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OLEJNICZAK & RICHARDSON

AGENCY AND DISTRIBUTION AGREEMENTS IN POLAND

Country: **POLAND**

Office Locations:

Firm: **Olejniczak & Richardson Sp. k.**
Street: **Nowy Świat 7/15**
City Country Postal Count: **00-496 Warsaw, Poland**
T: Telephone: **+48 22 584-48-40**
F: Fax: **+48 22 584-48-50**

Web Address:

www.olrlegal.com

Authors:

Name: **Joanna Chmiel**

Legal advisor

Tel: **+48 (22) 58-44-851**

E-mail: joanna.chmiel@olrlegal.com

Name: **Anna Szyszka**

Tax advisor

Tel: **+48 (22) 58-44-845**

E-mail: anna.szyszka@olrlegal.com

Introduction:

Under Polish law agency agreements are regulated by the Civil Code ("CC") the provisions of which are generally applicable to all legal relationships, including trade and economic relationships. Pursuant to the CC by a contract of agency the person accepting the mandate (agent) assumes the obligation, within the scope of its business activities and for payment, to enter into contracts with clients for the benefit of the principal or to conclude such contracts in the principal's name.

A distribution agreement is not a separate type of a contract under Polish law and combines the features of several types of agreement that are regulated by the CC. A distributor is characterized as an entity that facilitates the movement of the product from the manufacturer to the consumer. What differentiates the distributor from the manufacturer is the fact that the activity of the distributor does not affect the quality of the product as related to safety. It should be noted that nowadays the economic role of distribution agreements is significant and it grows constantly as more entities conduct

business through retail chains and have to be able to secure a constant supply of goods for sale.

Freedom of Contract:

According to the general rule of Polish civil law, expressed directly in Article 353¹ of the CC, the parties to an agreement are free to agree the terms and conditions of that agreement as long as the provisions of the agreement and the common objectives of the parties are not contrary to law. Therefore, the parties to a contract may arrange the legal relationship as they deem appropriate on the condition that neither the content nor purpose of the contract are contrary to the nature of the relationship, to statutory law or with the principles of community life.

Absent or Ambiguous Terms:

It must be emphasized that an agreement which is inconsistent with statutory law or which is designed to circumvent statutory law will be void unless the appropriate provision envisages a different effect, in particular that those provisions of the act in law which are void are replaced by the appropriate provisions of statutory law. However, if only some of the provisions of the agreement are affected by nullity, such agreement will remain valid as to its remaining parts unless it follows from the circumstances that without the provisions affected by nullity such agreement could not have been performed.

For example, the CC provides that if an agency agreement does not specify the amount of the agent's commission, the commission due shall be in the amount commonly accepted in the relationships of that type and in the place where the agent carries out its activity. If it is impossible to determine commission in this way, the commission due to the agent shall be an appropriate amount which takes into account all the circumstances directly pertaining to the performance of the agent's acts.

Oral Contracts:

If statutory law stipulates that agreement must be executed in a written form, an agreement entered into other than in stipulated form shall be void only if statutory law specifically provides that the agreement will be void.

As a matter of law, neither distribution nor agency agreements require written form. Notwithstanding the legal position, it is rare in practice to base economic cooperation on oral contracts, largely because the absence of a written agreement may create difficulties in the case of a dispute between the parties making resolution of any dispute before the court more difficult. Moreover certain terms and conditions might be reserved only if the agreement is concluded in a written form. Pursuant to the CC either party to

an agency agreement is entitled to demand that the other party confirms the terms and conditions of the agreement in writing and any provisions that amend or complement it. Any waiver of this right is deemed invalid.

Competition/Antitrust/Non-Compete Covenants:

✓ Distribution agreements

As the distribution agreements are nowadays very common and significant it is almost impossible to imagine the contemporary economy without them. According to the act of 16 February 2007 on the Protection of Competition and Consumers, distribution agreements which restrict competition are, as examples of a vertical agreements leading to division of a market between distributors, generally forbidden in Poland. However there are several regulations of the President of the Council of the Ministers containing exceptions from this rule which do allow businesses to conclude agreements which restrict competition between distributors. The only way to avoid prohibitions arising from the Act on the Protection of Competition and Consumers is to prepare distribution agreements that fall under one of these exceptions.

✓ Agency agreements

According to the CC the parties of an agency agreement may include in the text of the agreement a non-competition covenant which limits the agent's competitive activities for the period following the dissolution of an agreement. This period may not exceed two years. This rule applies only to situations where the principal and agent are parties to a civil law agreement and not to a contract for employment. In exchange for the agent's consent to such non-competition provision the principal is obliged to pay the agent appropriate remuneration.

Tax Considerations:

The general rules on VAT and income tax regarding entrepreneurs providing services under agency or distribution agreements are as follows:

✓ VAT

As a general rule turnover is the tax base for VAT. With respect to an agency agreement (as regulated in the Polish Civil Code) or other similar services this is the amount due for services rendered, minus the amount of VAT.

The current standard VAT rate is 23%. However a 0% rate may be applied to services connected directly with export of goods rendered on the basis of (among others) an agency agreement. Moreover, under certain conditions services may be exempt from

VAT, depending on the services, for example transactions, including intermediary services, regarding currency, banknotes and coins used as legal tender.

✓ Income tax

As a general rule the income tax base is the difference between revenues and tax deductible costs. The corporate income tax rate applicable to companies (legal persons) is 19%. Partnerships are tax transparent and their income is taxed at the partner level. Natural persons may be taxed either according to a flat rate of 19% or according to a sliding tax scale (18 and 32%).

Other Issues:

It is worth mentioning the general rule regarding liability for non-performance or improper performance of contracts under Polish law, according to which the party in default is obliged to redress the damage resulting from the non-performance or improper performance of the obligation unless the non-performance or improper performance were due to circumstances for which the party in default is not liable. Moreover, a person obliged to pay damages is liable only for the normal effects of the act or omission from which the damage resulted. Within these limits and in the absence of a different provision of statutory law or specific provision in the contract, the amount of the damage shall cover the actual losses incurred by the injured person as well as the benefit which that person could have obtained had the non-performance not occurred. For example, in the agency agreement concluded in a written form may stipulate that, in consideration of additional remuneration (*del credere commission*) and within the agreed scope, the agent shall be liable for the performance of the obligation to the client. In such case the agent's liability may relate only to a specified contract or to contracts with specified clients that were concluded through the efforts of the agent or by the agent in the principal's name.

Resources:

- **Ministry of Economy:** www.mg.gov.pl
- **Ministry of Finance:** www.mf.gov.pl
- **Polish Information and Foreign Investment Agency:** www.paiz.gov.pl
- **Polish Office of Competition and Consumer Protection:** www.uokik.gov.pl
- **Ministry of Regional Development:** www.mrr.gov.pl
- **Ministry of Justice:** www.ms.gov.pl

Firm Description:

Olejniczak & Richardson is a commercial law firm which assists many non-Polish owned and businesses enter and conduct business in the Polish market as well as assisting Polish businesses.

The firm offers advice on Polish and English law across a range of businesses sectors including manufacturing, retail, real estate and construction, financial, transport and distribution, trading, pharmaceutical, food, banking and financial services. Our clients include Polish and international companies, investment funds, professional firms, public utilities, government departments and individual entrepreneurs across the major legal practice areas including commercial, corporate, tax, employment, litigation, and real estate.

At Olejniczak & Richardson we seek to:

- look after our clients by giving sound, commercial advice delivered promptly
- remember that our clients have their own businesses to run
- understand that our clients do not have infinite reserves of time, money or patience
- maintain a sense of perspective and humour

The business environment has never been more challenging nor has the need for lawyers who understand the pressures their clients' businesses face been greater. We strive to support our clients with our constructive approach to problem solving to deliver effective business-like results in a friendly and professional atmosphere.