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AGENCY AND DISTRIBUTION AGREEMENTS (Denmark)

General

Generally speaking there is a wide opportunity for business partners to enter into whatever form of contract they might want since a freedom of contract is the governing principle. However, and with Danish legislation founded on a civil law system, various standard provisions of average agency and distribution agreements are automatically covered by various laws of Denmark, although there is no specific law on distribution agreements but a specific law on agency agreements (see Freedom of Contract, below).

There is no requirement of written contracts although this is the common approach bearing the advantages of written contracts in court cases in mind.

The principle of "consideration" is not known in Denmark.

When assessing the content of a contract, the parties' intentions might be taken into consideration just as trade usage can be applied. If a contract between two parties was unilaterally made by one of the parties – and especially if the contract was not subsequently negotiated as such – certain problems in understanding specific provision of the contract might later on be interpreted against the author of the contract (known as the "koncipistregel").

Freedom of Contract

The extensive number of legislation of a civil law system makes Denmark rather well regulated concerning various different commercial contracts on topics such as sale of goods, terms covering communication between the parties with regards to the binding effect of tenders, etc. However, having no specific law on distribution agreements there is still a need for most contracts on this subject to be individually regulated by an agreement between the parties either in order to *avoid* specific Danish legislation or in order to *secure* regulation on specific conditions which are common in the area of distribution.

Among the most common Danish laws to take into consideration when dealing with distribution agreements you will find:

"Aftaleloven" 1996 (Agreements Act)

Among other things the Act regulates when an offer is deemed to become binding unless otherwise specifically regulated between the parties. Regulation on power of attorneys – either written or oral – is also to be found in the Act. Whereas the regulation between the business partners on how to bind and execute a POA is subject to freedom of contract, a third party, towards whom the POA is used, will find his rights and obligations in the Act.

The Agreements Act also contains - in art. 36 – the general clause on unfair agreements. Though hard to invoke in business relationships, the provision might be useful e.g. where one party tries to avoid responsibility for gross negligence etc.

"Købeloven" 2003 with later amendments (Sale of Goods Act)

Distribution agreements will be subject to the Sale of Goods Act securing regulation concerning situations such as time of delivery, faulty goods, transfer of risk, statute of limitation, etc. It is important to notice that substantial parts of the Sale of Goods Act are mandatory towards the consumer – e.g. giving the consumer a 2 year statute of limitation and to some extent a right to choose between various possibilities (repair, replacement, proportionate discount or defeasance) in case of faulty goods.

"Markedsføringsloven" 2005 with later amendments (Marketing Practices Act)

The Marketing Practices Act contains – in art. 1 - the general clause stating that "Traders subject to this Act shall exercise good marketing practices with reference to consumers, other traders and public interests". In the Act you will find several provisions further defining how art. 1 is to be assessed in the light of behaviour between competitors and between businesses and consumers.

"Forbrugeraftaleloven" 2004 (Consumer Agreements Act)

The Consumer Agreements Act is only having the consumer as its protected subject. Together with the Marketing Act (see above) the Consumer Agreements Act contains mandatory provisions on how to approach consumers. Further more the Consumer Agreements Act regulates the minimum requirements on information towards a consumer concerning a general right of cancellation if the agreement between the consumer and the company has been made outside the company's premises.

The Consumer Agreements Act incorporates EC Directive 97/7 on the Protection of Consumers in Respect of Distance Contracts.

"Produktansvarsloven" 2007 with later amendments (Product Liability Act)

The Product Liability Act imposes – regardless of fault – individual liability for the supply of defective products on manufacturers, suppliers of own label products and importers (into the EC) as well as middlemen within the EC. The middleman, however, is not subject to an individual liability if he is able to prove that the defect was not a result of his error or neglect. Nevertheless, the middleman can not avoid a vicarious liability for errors and neglect committed by the manufacturer or earlier middlemen in the process. Finally the middleman is considered a *manufacturer* (thereby increasing his liability) if it is impossible to find out who imported the products into the EC or – if produced within the EC – who originally manufactured the products.

The Product Liability Act incorporates EC Directive 85/374 on Liability for Defective Products.

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For commercial agency agreements some of the regulation described above will in the circumstances be relevant, but concerning the *specific* regulation between the principal and the agent, a number of minimum mandatory regulation in order to safeguard the agent, is contained in:

“Handelsagentloven” 1990 (Commercial Agents Act)

By this Act a number of minimum mandatory protection rights are safeguarded for the commercial agent. These rights include among others: **i)** If the contract is agreed without any date of termination, a mutual minimum notice period ranging from 1 month to 6 months (to the end of a month) depending of the length of the co-operation, must be observed. The commercial agent, however, is able to observe only a maximum of 3 months if this has been agreed in the contract between the parties; **ii)** A minimum compensation upon termination of the contract can be claimed by the commercial agent if he has participated in getting new customers or has increased the turnover with the existing customer base or if it is considered adequate based on other specific matters related to the co-operation; and **iii)** Certain requirements on restrictive covenants on the commercial agent such as a requirement of said covenants to be made in writing and with a maximum duration of 2 years. Further more such covenants can only be made with regards to the products and geographical territory which were the responsibility of the commercial agent.

The Commercial Agents Act incorporates EC Directive 86/653 on Self-employed Commercial Agents.

Choice of Law

The parties are free to agree on any law and venue they see fit. However, and especially for the commercial agent cf. above, mandatory provisions can not be circumvented by reference to the law of foreign jurisdictions just as "ordre public" (very fundamental public policy) in general must be observed.

In the absence of a choice of law and/or choice of venue the assessment by a Danish judge must be made observing Danish international private law. This typically leads to a choice of law of that jurisdiction where the contract is most closely connected. The venue is typically found by assessing (using – if a choice of law was not made – the law of the jurisdiction where the contract is most closely connected) where the contract's central act of performance is to be delivered.

Concerning the sale of goods, Denmark has ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) although Part II on the formation of the contract has not been ratified. Thus, the specific regulation on the sale of goods in CISG will be applied between two business parties when the choice of law points out Danish law. As a matter of form it should be noted that an agreement between two business parties – one being from Denmark and the other being from e.g. USA – stating Danish law as the choice of law, results in the use of CISG unless it is specifically agreed that the Danish choice of law does *not* imply CISG (whereby the Danish Sale of Goods Act is applied).

Competition Law Issues

"Konkurrenceloven" 2007 (The Danish Competition Act) with later amendments is governing merger notifications, cartels and the abuse of a dominant position. In this respect the Danish regulation is very closely modelled on the corresponding EU regulation on the subject matter.

Thus, the EC block exemptions apply and among these especially the block exemption on Vertical Agreements and Concerted Practices (Commission Regulation 2790/1999) is relevant on distribution agreements. Except in cases where no perceptible effect on the *competition* (collective size of market share) or on the *trade* (collective size of turnover) can be observed (these thresholds are somewhat lower in the Danish Competition Act than in the EC regulation), any kind of agreement having any effect on the competition whatsoever must be assessed by using the block exemption or – if the supplier's market share exceeds 30% on the relevant market (taking both product market and geographic market into consideration) – be the subject of an individual exemption.

It should be stressed that a number of commonly seen issues between the parties such as agreements on specific sales prices, minimum prices, contribution margin or how to make a

specific tender, are black listed and can not in any event be accepted regardless of the “de minimis” regulation described above.

Finally the parties must observe an obligation not to have the agreement running endlessly if the agreement contains provisions that would be considered to have an effect on competition on the relevant market. There is a general requirement of securing a re negotiation within every 5 years.

Tax

A company, which is not a Danish tax resident, is not in general chargeable to capital gains tax. Below the possible implications for income tax and corporation tax with regard to the various types of agency contracts are set out.

Sales agents

A company, which is not a Danish tax resident, is in general chargeable to income tax on income arising in Denmark, subject to certain exceptions and to the provisions of relevant applicable double taxation convention. A principal, which is not a Danish tax resident, may also be chargeable to corporation tax on the profits attributable to its agent’s activities.

Marketing agents

In cases where the principal, which is not a Danish tax resident, uses a marketing agent, this fact alone is not likely to cause the tax authorities to regard it as trading and thereby having a Danish tax liability, since the agent is unlikely to have authority to enter into contracts on its behalf. However, if the agent has made all the preparatory work and it is just a formality for the principal to enter into the contract, the principal might incur a Danish tax liability.

Distributor

The Danish tax liability of a manufacturer/supplier, which is not a Danish tax resident, will be determined by the facts of the case. The use of an independent distributor will generally not render the overseas manufacturer/supplier chargeable to Danish income or corporation tax.

International Conventions

Denmark has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Denmark has ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) although not Part II of the convention.

DANISH TRADE LAW WEBSITES

1 Danish Commerce and Companies Agency (DCCA)

DCCA is the Danish Government's department for business enterprise and regulation. It is through DCCA registrations of new companies are made. Setting up a new company can be made on-line and normally instantly whereby it is possible to have it registered on the same day as it is decided to found a new company. The web page contains various information on businesses and corporate entities in English as well as translations of the Danish Public Companies Act and the Danish Private Companies Act.

www.eogs.dk

2 Danish Competition Authority (DCA)

DCA is the official authority observing compliance with Danish regulation on competition issues as well as cases which are referred from the EU Commission to be handled locally. Further more merger applications are made to the DCA. Finally cases on procurement involving public tender rules are the subject of DCA's responsibility. The webpage is useful in finding translated legislation as well as decisions on the subject matter.

www.ks.dk

3 Danish Data Protection Agency (DDPA)

DDPA is the official authority observing compliance with Danish regulation on personal data protection issues. The agency mainly deals with specific cases on the basis of inquiries from public authorities or private individuals, or cases taken up by the agency on its own initiative. The webpage is useful in finding translated legislation on the subject matter.

www.datatilsynet.dk

4 The Danish Consumer Ombudsman (DCO)

The DCO's main task is to supervise compliance with the Danish Marketing Practices Act. The webpage contains translated legislation as well as guidance and guidelines from the DCO. Further more the webpage contains DCO decisions as well as judgments.

www.forbrug.dk

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