deal with the problems which arise in case of acquisition of a company which has a distribution network.

A first problem will be that of ascertaining (in the due diligence stage) the characteristics of the network, the effectiveness of the contracts in force, etc.

A second, very important issue, arises when it appears necessary to dismiss the whole or part of the network at a later stage, a very likely solution where the acquiring company already has its own network. If the acquiring company needs to terminate contracts with the agents or distributors of the acquired company, it may need information about the past (e.g. existing customers, contract modifications, commissions paid) which may not be available. This should be considered when negotiating the acquisition.

In some cases the acquiring company may require the seller to terminate the contracts before the closing.

The speakers will analyze these and other problems. A testimonial from business could be very useful.

**WORKSHOP III**  
**LITIGATION STRATEGIES IN INTERNATIONAL DISTRIBUTION**  
**AGREEMENTS**

Which solutions are appropriate in case of litigation in the future?

Arbitration? Jurisdiction of the courts of the principal's country? Jurisdiction of the courts of the country of the agent or distributor? Or, no choice of court at all?

There are no general answers to these questions, but it is nevertheless possible to work out some general strategies on the following issues:

- Arbitration or ordinary courts? In which situations arbitration is to be preferred and in which not? In which cases arbitration is not effective (e.g. Belgian distributors, Italian agents).
- What happens in the EU (under regulation 44/2001) when no choice of court has been made? Agents will normally be able to claim before their courts, but for distributors the situation is different in various countries.
- How to make sure that a choice of forum is effective: the requirement of written form.
- Which strategies are recommended outside the EU? In the US? In the Arab countries? In the Far East? Central and South America?