Key Distribution Considerations: Overview (Switzerland)

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A Practice Note providing an overview of key issues for foreign counsel of overseas manufacturers or suppliers of goods to consider when entering distribution arrangements in Switzerland including applicable laws and regulations, important considerations for appointing a distributor, key provisions in distribution agreements, and termination considerations.

Distributors purchase goods from manufacturers or other suppliers and resell them to others in the supply chain, such as resellers and end users. Distributors may also provide services for the manufacturer, such as product marketing and post-sale support services.

Distribution is a commonly used vehicle for sale of goods in Switzerland and has many benefits for a foreign supplier, including that the supplier benefits from the distributor's knowledge of local laws, trading conditions, and customs. However, there are a variety of risks and issues a foreign supplier planning to engage a distributor in Switzerland should consider, including tax, competition law, product liability, triggering agency or franchising laws, intellectual property, and termination-related risks.

This Note discusses:

- Key legal and regulatory requirements governing the distribution of goods in Switzerland, including:
    - legal formalities;
    - tax requirements;
    - competition laws; and
    - product regulatory requirements and product liability laws.
- Important considerations for appointing a distributor and structuring the distribution relationship in Switzerland, including:
    - types of distributorships;
    - relationship of the parties;
    - import requirements;
    - intellectual property issues; and
    - online sales considerations.
- Key provisions in the distribution agreement.
- Issues related to the termination of the distribution relationship under Swiss law.

Governing Legislation and Regulation

Introduction to the Swiss Contract Law

The principle of freedom of contract is fundamental to Swiss contract law. This principle reflects the freedom of each person to decide whether and with whom to enter a contract and the content and type of contract. Parties are not limited by the list of specific contracts provided by Swiss law, known as named contracts. They can conclude contractual relationships outside of this list, which are often referred to as unnamed contracts.

While parties have wide room to tailor their agreement, the Swiss Code of Obligations (CO) regulates contractual relationships and commercial enterprises. For example, the CO requires the parties to:

- Respect the limits set by law (Article 19, CO). This applies to:
    - mandatory provisions from which the parties cannot validly derogate; and
    - provisions that are partially mandatory, meaning that either a specific form is required or amendments are not valid to the detriment of one party.
- Sign contracts by hand unless an exemption is provided (Articles 12 to 15, CO).

The CO divides contract law into two main parts:

- General Provisions (Articles 1 to 183, CO).
- Types of Contractual Relationships, which sets out the specific contracts regulated by law (or named contracts) (Articles 184 to 551, CO).

The Swiss Civil Code (Civil Code) also applies to contracting and requires, for example, that the parties exercise their rights and perform their obligations in good faith.

Laws and Regulations Governing the Distribution of Goods in Switzerland

There is no legal definition of distribution in Swiss law. A contract for distribution is not in the list of named contracts in the CO, and there is no unanimous definition of the distribution relationship. (Fabrizio La Spada, "La typologie des accords de distribution," *Les accords de distribution* (CEDIDAC, p. 7 no. 7, Gilliéron and Ling, eds., 2005) (La Spada)). Therefore, distribution agreements are subject to the general provisions of the CO.

The term distribution is broadly used in Switzerland to refer to the various commercial systems that a manufacturer can set up to market its products, goods, or services to consumers (La Spada, p. 7 no. 9).

While the term distribution can cover a wide range of legal relationships, this Note uses distribution to mean distributors or representatives acting in their own names and on their own behalf, in contrast to and with more independence than agents in agency relationships, who negotiate or conclude contracts in the name and on behalf of the principal (Christoph Müller, *Contrats de droit suisse*, p. 867, no. 4090 (Stampli, 2021) (Müller, *Contrats de droit suisse*)). For more information on agency arrangements, see Practice Note, Key Agency Considerations for Switzerland: Overview.

An exclusive distribution contract is an agreement by which one person, the supplier, commits to supply to another person, the exclusive distributor, certain goods at a certain price and to grant exclusivity in a certain territory. In return, the distributor agrees to pay the price and promote the sale of the goods in the territory granted (Pierre Tercier and others, *Les contrats spéciaux*, p. 1071, no. 7239 (Schulthess Verlag, 2016) (Tercier). Exclusive distribution contracts are referred to as unnamed and *sui generis* contracts, comprising elements of other either named or unnamed contracts (Federal Supreme Court, First Civil Chamber, BGE 78 II 32, 17 January 1952, at 33-38).

Because they are not governed by a specific regulation in the CO, distribution agreements are primarily regulated by the parties themselves, who have considerable leeway to structure their respective obligations. When the parties have not specifically agreed on an aspect of their relationship, the parties may need to consider application by analogy of special rules relating to named contracts, such as the commercial agency contract in Articles 418a to 418v of the CO.

Legal Formalities

In principle, distribution agreements do not need to be written. However, the best practice, which is widely used, is to use a written agreement signed by all parties, either by hand or authenticated electronic signature.

Parties to a distribution agreement generally use written agreements to capture:

- Exclusive distribution relationships.
- The use of licensed trademarks.
- Commitments related to the promotion of the relevant goods.

(Tercier, p. 1074, no. 7259).

Tax Requirements

Income Tax

Under the Federal Act on Federal Direct Tax (LIFD), Switzerland levies a federal tax on the income of individuals and on the profits of legal entities.

Individuals who are neither domiciled nor resident in Switzerland are subject to this tax based on their economic connection when gainfully employed in Switzerland as an independent or dependent party, which is the case when operating a permanent establishment in Switzerland (Article 4(1)(b), LIFD).

Legal entities that have neither their registered office nor their effective management in Switzerland are subject to tax based on their economic connection, including when they operate a permanent establishment in Switzerland (Article 51(1)(b), LIFD).

In principle, a foreign supplier, whether a natural or legal person, who sells goods in Switzerland through a distributor located in Switzerland does not operate a permanent establishment in Switzerland due to the economic independence of the parties. In this situation, the supplier is not subject to income tax in Switzerland.

However, it is important to determine whether the legal relationship between the foreign supplier and the Swiss distributor puts the distributor in a situation of dependence on and integration within the supplier, similar to that of an agent or employee, or whether the distributor enjoys sufficient freedom, both personally and economically, to be considered an independent operator (Federal Supreme Court, BGE 79 I 218, 7 October 1953). If a foreign supplier carries out activity in Switzerland through a distributor that acts as the supplier's agent or employee, the income the supplier derives from this activity is subject to Swiss income tax. Conversely, if the distributor acts in its own name and for its own account, the supplier's income is not subject to Swiss income tax. (Federal Supreme Court, Second Public Law Department, BGE 134 I 303, 17 June 2008, at 311-312.)

For additional information on taxation for commercial agency arrangements, see Practice Note, Key Agency Considerations for Switzerland: Overview: Tax Requirements.

Value-Added Tax

Companies based abroad are subject to value-added tax (VAT) if they provide services or products in Switzerland. However, they are exempt from taxation if they exclusively provide tax-exempt services or products.

VAT is an indirect tax, usually 7.7%, collected by the Federal Tax Administration on nearly every purchase or sale of products or services. It is a general consumption tax that is charged directly to customers on the goods they consume or the services they use. When a person acts in the name and on behalf of another, the service is, under certain conditions, deemed to be provided by the person represented. (Article 20(2), Federal Act on Value Added Tax.)

By definition, a distributor acts in their own name and for their own account and is not considered as acting as a direct representation for VAT purposes. Therefore, in principle, foreign companies that supply goods to Swiss distributors who act independently are not subject to VAT in Switzerland. However, the parties can agree by contract on a different allocation of VAT, for example by requiring the foreign supplier to refund VAT directly to the Swiss distributor.

Competition Laws

The main Swiss competition law is the Federal Act on Cartels and other Restraints of Competition (Cartel Act). It applies to practices that have effects in Switzerland, even if the practices originate in another country. The Federal Competition Commission (ComCo) is the independent federal authority responsible for applying the Cartel Act.

On 28 June 2010, the ComCo issued a Notice on the Competition Law Treatment of Vertical Agreements, last revised 12 December 2022 (Verticals Notice). The Verticals Notice provides guidance for harmony with different aspects of EU competition law (Silvio Venturi and Christoph Vonlanthen, "Accords de distribution et droit de la concurrence," *Les accords de distribution* (CEDIDAC, p. 125, no. 19, Gilliéron and Ling, eds., 2005) (Venturi and Vonlanthen)).

The Verticals Notice is not a formal legal act and is not binding for courts in the interpretation of competition law. However, it provides practical guidance, especially for distributors that are part of the distribution chain.

Distribution agreements are vertical agreements within the meaning of Article 4 of the Cartel Act. They can be illegal if they:

- Significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency (Article 5, paragraphs 1 and 2, Cartel Act).
- Eliminate effective competition (Article 5, paragraphs 1, 3, and 4, Cartel Act).

Article 5, paragraph 4 of the Cartel Act specifies two types of vertical agreements presumed to lead to the elimination of effective competition:

- Agreements between parties at different levels of the production and distribution chain regarding fixed or minimum prices.
- In the case of agreements contained in distribution contracts regarding the allocation of territories, to the extent that sales by other distributors into these territories are not permitted.

Vertical agreements are presumed to eliminate effective competition if they cover minimum or fixed sales prices only, not maximum prices (Venturi and Vonlanthen, p. 137, no. 47).

The mere fact that the supplier makes a price recommendation to its distributor can, depending on the case, create a presumption of an agreement to suppress competition within the meaning of Article 5, paragraph 4 of the Cartel Act. This is the case if the recommendation is the result of a concerted practice, which may result from particularly intensive communication on recommended prices (section 12, paragraph 3, Verticals Notice).

Exclusive territory clauses, frequently contained in distribution agreements, may violate competition law by:

- **Prohibiting active sales.** This prohibits the distributor who is granted territorial exclusivity from undertaking any sales activities in the exclusive territory of another distributor.
- **Prohibiting passive sales.** This prohibits the distributor from taking orders from individual customers, end customers, or distributors established outside the territory assigned to the distributor.

Both types of territorial prohibitions can constitute significant restrictions on competition (Article 5, paragraph 1, Cartel Act). However, only an allocation of territory coupled with a prohibition of passive sales is presumed to suppress competition (Marc Amstutz and others, "Commentaire des articles 4 et 5 LCart," *Commentaire romand – Droit de la Concurrence* (Vincent Martenet and others, eds., no. 222, Helbing Lichtenhahn Verlag, 2d. ed. 2013)). Therefore, contractual prohibitions of passive sales into exclusive territories (absolute territorial protection) are unlawful.

However, ComCo has specified that a non-competition clause with a term of less than five years that prohibits the distributor from distributing competing products does not represent, in principle, a qualitatively significant restriction on competition (Section 15, lit. g, Verticals Notice).

For additional information on competition laws, see Practice Note, Competition Issues for Distribution and Supply Agreements in Switzerland

Non-Compete Covenants

The distributor may agree not to compete with the supplier after the end of the contract. In these cases, most authors advocate applying by analogy Article 418d, paragraph 2, of the CO regarding the contractual prohibition of competition of the agent (Tercier, p. 1079, no 7281). Article 418d, paragraph 2 specifies that the validity of a non-competition clause is basically subject to the same terms and conditions as an employment contract, as this article refers to the provisions of the employment contract regarding the contractual obligation not to compete (Articles 340(a)-(c), CO).

Article 340, paragraph 2 of the CO provides that the prohibition of competition is binding for employment relationships only where the relationship allows the employee to have knowledge of the employer's clientele or manufacturing and trade secrets and where the use of this knowledge might cause employer substantial harm. However, this prohibition should not apply by analogy to an exclusive distribution contract to the extent the clients belong by definition to the distributor, not the supplier. (Kaveh Mirfakhraei, *Les indemnités de fin de contrat dans le contrat d'agence et le contrat de distribution exclusive*, p. 266 (Collection Genevoise, 2014) (Mirfakhraei).)

Non-competition clauses must be in writing and appropriately restricted regarding place, time, and scope (Articles 340 and 340a, CO). They are valid only if imposed on a real potential competitor.

If the parties agree to a non-competition clause, the question often arises regarding whether an exclusive distributor should be compensated in the same way as an agent, by analogy to Article 418d, paragraph 2, of the CO. The answer to this question is unclear under current Swiss law. The Swiss Federal Supreme Court has not rendered a clear decision.

Most Swiss legal authors believe that this clause gives the distributor an inalienable entitlement to adequate special remuneration, due at the end of the contract (Tercier, p. 1079, no 7281; Mirfakhraei, p. 260). Other authors believe that the exceptional nature of Article 418d, paragraph 2, of the CO does not allow application by analogy (see Ivan Cherpillod, "La fin des contrats de distribution," *Les contrats de distribution* (Ivan Cherpillod and others, eds., p. 456 (CEDIDAC no. 38, 1998)).

If the parties want to include a non-competition clause, they should include in their agreement:

- Whether the distributor is entitled to remuneration.
- The amount (if any) of renumeration.
- The consequences of non-compliance (most often, the payment of a contractual penalty).

In principle, the parties are free to determine the amount of compensation. However, in the event of a dispute, the court has broad discretionary power to verify the fairness of the compensation (Article 4, Civil Code).

For additional information on competition laws, see Practice Note, Competition Issues for Distribution and Supply Agreements in Switzerland.

Product Regulatory Requirements and Product Liability Laws

The Federal Act on Product Liability (LRFP) regulates the requirements a product must meet to be placed on the Swiss market and defines liability for damages when a defective product causes:

- Death or bodily injury to a natural person.
- Damage to property.

(Article 1, LRFP.)

The producer is usually the actual or apparent manufacturer of a product or the commercial importer of the product, who is jointly and severally liable with the actual or apparent manufacturers (Articles 2 and 7, LFRP).

A Swiss distributor who imports products for sale in Switzerland is in principle jointly and severally liable in the event of a defect in the product in question. The customer (the victim of the defect) can bring an action against the supplier of the products, the distributor, or both.

The parties can provide for a different allocation of liability. For example, they can establish that the supplier assumes the obligations regarding the conformity and safety of the product and is fully responsible if the product is deformed, has a latent defect, or is otherwise defective, or if there is a problem regarding the product's safety.

The Federal Act on Product Safety (LSPro) regulates the commercial and professional marketing of products in Switzerland. According to Article 3, paragraph 1 of the LSPro, products are safe and can enter the Swiss market if they present no or minimal risk to the health or safety of users or third parties when used under normal or reasonably foreseeable conditions. The LSPro does not apply when commercially manufactured products are transferred for charitable purposes, whether in return for payment or free of charge. Similarly, the LSPro does not apply to the delivery of products by private individuals to private individuals, whether free of charge or for a fee. However, the free supply of a product for advertising or public relations purposes is based on an economic motive, so the LSPro applies. (Eugénie Holliger-Hagmann, "Art. 1 PrSG," *Haftpflichtkommentar, Kommentar zu den schweizerischen Haftpflichtbestimmungen* (Willi Fischer and Thierry Luterbacher, eds., 2016)).

The requirements that a product must meet before it is placed on the market are primarily imposed on the producer of the product itself and, secondarily, on the importer, distributor, or service provider (Article 3, paragraph 6, LSPro).

Article 8 of the LSPro defines obligations of producers, importers, and distributors after the product has been placed on the market. Producers and importers have an obligation to monitor products. This applies to consumer products, defined as products intended for consumers or likely to be used by consumers under reasonably foreseeable conditions. The traceability of products must be also guaranteed. (Article 8, paragraphs 1 and 2, LSPro.)

Producers and importers must also take measures to prevent risks. Complaints from third parties regarding product safety must be carefully investigated. If necessary, spot checks must be carried out. (Article 8, paragraph 3, LSPro.) The distributor must cooperate with producers and importers in monitoring product safety and take the necessary measures for effective cooperation (Article 8, paragraph 4, LSPro).

Appointing a Distributor and Structuring the Distribution Relationship

Types of Distribution Agreements

Exclusive Distribution Agreements

In Switzerland, exclusive distribution agreements are the most common type of distribution agreements. These contracts can have very different content, but they usually include:

- A supply contract, which is a contract of sale with successive deliveries to which the rules of the contract of sale apply in principle (Articles 184 to 236, CO).

- An exclusivity clause, by which the supplier reserves for the distributor the exclusivity (total or partial) of the distribution of the product in a determined territory, in return for which the distributor must promote the sale.

(Federal Supreme Court, First Civil Chamber, BGE 107 II 216, 14 July 1981.)

Types of exclusivity agreements include those where:

- The supplier can sell only to the distributor in the specified territory and must refrain from any direct intervention in the area reserved to the distributor. The supplier must then transfer to the distributor any demand from clients located in that territory. The parties may instead agree to reserve to the supplier the right to contact clients in this territory, or even authorise the supplier to sell the products directly, usually by paying a fee to the distributor on the business concluded.

- The distributor can obtain the products only from the supplier. This restriction may be useful to avoid parallel import.

Exclusive distribution agreements are comprised of a double-exchange relationship including:

- The supplier's obligation to refrain from selling in the reserved territory and the exclusive distributor's obligation to promote sales.

- The supplier's obligation to deliver the goods and the distributor's obligation to pay the price.

(Federal Supreme Court, First Civil Chamber, 4A_613/2009, 2 July 2010, at recital 3.)

Selective Distribution Agreements

In Switzerland, selective distribution agreements are not clearly defined and have mainly emerged from business practice.

Selective distribution is a vertical marketing system. It involves a supplier who contracts with multiple distributors, who are responsible for organising the distribution network in the territory granted to them by choosing several resellers according to qualitative and quantitative criteria defined by the supplier. (Ralph Schlosser and Marco Villa, "Les accords de distribution selective," *Les contrats de distribution* (Ivan Cherpillod and others, eds., p. 110 (CEDIDAC no. 38, 1998).)

Unlike exclusive distribution, the selective distribution system does not guarantee or assign a defined territory or a specific group of customers to a distributor. Selective distribution requires the distributor to select resellers based on supplier's objective criteria. Selective distribution systems are often organised to limit the number of resellers in a territory. (Tercier, p. 1074, no. 7257.)

Non-Exclusive Distribution Agreements

Non-exclusive distribution contracts exist in Switzerland, although in practice their scope is limited. Without an exclusivity clause, distributors usually find these contracts to be less attractive when balanced with the commercial risks taken by the distributor. Also, non-exclusive distribution agreements are legally equivalent to contracts of sale with successive deliveries. In principle, the rules for contracts of sale apply to these contracts. (Articles 184 to 216(e), CO.)

Relationship of the Parties

Exclusive distribution contracts are closely related to commercial agency contracts and commercial traveller's contracts (Articles 347 and 418a, CO). In practice, it may be difficult to distinguish between these contracts when the agent is also granted an exclusive right. (Federal Supreme Court, First Civil Chamber, BGE 122 III 66, 21 December 1995, at 69.)

However, a distributor has greater independence than an agent and a commercial traveller. The distributor acts in its own name and for its own account, while the agent and the commercial traveller act in the name and for the account of the supplier. (Federal Supreme Court, First Civil Chamber, 4C.130/2004, 18 June 2004, at recital 2.2.) Unlike the customers of an agent or commercial traveller, who become the supplier's customers, the exclusive distributor is not required to give its supplier the benefit of the economic value of the customer base. (Christoph Müller, "Les contrats de distribution," *Droits de la consommation et de la distribution: les nouveaux défis* (Blaise Carron and Christoph Müller, eds., no. 38, Helbing Lichtenhahn Verlag 2013) (Müller, "Les contrats de distribution")).

Distribution agreements may also be confused with franchising agreements. However, distributors are in principle less integrated into the supplier's distribution organisation than franchisees are into the franchisor's organisation. Distributors are also independent businesses that work with the supplier in select areas, while franchisees coordinate closely with the franchisor across the distribution chain, especially in marketing and brand positioning. The primary distinction between distribution and franchising is the extent to which a distributor must follow the supplier's instructions. (Müller, *Contrats de droit suisse*, p. 868, no. 4094.)

Despite these important distinctions, counsel should be mindful that the title the parties give to the contract is not decisive in determining the nature and the essence of their contract (Article 18, paragraph 1, CO). When drafting the contract, particular attention should be paid to the nature of the contemplated relationship to ensure the appropriate contract is created to support it. For an overview of agents, distributors, franchisees, and other sales intermediaries in the supply of goods, see Practice Note, Sales Intermediaries in the Supply of Goods: Overview (International).

Import Requirements

In Switzerland, customs duties are indirect taxes levied on goods brought into the Swiss customs territory. They must be paid to the Federal Office for Customs and Border Security and normally arise when the office accepts the customs declaration.

The amount of customs duties depends on the condition of the goods, their weight, their material, and their use.

The following persons are jointly and severally liable for payment of customs duties:

- The person who drives or causes the goods to be driven across the customs border.
- The person subject to the obligation to declare or their agent.
- The person on whose behalf the goods are imported or exported.

(Article 70, paragraphs 2 and 3, Federal Customs Act (LD)).

The customs procedure is based on the principle of self-declaration. The taxable person must take the necessary measures to ensure that the goods imported and exported across the border are correctly declared, and, in case of doubt, ask the authorities for information. (Articles 18 and 25, FCA.)

In Switzerland, in principle, the parties to a distribution agreement are free to allocate responsibility for compliance with import laws and payment of customs. Even if the distributor imports goods ordered from the supplier and pays customs duties, the parties can agree that the supplier reimburse the distributor for their costs.

Intellectual Property Issues

Intellectual property law is regulated by the Trade Mark Protection Act (TmPA).

The right to a trade mark comes from registering the trade mark in Switzerland. It is the entry in the trade mark register that confers on the owner the exclusive right to use the registered trade mark. (Article 5, TmPA.)

For a trade mark to be effective, the trade mark must be used in connection with the goods or services registered (Article 11, paragraph 1, TmPA). The use of the trade mark can be made by a licensee, an agent, an authorised importer, and an exclusive or non-exclusive licensee, but only with the owner's consent (Article 11, paragraph 3, TmPA).

The owner can assign or license its trade mark. Trade mark assignment agreements must be in writing (Article 17, paragraph 2, TmPA). There are no formal requirements to license a trade mark, and an owner can grant a licence by conclusive acts.

A distributor does not need to be the user or owner of the supplier's trade mark to import goods or market them in Switzerland. However, the distributor needs the consent of the foreign supplier owning the trade mark to sell the supplier's product under the supplier's trade mark.

The parties may include in the distribution contract a licence regarding the trade mark owned by the supplier. For clarity, they may also include an explicit agreement that the distributor must stop all use of the trade mark at the end of the contract. A distributor does not gain rights in a trade mark or other intellectual property rights by selling the supplier's trademarked products in Switzerland. To reinforce this presumption, the parties often specify in their contract that the use of the intellectual property rights by the distributor is always in the name and interest of the supplier.

Article 4 of the TmPA protects the rightful owner of the trade mark against misappropriation by providing that trade marks registered without the consent of the owner in the name of an agent, representative, or other authorised user are not protected.

Online Sales Considerations

The Federal Act on Unfair Competition (UCA) and the Price Indication Ordinance (OIP) govern electronic commerce in Switzerland.

When a person offers goods, works, or services by electronic commerce, the person must:

- Indicate clearly and completely their identity and contact address, including for electronic mail.
- Indicate the different technical steps leading to the conclusion of a contract.
- Provide the appropriate technical tools to detect and correct input errors before sending an order.
- Confirm the customer's order by email without delay.

(Article 3, paragraph 1, letter s, UCA.)

Violation of these requirements may lead to criminal sanctions (Article 23, paragraph 1, UCA).

Internet sales are passive sales for purposes of competition law. According to the ComCo, online sales can be lawfully restricted only in specific circumstances. (Franz Hoffet and others, "New Vertical Restraints Notice of the Swiss Competition Commission," *Homburger Bulletin* (2010), p. 275.)

The Distribution Agreement: Important Provisions

Distribution agreements in Switzerland generally address many issues, including those related to the terms for the sale of goods between the parties. While all the provisions in the distribution agreement are important, counsel should pay particular attention to those provisions specific to the distribution relationship.

Confidentiality and Protection of Personal Data

Because the distribution contract is an unnamed contract, the CO does not specifically impose restrictions on the distributor's use of the supplier's confidential information during or after the expiration of the distribution agreement. By virtue of their contractual freedom, the parties can impose a duty regarding the supplier's confidential information. The parties should specify precisely what information they consider confidential to avoid any later disputes.

The Federal Act on Data Protection (FADP) regulates private persons' processing of data pertaining to natural persons and legal persons. Article 6 of the FADP prohibits the disclosure of personal data abroad if the disclosure endangers the privacy of the data subject, especially in the absence of legislation providing adequate protection. To ensure the correct application of Article 6, the Federal Data Protection and Information Commissioner publishes a list of countries with legislation ensuring an adequate level of protection. The list includes most EU member states but not the US or Russia.

In the absence of legislation that guarantees adequate protection, the transfer abroad of personal data relating to a client by the distributor may be possible, especially if the client consents to it or if it concerns the conclusion or the performance of a contract (Article 6, paragraph 2, FADP). The distributor contract may add further obligations pertaining to data protection in addition to mandatory obligations under the FADP or the EU General Data Protection Regulation ((EU) 2016/679) (EU GDPR).

For more information on data protection in Switzerland, see Country Q&A, Data Protection in Switzerland: Overview.

Pricing and Payment Terms

Under distribution agreements, the distributor is subject to two main obligations:

- To purchase the goods from the supplier.
- To promote the sale of the goods.

The distributor must order the goods and pay for them in accordance with the terms of the distribution agreement. The parties are free to set the price at which the distributor can acquire the goods for resale from the supplier, with no Swiss law restrictions.

The parties can mutually agree to increase prices charged to the distributor, but the supplier cannot unilaterally impose a price increase on the distributor unless the parties have reserved this right in their contract. The parties often agree that the price charged to the distributor should be revised in certain specific circumstances, such as an increase in the price of raw material or a change in the price of the products in the market.

Parties commonly add a clause requiring the distributor to order a minimum quantity of goods from the supplier. If the distributor fails to purchase the minimum quantity, the parties often agree that the distributor has an additional period to make purchases to meet the minimum quantity required. If the supplier reasonably concludes that the distributor will not order the contractual minimum, the supplier may be entitled to either:

- Appoint another distributor of the products in the distributor's exclusive.
- Restrict the distributor's territory.
- Terminate the distribution agreement.

It is in the parties' best interest to agree on precise payment terms and the consequences of non-payment. The parties often provide that, if the payment is not made when due, the distributor must pay a late payment, generally a percentage of the overdue payment.

The parties may also include a clause stipulating that the supplier retains ownership of the products until the supplier receives payment from the distributor. This is known as a reservation of ownership pact. To be valid under Swiss law, the reservation of ownership pact must be registered in the register of reservation of ownership pacts at the current domicile of the supplier, although this is not often used in practice. (Article 715, Civil Code.)

Non-payment without a valid justification is a breach of the contract, and the supplier can act according to the ordinary rules of the CO, particularly the general provisions (Articles 97 to 109, CO). The supplier can go to court to demand that payment be made or, as a last resort, terminate the contract, especially if the distributor becomes insolvent.

Limitation of Liability

Parties to a distribution agreement may include limitations and exclusions of liability.

It is very common for the parties to include a force majeure clause in the distribution agreement. This clause provides that if one of the parties cannot fulfil its contractual obligations due to causes beyond its control or causes that the parties could not have anticipated, and immediately informs the other party, neither the distributor nor the supplier is liable for consequential damages of any kind or for losses incurred as a result.

While the parties may provide for other clauses limiting their liability, under Swiss law they cannot exclude liability in advance for unlawful intent or gross negligence (Article 100, paragraph 1, CO). However, the parties can exclude in whole or in part liability arising from the acts of their associates (Article 101, paragraph 2, CO).

Indemnification and Insurance

Indemnification clauses in distribution agreements may include:

- The supplier's obligation to indemnify the distributor if a third party brings an action against the supplier or the distributor due to a breach by the supplier of its obligations under their contract.
- The distributor's obligation to indemnify the supplier for any damage caused by the distribution's breach of its contractual obligations, including, but not limited to, a third-party claim against the supplier or the distributor.
- The supplier's obligation to indemnify the distributor against damage resulting from the use of intellectual property rights based on the supplier's warrant that the intellectual property rights exist and are valid and the distributor has the right to use the intellectual property rights for the purposes of the distribution agreement.

Distribution contracts generally require both the supplier and the distributor to provide the other with evidence of product liability insurance coverage for product liability risks associated with the sale of the supplier's products.

Term of the Agreement

The CO does not regulate the term of the distribution agreement or the required period for giving notice of termination.

The distribution contract should clearly set out:

- The duration of the contract.
- The terms and conditions of any extension of the contract.
- The terms for terminating the contract.
- Grounds for terminating the agreement.

If the contract does not specify a term and has an indefinite duration:

- During the first year, the contract can be terminated in any manner and for any reason with a one-month notice period (Article 418q, CO).
- After the first year, the parties can terminate the contract with six months' notice. This also applies to contracts with fixed terms that expire and are extended without a fixed term. (Article 546, paragraph 1, CO; Federal Supreme Court, First Civil Chamber, BGE 107 II 216, 14 July 1981, at 218.)

(Tercier, p. 1081, no. 7289; see Terminating the Distribution Agreement.)

Marketing and Promotion

In exclusive distribution contracts, the distributor's obligation to promote the sale of the product in the relevant territory is essential (Federal Supreme Court, First Civil Chamber, BGE 107 II 222, 25 July 1981, at 223-24). Marketing and promotional

responsibilities are key elements of an exclusive distribution contract, which requires the distributor to promote the supplier's products in the assigned territory.

Swiss law does not impose restrictions on the parties' ability to agree how to promote and advertise the contracted products. The parties are free to allocate responsibilities and resources for marketing and promotion as they wish.

Frequently, the contract requires the distributor to devote the necessary resources to the actual promotion of the product's sales. The parties specify whether the distributor must exclusively use the promotional material provided by the supplier to promote the product or whether the distributor can create their own advertising material, approved by the supplier before any use.

Compliance with Laws and Supplier's Policies

If the parties stipulate in the distribution agreement that Swiss law applies to the agreement, regardless of their place of residence, both parties must comply with mandatory Swiss laws and regulations.

However, even if the contract is subject to Swiss law, the distributor or supplier are not required to reside or operate in Switzerland and can operate in or from another jurisdiction. In this case, the parties often agree that the distributor must observe and comply with all local rules and regulations pertaining to the marketing, distribution, sale, and use of the products within the authorised territory with reasonable support from the supplier. If the distributor fails to do this, the supplier can claim damages.

The parties may also specify that if the products require any modification to comply with applicable laws and regulations in the authorised territory, the distributor must notify the supplier in writing immediately on the distributor's good faith knowledge of the need to make these modifications. Otherwise, any later modification of the products is at the distributor's expense.

The supplier may require the distributor to comply with the supplier's policies in addition to any other applicable rules.

Choice of Law and Forum

Parties to an international distribution contract may choose the law governing their contractual relationship (Article 116, Federal Act on Private International Law (PILA)).

The parties can agree that a legal system other than Switzerland's governs their relationship. If the parties make this agreement and Swiss courts have jurisdiction to resolve the dispute, the Swiss courts must apply foreign law, which, in practice, is not ideal. (Articles 112 and 113, PILA.) In this case, the parties may have to collaborate in establishing the applicable foreign law, that is, by providing at the judge's request information regarding rights, objections, and exceptions under the applicable foreign law (Article 16, PILA). If application of foreign law would lead to a result incompatible with Swiss public policy, Swiss courts will not apply the foreign law (Article 17, PILA).

In the absence of a choice of law, the distribution contract is subject to the law of the state with which it has the closest connection. This connection is presumed to exist with the state of habitual residence or establishment of the party that performs the characteristic obligation of the contract (in this case, the distributor). (Article 117, PILA; Federal Supreme Court, First Civil Chamber, BGE 100 II 450, 10 December 1974.)

As to the forum, the parties can agree on the court that will decide a dispute arising from their contract. The agreement can be made in writing, by telegram, telex, telefax, or any other means of communication that allows it to be proved by written text. (Article 5, paragraph 1, PILA.) In the absence of a choice of forum, Swiss courts of the domicile or, in the absence of a domicile, those of the defendant's habitual residence, have jurisdiction to hear actions arising from the distribution contract. In addition, if

the characteristic performance of the contract is to be performed in Switzerland, the claimant can also bring the action before the Swiss court of the place where it is to be performed. (Articles 112 and 113, PILA.)

The parties may also decide to submit any dispute arising out of their contract to an arbitral tribunal.

Terminating the Distribution Agreement

Causes of Termination of the Contract

Ordinary Causes of Termination of the Contract

Contract concluded for a fixed term. Where the distribution contract is concluded for a fixed term or its duration is limited by virtue of its purpose, it ends without notice on expiry of that term (Article 418p, paragraph 1, CO). The contract is terminated in accordance with the terms and conditions if their implementation is not abusive in view of the specific circumstances. (Federal Supreme Court, First Civil Chamber, 4A_293/2007, 15 January 2008, at recital 7.)

Contract concluded for an indefinite duration. If the contract does not specify a term, most Swiss legal authors make the following distinction:

- During the first year, the contract can be terminated without any specific form of notice and without giving any reason, but in compliance with the time limit of one month for the end of a month (that is, one month of notice, with the contract to end on the last day of the month), relying by analogy on Article 418q of the CO.
- After the first year, each party can terminate the contract by giving six months' notice, relying by analogy on Article 546, paragraph 1 of the CO.

(Tercier, p. 1081, no. 7289; see Term of the Agreement.).

Extraordinary Causes of Termination of the Contract

Termination for good cause. Because distribution agreements are contracts of duration, either party can terminate the contract on an extraordinary basis for good cause, effective from the time of notification of the termination. If the termination is made in accordance with the rules of good faith, the termination takes effect immediately. (Müller, "Les contrats de distribution," no. 40.)

The Swiss Federal Supreme Court has recognised this right as a general principle, and in contrast to a commercial agency contract, unjustified termination does not end an exclusive distribution contract. (Federal Supreme Court, First Civil Chamber, BGE 122 III 262, 5 June 1996, at 265-66; Federal Supreme Court, First Civil Chamber, BGE 99 II 308, 25 September 1973, at 310.)

The opposing party can terminate the contract for good cause and is entitled to damages in accordance with Article 97 of the CO (BGE 99 II 308 at 312). The determination of good cause is left to the discretion of the judge (Article 4, Civil Code). Generally, there is good cause when one party's behaviour of a party is destroying the mutual trust and when the continuation of the relationship is intolerable (Müller, "Les contrats de distribution," no. 23).

Certain situations constitute good cause for termination of an exclusive distribution contract, including:

- Refusal by the distributor to take delivery of the products.
- Substantial delays or default in deliveries.
- Non-payment of sale price, especially if the distributor becomes insolvent (but not while negotiating price adjustments).
- Default by the distributor.
- Repeated violations of the exclusivity clause.
- Disclosure of confidentiality issues or trade secrets.

(Marie-Noëlle Zen-Ruffinen, *La résiliation pour justes motifs des contrats de durée* (Schulthess Verlag 2007) p. 282 and following, no. 1096 and following.)

The parties should draft the termination clause carefully each time as the parties consider specific cases or risks as good cause for termination.

Death or bankruptcy. The death of the distributor terminates the contract. Automatic termination of the contract also occurs through the death of the supplier if the contract was entered into essentially because of the supplier's person and qualities (Tercier, p. 1081, no. 7291).

The supplier's bankruptcy terminates the contract effective as of the bankruptcy. Unlike for a commercial agency contract, the distributor's bankruptcy also terminates the contract because continuation of the contract becomes impossible as soon as the purchased goods fall into the bankruptcy estate and can no longer be redistributed (Müller, "Les contrats de distribution," no. 42.)

Legal and Contractual Obligations on Termination

The termination of the distribution contract has the following consequences:

- Other than in a bad faith termination, the supplier is not required to repurchase the stocks of products and spare parts still in the possession of the distributor at the end of the contract, if the distributor has the right to resell the goods (Tercier, p. 1083, no. 7298).
- In the absence of a specific contractual provision, the distributor must return to the supplier the parts and documents, including advertising material, that the supplier made available to the distributor free of charge (Tercier, p. 1083, no. 7298).
- The supplier regains ownership of the trade mark exercised by the distributor under the distribution agreement and can demand the cancellation of any trade mark registration made by the distributor (Federal Supreme Court, First Civil Chamber, BGE 107 II 356, 6 October 1981, at 364). The supplier can also request that this registration be transferred to the supplier, subject to the rights acquired by third parties in good faith (Article 53, paragraph 3, TmPA).

In certain circumstances, the distributor may be due compensation at the termination of the distribution contract where the distributor has substantially expanded the supplier's clientele. Article 418u of the CO applies by analogy under certain conditions, when the exclusive distributor is in a situation similar to an agent. (Federal Supreme Court, First Civil Chamber, BGE 134 III 497, 22 May 2008, at 505-506.) In making this determination, the Federal Supreme Court examines all the specific circumstances, including:

- The degree of autonomy of the distributor.
- The extent of its integration into the principal's organization.
- Whether the distributor assumes the economic risk.

(ATF 134 III 497; Dominique Dreyer, "Article 418u," *Commentaire romand – Droit des obligations I* (Helbing Lichtenhahn Verlag, 3d ed. 2021), no. 2 (Dreyer)).

Where the circumstances lead to the application of the principle requiring compensation of the distributor for the clientele, application of the principle is mandatory and cannot be excluded by agreement (Dreyer, no. 3).

Competition Law Issues Related to Termination

Competition law issues may arise at the end of the contract in connection with its termination.

For example, when the party who terminates the distribution contract holds a dominant position within the meaning of Article 4, paragraph 2 of the Cartel Act, the termination of the contract leads to a breach of commercial relations that, in the absence of objective justification, may be abusive within the meaning of Article 7, paragraph 2, letter a of the Cartel Act. The dominant position may result from the relationship of economic dependence between the parties. (Tercier, p. 1081, no. 7290.)

Competition law may also impose restrictions on the parties' ability to enter into agreements regarding the termination of their contracts. For example, generally, clauses relating to the termination of contracts that significantly affect competition and are not justified in writing are void if the parties do not provide the following notice periods of an intention not to renew:

- For an agreement of at least five years, notice of at least six months.
- For contracts of indefinite duration, notice of at least two years, except that this period can be reduced to at least one year, when:
    - an automobile supplier must pay appropriate compensation under statutory provisions or a special agreement; or
    - an automobile supplier terminates the agreement because of the need to reorganise all or a substantial part of the network.

(Notice on Vertical Agreements in the Field of Motor Vehicle Distribution of 29 June 2015.)

For additional information on competition laws, see Practice Note, Competition Issues for Distribution and Supply Agreements in Switzerland.

