



International Distribution Institute

REPORT ON THE 2005 IDI CONFERENCE

ORGANISING DISTRIBUTION IN THE ENLARGED EU - A NEW CHALLENGE FOR BUSINESS (Establishing and managing agency and distribution agreements between parties of the old and new member States)

Paris, 13th May 2005

The International Distribution Institute (IDI), established in 2004 to deal with matters involving international distribution law organised its first annual conference around the topic “Distribution Agreements in the Enlarged European Union – A New Challenge for Business – Establishing and Managing agency and distribution agreements between parties of the “old” and the “new” member States, in recognition of the substantial impact of the enlargement of European Union on distribution agreements and networks within this new market.

Manufacturers of the “old” member States are extending their distribution networks to the “new” member States and, *vice versa*, companies of the “new” member States are beginning to organise distribution of their products in the “old” member States. As a result, cross-border distribution, particularly through commercial agency, distribution and franchising agreements, between these two sides parts of the European Union is expanding rapidly and it is expected to continue to do so in the years to come. The purpose of the conference was to highlight the main problems that participants may have to face in cross-border distribution in the enlarged European Union.

The conference was attended by attorneys and company lawyers not only from Europe, but also from Africa and Asia.

Introduction: The Lawyer Faced with the Problems of International Distribution.

The conference was opened by Mr Jean Louis PAUL, Chairman of the French law firm *Fidal*, who stressed the importance of the IDI website and its network of experts, as an ultimate answer to the needs of lawyers dealing with problems of cross-border distribution.

The IDI Project: A New Tool for the Management of Cross-Border Distribution Contracts. What is IDI? Why did we Choose this Theme for the Inaugural Conference?

Fabio BORTOLOTTI (Professor of Law, University of Turin, Italy; Partner at the Italian law firm *Buffa, Bortolotti & Mathis*, Turin, Italy) spoke as President of the International Distribution Institute and as IDI Expert for Italy.

He pointed out that the term “International Distribution” is designed to cover all types of agreement involving the cross-border distribution of goods or services, such as commercial agency, distributorship, franchising, selective distribution, etc. “The main purpose of the IDI Project - he went on to explain - is to set up, develop and keep updated a website <www.idiproject.com> on international distribution where those who are engaged in establishing distribution networks and in drafting, negotiating and managing distribution contracts can find all the legal information they need to do their job, and where they can exchange views and share experiences with other people sharing the same problems”.

Mr Bortolotti concluded by saying that, besides the founders and the country experts, membership of the IDI Association also includes subscribers who are invited to participate actively in the development of the initiative, particularly on the occasion of the IDI annual conference and meeting.

Silvia BORTOLOTTI (*Buffa, Bortolotti & Mathis*, Turin, Italy; Council Member and Secretary General of IDI) next took the floor to explain in details the contents of the IDI website, mentioning in particular:

- the “legislation” section, which contains more than 350 national laws on commercial agency, distribution, franchising and other matters related to international commercial contracts, and information on 139 countries;
- the “reports” section, providing detailed country reports on commercial agency and distribution law, in 28 countries (European, as well as North and South American and Asian) and two special reports, one which concerns the choice of law and jurisdiction in the framework of distribution contracts and the other which concerns the EC antitrust rules applicable to commercial agency and distribution agreements;
- international model contracts on agency and distribution (long and short forms) each in three versions: agent/distributor-friendly, principal/supplier-friendly and balanced;
- nearly 100 abstracts of arbitral awards issued in the field of distribution by several national and international arbitral institutions;
- over 500 references to articles and books on commercial agency, distribution, franchising and similar contracts, etc.

Ms Bortolotti noted that the Project is growing steadily. Besides updating the present contents of the website, IDI will add new services year by year (e.g. a franchising model contract) and will provide new tools for sharing information among all the members of the IDI Association (e.g. a discussion forum, a newsletter). Furthermore, she said the number of country experts (and their relevant country reports) is constantly increasing.

PANEL ON AGENCY CONTRACTS: Envisaging Contract Termination within Commercial Agency Contracts. Clauses regarding Termination for Cause (Breach of Contract, Minimum Turnover, etc.), Calculation of the Goodwill Indemnity.

The conference continued with a discussion panel on commercial agency, chaired by Erwin GÄRTNER (*Gärtner, Stübel, Baumann & Partners*, Stuttgart; Council Member and IDI Expert for Germany).

The other panel members were: Gustav BREITER (*Viehböck Breiter Schenk & Nau*, Vienna; IDI Expert for Austria); Piret LUIGA (*Tark & Co.*, Tallinn; IDI Expert for Estonia); Ingrid MEEUSSEN (*Lafili, Van Crombrughe & Partners*, Brussels; IDI Expert for Belgium); and Olga SZTEJNERT (*Drzewiecki, Tomaszek & Partners*, Warsaw; IDI Expert for Poland).

The panel discussed the main clauses of the IDI agency model contract regarding contract termination, in the light of the law and practice of their respective countries. Particularly, each country expert analysed the consequences of unjustified termination of an agency contract in his/her own jurisdiction.

Mr Gärtner next introduced the topic of the agent’s right to goodwill indemnity, pursuant to EC Directive 86/653: the conditions required, according to the German and French models. Each country expert explained how this topic was dealt with in their own jurisdiction and, finally, all the members gave an estimate of the actual calculation provided by the courts in their countries (in those countries where there is already sufficient case law on this point).

Selecting the Applicable Law in Agency and Distribution Contracts within the Enlarged EU. How to Make the “Best Possible” Choice and How to Make It Really Effective.

Fabio Bortolotti gave a general overview of the main problems regarding the applicable law that must be dealt with, when drafting and negotiating international agency and distribution agreements.

The determination of the applicable law is a crucial issue that arises in all contracts between parties belonging to different legal systems. Even in a harmonised context such as that of the European Union, differences between national laws substantially affect the parties' position and, as a consequence, the issue of deciding which law shall apply is of paramount importance.

Almost all legal systems in principle allow the parties to choose the law to be applied to their international contract. This means that, as a general rule, it is possible to choose a law other than the law that would apply in the absence of such choice (e.g. the law of the principal's country rather than the law of the agent's country).

After considering all the aspects that come into play in making the best possible choice for each contract party, Mr Bortolotti analysed the impact of the chosen law on possible mandatory rules protecting the agent or distributor and introduced the concept of «internationally mandatory rules», particularly in the context of the *1980 Rome Convention on the law applicable to contractual obligations*.

Working Out a Strategy on Dispute Resolution within the Enlarged EU. Choice of Forum and Recognition of Judgements under Regulation 44/01.

The afternoon session started with an address by Jaap VAN TILL (*Van Till Advocaten*, Amsterdam, IDI Expert for the Netherlands), which dealt with the choice of forum and the recognition of foreign judgements in the European Union, under Regulation 44/01.

In particular, Mr van Till mentioned the general principle of the defendant's domicile and the main exceptions thereto. He also analysed the form requirements and effectiveness of exclusive and/or non-exclusive jurisdiction clauses as well as the recognition and enforcement of judgements in the enlarged European Union.

Recalling his personal experience, Mr van Till recommended that operators take care in trying to match the contract clause on applicable law with the jurisdiction clause.

PANEL ON DISTRIBUTION CONTRACTS: Drafting and Managing Contracts in Compliance with the European Antitrust Rules: Non Competition Clauses, Export Prohibitions, Active & Passive Sales.

Didier FERRIER (Professor of Law, University of Montpellier; vice-chair IDI and IDI Expert for France) chaired the discussion panel on distribution contracts.

The other panel members were: Dominique FERRÈ (*Fidal*, Paris), Katarina KRESAL (*Miro Senica in odvetniki*, Ljubljana; IDI Expert for Slovenia), Edward MILLER (*ReedSmith*, London; IDI Expert for the UK) and Agnès SZENT-IVANY (*Sándor Szegedi Szent-Ivány & Komáromi Attorneys at Law*, Budapest; IDI Expert for Hungary). The panel focused on the compliance of distribution contractual provisions with EC antitrust rules.

The discussion revealed that, as a general rule, distribution agreements are not regulated by statutory rules in the jurisdictions concerned: the general provisions on contracts of the relevant legal systems are the only rules applicable. What is nonetheless regulated is competition, since the EC antitrust rules (e.g. Regulations 2790/99) are immediately

applicable in all the countries of the EU (and also in the “new” member States); apart from that, every European country has also adopted its own antitrust rules. As a consequence, distribution agreements have to comply with both national and European antitrust rules. Participants in the panel analysed the effectiveness of specific clauses of the IDI distribution model contracts in their respective jurisdictions.

Individual contacts with IDI Experts.

Finally, at the end of the afternoon session, some time was set aside for individual contacts between participants and the IDI experts to discuss their specific problems. Besides the IDI Experts already mentioned as speakers, Experts were available from Brazil, Canada, China, Norway, Spain, Sweden, Switzerland and the USA.

The conference offered an important opportunity to exchange views and information among practitioners dealing with international distribution agreements and the problems to which they give rise. In particular, participants appreciated the speakers’ high level of expertise as well as the fact that the discussion centred on issues of real relevance to those active in the field of international distribution.

IDI Editorial Board