



International Distribution Institute

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INTRODUCTION

Is traditional distribution still the appropriate solution?

Growing constraints to freedom of contract and possible remedies and/or alternatives.

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Why is freedom of contract essential in distribution

Distribution implies necessarily flexibility.

The supplier/principal must retain freedom to adapt quickly to changes in market conditions, opportunities, etc., by:

- changing counterparts without excessive expense and loss of time;
- changing easily conditions of contract with counterparts (excluded customers, minimum turnover, etc.);
- Negotiating convenient contract conditions without risking the nullity of essential clauses.

The main reasons for party autonomy limitations

- Protection of agents, distributors, franchisees as weaker parties.
 - This is a general and unavoidable trend in Europe: agency directive, etc.
 - More extensive protection arising out of special categories of “weaker parties” influencing case law: car dealers (e.g. Germany); suppliers of modern distribution (France, rupture brutale)
- Extending legal principles developed in consumer law to B2C relations.
 - Clauses in general conditions/standard contracts;
 - Pre-contractual information (from franchising to other distribution contracts)

The limitations regarding termination of distribution agreements

- Protection of agents in case of termination through **goodwill indemnity** and similar means and its gradual extension to distributorship agreements.
- Protection of agents/distributors through long **periods of notice**.
- Recognizing **long term relations** in case of succession of contracts of sale.

POSSIBLE REMEDIES

- Regulating in detail termination conditions
- Expanding reasons for earlier contract termination.
- Minimum purchase obligations
- Right to terminate without notice by paying a termination notice indemnity
- Choice of law/forum

Changes in general contract law

PRE-CONTRACTUAL INFORMATION

- Trend towards expanding the obligation to give pre-contractual information.
- This approach makes sense in franchising, where the distributor is a quasi-consumer, but not in distributorship contracts.

STANDARD CONTRACTS AND SURPRISING TERMS

- Supplier must be sure that once the standard contract is discussed and accepted all the clauses are OK.

The impact of EU antitrust

- Antitrust rules are also used to protect weaker parties.
- The past regulations of automotive contracts.
- Regulation 330/2010 and post-contractual non-competition clauses
- The need to consider the *de minimis* notice of the Commission

Possible remedies

- Changing type of contract.
 - Agent without right to negotiate (France)
 - Commission agent
 - Consultancy agreement
 - Occasional intermediary
- Changing the applicable law
 - The problem of overriding mandatory rules
 - The choice of forum
- Strengthening the position of the principal/supplier within the contract.
- Managing distribution directly through own means (subsidiary, internet sales, etc.)