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AGENCY AND DISTRIBUTION AGREEMENTS (NORWAY)

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General

Under Norwegian law, agency agreements are in part regulated through the *Norwegian Agency Act* (1992). Distribution agreements are not specifically regulated in an individual act concerning only such agreements. Regard must also be had to other laws, regulations and customs.

The parties are therefore free to contract, this only subject to non-derogatory limited rights and obligations implied by law or custom (*see Freedom of Contract, below*). Non-derogatory terms / rules of law can be found in numerous commercial laws which consist of both derogatory and non-derogatory rules of law.

As a general rule, a contract does not have to be in writing. Although oral contracts are legally enforceable, it is prudent to have a written contract to record the terms agreed between the parties which can then be used for evidential purposes if necessary.

It is also important to note that terms which have not been expressly agreed by the parties may be implied into the contract. With regard to terms pursuant to non-derogatory statutes, this follows automatically. With regard to terms that the parties can be derogated from, Norwegian law has a general presumption that such term/terms may be implied into the contract, unless such a presumption would be in conflict or incoherent with the other terms of the parties' contract.

A term may also be implied into a contract by adducing evidence of local custom or trade usage with respect to matters which are not referred to in the contract. Also, certain statutes imply terms into particular contracts, see below.

Freedom of Contract

As noted above, parties have a wide discretion to agree the terms of their agency or distribution contracts.

However, this freedom of contract is subject to the restrictions imposed by, amongst other factors, public policy as well as legislation such as the Norwegian Agency Act (1992), the Norwegian Contract Act (1918), the Norwegian Sale of Goods Act (1988) and the Norwegian Consumer Purchase Act (2002) to name a few.

The Norwegian Contract Act (1918)

The Act contains the most elementary provisions concerning the entry into contract of all types of agreements, statutes concerning proxy and equally importantly – general statutes stipulating that agreements may fully or in part be void due to either the way in which the agreement was concluded or due to the specific content in the agreement.

As to issues relating to the way in which a contract was concluded, a party may e.g. not be bound by his/her contractual obligations if the other party has acted in bad faith, knowingly has withheld important information, or has actively misled the other contracting party.

As to the specific content of an agreement, “unreasonable” clauses may in extraordinary circumstances also be deemed void, but the threshold for this is high between *commercial* parties. An example of a contract term that always will be considered as unreasonable are where contractual clauses seek to exclude or limit liability where a party has acted intentionally or with gross negligence.

The Norwegian Agency Act (1992)

The Act contains a number of non-derogatory provisions. These especially concern provisions intended to protect the agent’s interests such as:

- the agent’s right to get documentation from his principal
- the agent’s right to hold the principal’s goods as collateral for possible claims
- the agent’s right to compensation during and after the termination of the agreement
- rules concerning the termination of the agency agreement

An important provision can be found in section 28 of the Act. Here, the agent is granted an unconditional right to get consideration for the principal’s continued benefits of the agent’s efforts after the agreement between the two has ended. Such benefits may be that the principal’s customer base has increased and that the principal, even after the contract has ended, will

continue to receive the benefit of the agent's efforts. The consideration is capped to one year's commission based on the agent's average annual remuneration over the preceding five years (or the period of the agreement if shorter).

The Norwegian Sale of Goods Act (1988) and the Norwegian Consumer Purchase Act (2002)

A distribution contract will be subject to the Sale of Goods Act 1988, which contains provisions that would be implied into any such contract e.g. that the goods will conform to their description, will be reasonably fit for purpose and shall be of satisfactory quality. If goods are sold to consumers, the latter transaction will be regulated by the Norwegian Consumer Purchase Act (2002).

The Norwegian Product Liability Act

Under the Act, liability for the supply of defective products is, in the first instance, imposed – regardless of fault – on manufacturers, suppliers of 'own-label' products and importers into the EC.

Choice of law

Parties are free to choose the system of law which is to govern their contract. However, mandatory provisions of Norwegian law (i.e. provisions which expressly or by implication apply, irrespective of the choice of some other system of law) may override the choice of law clause.

For example, the Norwegian Agency Act expressly stipulates that the parties cannot evade the restrictions imposed by the Act (*see above*) by choosing a system of law outside Norway as the governing law (e.g. UK law) unless the contractual relationship would nonetheless and in the absence of the clause would have been deemed to be governed by foreign law.

In the absence of an express choice of law clause, the applicable law is the law with which the contract is most closely connected (which, if the agent or distributor is based in Norway and performs the contract here, is most likely to be Norwegian law).

Competition law issues

The principal piece of legislation is the Competition Act 2004. The Act created two basic prohibitions which are closely modelled on the corresponding prohibitions contained in the European Community (EC) Treaty.

Following recent reform of EC and Norwegian law in this area, agency or distribution contracts raise fewer competition issues than was previously the case. Under the competition rules, provided certain conditions are met (such as the supplier's market share is below 30%), most distribution agreements will benefit from a block exemption afforded to vertical agreements and thus fall outside the scope of the prohibition on anti-competitive agreements. (A vertical agreement is one that is entered into between businesses operating at different levels of the economic supply chain and includes, therefore, agency and distribution contracts). Parties may also be able to benefit from the "de minimis" exemption (where the contract is of 'minor importance' and is deemed not to appreciably restrict competition).

Exclusive agency or distribution contracts raise further competition law issues. Exclusive contracts raise the risk of reduced intra-brand competition and market partitioning, which may in particular lead to price discrimination – where most/all of the suppliers in a particular market apply exclusive distribution, this may facilitate collusion both at the suppliers' and distributors' levels.

The above demonstrates that competition law issues are complex and it is strongly recommended that principals (as well as agents) obtain expert advice on the particular arrangements relating to the agency or distribution relationship in question.

Tax

Under Norwegian Income Tax Act, general rules will apply on parties under agency and distribution agreements. Corporate residents in Norway are subject to pay Norwegian income tax. The tax rate for capital gains and business activity is 28 percent; this after cost has been deducted.

Foreign companies planning to establish business activities in Norway will meet several challenges related to Norwegian legislation. The company may be taxable to Norway according to permanent establishment rules and special rules related to the Norwegian Continental Shelf. In addition, the employees will be taxable to Norway for salary. Norway has entered into several tax treaties based on the OECD's Model Convention. Special rules may apply for agency agreements related to permanent establishment.

International Conventions

Norway has ratified the The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which was concluded in Lugano on 16 September 1988.

Furthermore, Norway is party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) which, to great extent, has been transformed into Norwegian law through the Norwegian Sale of Goods Act (1988).