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This paper has been prepared for the 2019 Annual Conference of the **International Distribution Institution** in its Workshop 1 *Negotiating agreements for distribution within department stores*. My presentation had the title "*The brand's position in the commercial negotiation".* This document, therefore, is a complement to the presentation of June 15. It does not intend to provide legal advice but general ideas on the subject for the discussion we had in the Conference and further on. I would much appreciate your comments to my email or on the LinkedIn post.

Negotiating agreements for distribution within department stores

Selling products within specific areas in a department store is a very important means of distribution, especially for luxury goods, which can benefit from the renown of the department store and of the neighbouring suppliers. At the same time this is a profitable activity for the department store, if it can offer a selection of prestigious brands to its customers.

There is a variety of contracts dealing with these situations: concessions, corner agreements, shop-in-shop, consignment agreement, *contrat de vente à* condition, *contrat de démonstration*, although certain provisions are common to many of them.

The purpose of this session is on the one hand to give a general overview of the various types of agreement and on the other hand to identify and discuss the critical issues and possible solutions.

The brand's position in the commercial negotiation with Department Stores

What are the main concerns and problems, from a commercial perspective, of companies selling internationally through department stores? One of the main issues certainly concerns difficulties in negotiation (less bargaining power); other typical problems are related to lack of sufficient revenues for the supplier, also on the light of discount policies decided by the DS; positioning and visibility of the products; managing the relationship in faraway countries through wholesale distributors; problems on termination and consequences of possible bankruptcy of the DS.

A Short Story[1]

Let's start with a short story. In 2003 Jim decided to travel to Bentonville, Arkansas, to the Central Offices of the DS Wal-Mart. Jim was at that moment the CEO of *Simplicity*, a company that owned *Snapper* a high-quality brand for lawn mowers. *Snapper* sales were of tens of millions of dollars at Wal-Mart representing the 20% of its total sales at that moment. Wal-Mart not only wanted to keep selling Snapper mowers, but it wanted to sell lots more of them. In exchange Wal-Mart insisted on a substantial price reduction.

When meeting the Vice President of Wal-Mart, Jim Wier explained to him **why Simplicity had decided not sell its products in Wal-Mart**. And his decision was taken because this was "*incompatible with our strategy*" Wier said. Jim Wier is from that moment known as "***The Man Who Said No to Wal-Mart***". This decision implied an automatic reduction of 20% of sales although Snapper decided to continue its selling through its dealers. Was it a wise decision/strategy? In the business world, it is widely considered suicide to say *No* to Wal-Mart (can we also add other DS in the world?), and most CEOs would have found this tempting offer impossible to refuse.

The main question and the first decision

This story is useful to introduce maybe the first question every manufacturer needs to answer. Do you really want to sell through a DS? What DS?

According to some researches, online purchases will increase to a 12% of the total sales during the period 2016-2020 (3% of the total sales in Spain will be online in 2020)[2] Omnichannel sales (showrooming or webrooming) are the new tendencies.

I am not defining a DS, and therefore some of them could be compared to Big-box stores, hypermarkets, discount stores.

> **EXAMPLE**: Eckhardt compares the Luxury apparel brands Shanghai Tang ("*very loud brand signals*") or Shang Xia emphasizing the artisans behind the products, tasteful stores and high-quality customer service.[3]

> **EXAMPLE**: *El Corte Inglés* has announced the creation in Spring 2020 of a new concept of DS in the south of Madrid Region by refurnishing one of its existing shops (a global investment of 100 million EUR and the creation of 800-1000 employments): MAD-FD (Madrid Fashion District) where customers will have the opportunity to buy more than 150 brands of fashion, beauty, accessories, sports, home, jewellery, technology and restaurants granting personalized experiences to customers beyond the concept of mere purchases.[4]

[1] Story and passages are taken from the book "*The Wal-Mart Effect: How the World's Most Powerful Company Really Works*" and the article (in Fast Company Magazine) "*The Man Who Said No to Wal-Mart*" both by Charles FISHMAN. Also from the book "*The Power of a Positive No: How to say NO and still get to YES*" by William URY.

[2] https://www.nielsen.com/es/es/insights/news/2016/evolucion-en-el-comportamiento-de-compra.html

[3] "*Marketing Luxury Branding Below The Radar. A research: The Rise of Inconspicuous Consumption*" by Jonathan A. J. WILSON, Giana M. ECKHARDT, and Russel W. BELK in Harvard Business Rreview, September 2015 issue.

[4] See press release of May 10, 2019 *El Corte Inglés fusiona en MAD-FD innovación y vanguardia para vivir y compartir nuevas experiencias* [in Spanish]

When negotiating the possible sales for your product through a DS the first move should consider these different elements. Is this something which matches your company's core values? Is this something according to your strategy and the DS'?

In my opinion, some elements were essential in Jim's decision:

(1) a ***long-term vision*** of your future and not only the immediate benefit. Jim had taken a hard look at where this process would lead over 10 years: a continual price reduction impacting the margins and the competition with the rest of your dealers;

(2) the ***core values*** of the company (focusing on product quality, consumers satisfaction); and,

(3) The ***alternative*** to the sales through the DS (in his case, more than 10.000 dealers in an already existing network with 4 regional warehouses).

But there also other alternatives such as online retail, personal shoppers.

Example[5]: **CASPER mattresses: *how to build its brand without retail stores***. Products such as mattress —an example of products needing a personal customer testing before purchasing— decided to launch in April 2014 the distribution of its products directly to consumers through an online strategy, a well-designed web and advertising program including Search Engine Optimization SEO and cookies. The strategy included an easy way to purchase them (only "*one* perfect mattress" valid for everyone and only few clicks to choose the size), free financing, an affordable price (starting at 500US$). The product was free UPS delivered in a compressed box in maximum five days (within the US), were easy to install (not more than 3 minutes), and most particularly, it included 100 days free trial and a all-your-money-back policy (refused mattresses were given to charities). Simplicity and trustworthy. **In 15 months from the launching of the products, sales reached an annual rate of 100 million US$ and continued to trend up**.

Example[6]: **STITCH FIX** business model is simple: They send you clothing and accessories they think you'll like; you keep the items you want and send the others back. They leverage data science to deliver personalization at scale, transcending traditional brick-and-mortar and e-commerce retail experiences. Customers enjoy having an expert stylist do the shopping for them and appreciate the convenience and simplicity of the service.

THE BRAND'S POSITION IN THE NEGOTIATION

The brand's negotiation with DS will depend very much on different elements: the position of the brand, the concrete DS (number of premises, category, and placement),

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https://www.elcorteingles.es/informacioncorporativa/en/communication/press-releases/el-corte-ingles-fusiona-en-mad-fd-innovacion-y-vanguardia-para-vivir-y-compartir-nuevas-experiencias.html

5 Example and ideas taken from *Casper Sleep Inc: Marketing the "One Perfect Mattress for Everyone"*. Robert J. DOLAN. HBR Rev. Nov. 15, 2017; from *Inside the Case* HBR Case Study broadcasted in May 9, 2019; and from *How Casper Became a $100 Million Company in Less Than Two Years* by Liz WELCH, Inc. Magazine, 2016.

6 See the full story at *Stitch Fix's CEO on Selling Personal Style to the Mass Market*, by Katrina LAKE. HBR May-June 2018 issue: Stitch Fix sold $730 million worth of clothing in 2016 and $977 million worth in 2017. One hundred per cent of their revenue results directly from their recommendations, which are the core of their business. They declare to have more than 2 million active clients in the United States, and to carry more than 700 brands.

the strategy of the brand (short term-long term, entering the market, complement to other networks, visibility, access to specific customers…).

Once this has been considered, the following steps could be necessary.[7]

1. HOW THE BRAND FACES THE NEGOTIATION WITH THE DS?

1.1. THE BARGAINING POWER

Most of the cases, the Brand has always a less bargaining power and it would be necessary to know what elements could be used or discovered in the future to change this position.

This is the case even for very well-known brands or conglomerates of trademarks.

> **Example**. Although this is mostly the case, it is not always like this. See for instance Apple products sold in some DS. Apple's position is clearly harder and some of the complaints from the DS are how they are treated by the brand (delays in serving new products, low stocks). Here there is the strength of the brand as well as the powerful alternative: Apple shops and Genius Bars

This is the starting point. You start the negotiation knowing that you are weaker than the DS but you do not have to accept an agreement that should have rejected and, in return, you have to try to satisfy all your interests as well as possible.[8]

But this should not necessarily be seen as problematic. Some strategies can be followed[9]

a. Do not reveal that you are weak, and do not accommodate too quick to their proposals[10];

b. Try to find out their weakness,

c. Work on your product/service, on your proposition; make it attractive, what you are able to offer (price, but also quality, service, originality, exclusivity, new trends). How you can create value?

   If the brand is able to show its *distinct value* with respect to its direct competition and the benefits for the DS to have them instead of other competitors, it will be better positioned. And this distinct value is not just from the brands perspective but what the DS actually considers.[11]

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[7] Some of the following comments and ideas are also taken from real examples with international companies selling their products through different negotiations with DS in Spain and for different markets (luxury cosmetics products, woman lingerie products and foodstuffs within supermarkets).

[8] "In response to power, the most any method of negotiation can do is to meet two objectives: first, to protect you against making an agreement you should reject and second, to help you make the most of the assets you do have so that any agreement you reach will satisfy your interests as well as possible." FISHER, Roger and URY, William. "*Getting to Yes: Negotiating an agreement without giving in*".

[9] "*Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond*" Deepak MALHOTRA and Max H. BAZERMAN

[10] "Under these conditions, a major danger is that you will be too accommodating to the views of the other side—too quick to go along. The siren song of "Let's all agree and put an end to this" becomes persuasive. You may end up with a deal you should have rejected." FISHER, Roger and URY, William. *Getting to Yes: Negotiating an agreement without giving in*.

[11] Deepak MALHOTRA and Max H. BAZERMAN have developped the concept of "Distinct Value Proposition" (DVP) to add value to the elements of the deal. *Negotiation Genius…*

One of the essential elements to increase the bargaining power is a good position and defence of the brand. In some cases, the DS cannot show the competitive products so it could be interested not necessarily in the one giving them better immediate revenues, but a better product, an increase of interest of its clients, a better experience a higher affluence of people.

Is the brand wanted by the DS as a sign of their relevance, distinction and differentiation from competitors (DS' and brand's)?

Example. The manufacturer of some foodstuff products wanted to sell them with the special selling procedure they used into a Supermarket within a DS. The DS already had a provider of the same product and with similar procedure. But that supplier reached to show the differences between both competitive products, services and benefits, and was able —after some years of negotiation— to enter into the DS.

1.2. THE ALTERNATIVES

Before starting the negotiation, consider your best alternatives in case of not reaching an agreement[12]: do you have other retailers? Do you have your own distribution network, or franchise, own shops, selective distributors, a new owned network, online selling, small retailers, and different geographical markets? And the better the alternative, the greater your negotiating power.[13]

To have clear and measured information about your alternative is essential; not to have thought carefully about what to do in case you do not reach the agreement means to lose an essential element in your negotiation.[14] And if you do not still have other retailers or networks, can you reasonably built them up? Alternatives can also be developed and being prepared for this and doing it before starting the negotiation will increase your possibilities:

But to focus only on *your* alternative can also diminish your possibilities. Has the DS also alternatives for your kind of product? Does the DS need to have a product like yours in terms of quality, market, public? Your uniqueness, your merits, the importance of your product, your brand, the benefits (others than economic ones)… needs to be shown.

Example. When a well-known brand for some women products abandoned a Spanish DS, the competitive brand for comparable products was ready to cover this gap and used its sudden hard position to make pressure on the DS. The DS could not accept the lack of such product in its offer and the take-or-leave-it position of the brand (realistic although very risky) ended successfully.

[12] The concept of Best Alternative to the Negotiated Agreement (BATNA) has been developed by FISHER, Roger and URY, William. "*Getting to Yes: Negotiating an agreement without giving in*". This is an essential concept in negotiation.

[13] Ibid.

[14] "If you have not thought carefully about what you will do if you fail to reach an agreement, you are negotiating with your eyes closed." FISHER, Roger and URY, William. Getting to Yes: Negotiating an agreement without giving in.

1.3. THE STRATEGY

It is always advisable to negotiate having in mind the global strategy.[15]

The strategy needs to focus on what to obtain in the negotiation in terms of interests and not on positions.[16]

Of course, it will depend on **the concrete DS** (its own brand, its spread in the country or geographical area, the differences between the shops in terms of profitability and exposure), the **intention of the Brand** to work with the DS (entering the new market from zero, its own kind of products/services, the global or local negotiation), the kind of contract.

Its future intention with **the product** and additional developments is also relevant. Are there new products to be sold? What is the long-term strategy of the brand?

Does the brand use its central company (European based, for instance, or a central one)? Does it incorporate an owned subsidiary? Distributors/agents? In my experience negotiations are better dealt locally.

Some elements help: to have a strong position in its country of origin, the presence in different countries, can be a relevant element to show a good starting position.

Usually the DS do not start accepting the presence of the product in all the shops but it will test the possibilities in some corners, kiosks or selling points. Depending on the evolution of such starting premises the DS can enlarge them. Are you ready for a probably costly test? This could be a good investment when entering into a new market.

The presence in the DS could be useful when entering or consolidating a new market. For instance being in a DS in a country and exploring in the same DS but in a different country. The experience in one country could be useful to convince the same DS in a different one

The negotiation of the agreement is of course important, but it is not the end of the negotiation. I have observed that not few of big companies are currently selling within major DS without a signed agreement.

And be careful on the *cocaine-addict-effect* (Wier) in the relationship with the DS (once entered in the DS it is very difficult to exit).

[15] This has been called the "Strategy based on your entire negotiation portfolio": "Too often, when negotiators are myopically focused on the current negotiation, the strategy they adopt is not an effective one for their portfolio of negotiations. If you had only one deal to negotiate, it would make sense for you to reduce your margins as much as necessary to win the deal… But because there are almost always multiple negotiations to consider, you need a strategy that makes sense for your entire portfolio of negotiations." *Negotiation Genius…*

[16] "Interests define the problem. The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears. FISHER, Roger and URY, William. *Getting to Yes: Negotiating an agreement without giving in*.

2. IN THE NEGOTIATION, WHAT ARE THE MAIN ISSUES?

2.1. What kind of **<u>commercial relationship</u>** is used? Consignment, leasing of spaces, supply agreement with/without employees, commercial collaboration (a specific panel was devoted to this question at the IDI conference)

It is something imposed or at last strongly proposed by the DS and in few cases I have seen that the contract model is the one of the brand (for example in some specific business models where the product sold requires particular attention to its *in situ* manufacture).

Related to the kind of contract it will be necessary to deal on products ownership: risks, transfer of ownership, defects.

2.2. **Brand <u>location</u>** within the DS

It is well-known that the ground level at the DS flagship shops has been transformed in a sort of luxury products gallery, but even there not all the placements are similar.

Decoration, image, showcases (usually more expensive placements with exterior views), products shown, employees...

It is also important the position of **immediate competitors** (Luxury brands). Some of them negotiate their agreements by reference to their immediate and neighbours and competitors

In **which shops** will the products be sold?

Usually the DS has several shops and not all of them are perhaps so interesting for the Brand. Will the product be sold at all the shops? Will the brand be imposed of some second range premises in exchange of well placements in prime shops? Usually parties sign a frame agreement and the different shops are then added as attachments.

The corners: how they will look, who will assume the construction (if any), who is the owner of the materials, the intellectual property of layout, placement of the trademark.

It is usual that Brand carries with the costs of its decoration within the general layout of the DS. They can be quite expensive. The brand also assumes their maintenance.

Parties usually agree the placement, although it is not infrequent unilateral replacements and modifications decided by the DS, sometimes for justified reasons (works) sometimes no (and without compensations).

Is it possible a **sub-license** of the space?

In some in-shop selling of some in-situ manufactured products it has been accepted a sublicense/franchise to third parties (franchisees) but with the same branding and being the brand responsible of its management.

2.3. The **exclusivity** [also considered in the following panels]. It could cover the Brand only being distributed through that DS or some products of such Brand can only be found at that DS

Products especially trade-marketed for the DS: some relevant brands manufacture products especially for the DS or at different prices avoiding internal competition.

2.4. **Labour relationships** with own employees. Usually corners/in-shops at DS are managed by the Brand. These persons, although employed by the Brand, have to respect internal DS policies.

From one side, the use of its own employees is necessary in order to control how the product is better sold, or the service rendered according to a general strategy and it permits to control the attitude towards clients[17]

From the other side, this introduces some problems like the relationship with the managers of the DS, collaborative relationship with the colleagues… but could also imply a ban of the DS to some employees of the Brand.

It usually creates difficulties with the hierarchical structure at the DS with the Brand employees. Some brands, for instance, complain about the use of their employees for internal DS needs.

Sometimes the DS penalizes the higher number of employees.

Sales periods and particularly in bank holidays have also an impact on the management of employees and in the permanent negotiation with DS. In Spain, for instance, it also depends on the different regions where the opening depends on regional regulations.

2.5. **Price** policies. This is related also to the ownership of the products.

Usually the recommended price is fixed by the Brand but the DS decides the final price as margin from the final customers' price.

Some problems could arise in special discount campaigns such sales, but also special discount days such as Black Friday and need to be agreed by the parties, and sometimes clearly imposed by the DS even in the day-to-day relationship.

[17] According to some researches if eye contact is made, the shopper is 37% less likely to purchase their intended product during that trip. Similarly, when shoppers' personal space was invaded, shoppers are 25% less likely to purchase the item in question if they feel another person is too close to them. In "*Your In-Store Customers Want More Privacy*". By Carol ESMARK and Stephanie M. NOBLE. HBR December 28, 2016; updated May 23, 2017.

2.6. **Relationship with clients** is important for the Brand but marketing is usually restricted by the DS: either internal promotion needs to be agreed with the DS, and the use of the Data Base (DS is charging for this information) for more concrete or focused promotions. A specific Data Base by the Brand is usually rejected.

2.7. Can extra **advantages given** by DS be negotiated?

Privacy in selling: Special areas UK DS Selfridges has created "*intimate shopping spaces*" that deemphasize brand and price

Is Click and collect available (costs/delivery/return policies)?

Repairs/adaptation (in products needing them) usually assumed by the Brand.

New launchings offered by the Brand to the DS

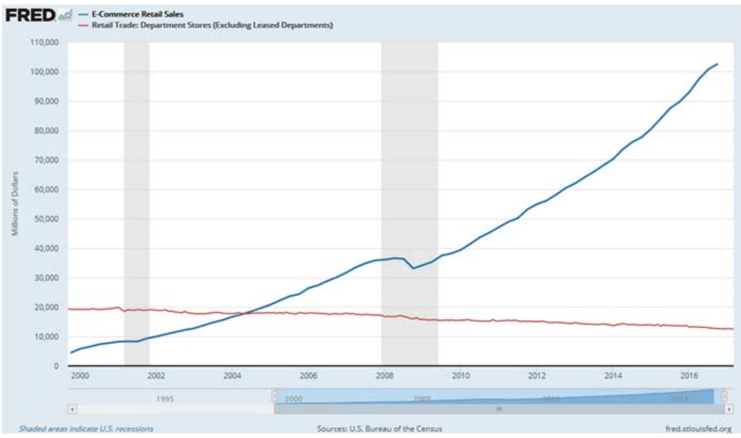
2.8. Interactivity with the **online shop** of the DS is nowadays essential.

The brand shall also negotiate its own online shop independent of the DS.

Is the exclusivity covering also this?

2.9. Possible **bankruptcy** of the DS

Bankruptcy of DS is always a black cloud over the skies of the DS particularly after some big examples[18] such as Sears in 2018 and Debenhams in April 2019[19]. Recent trends in online sales imply decreasing of sales in DS[20] in what has been called "Retail apocalypse"[21]



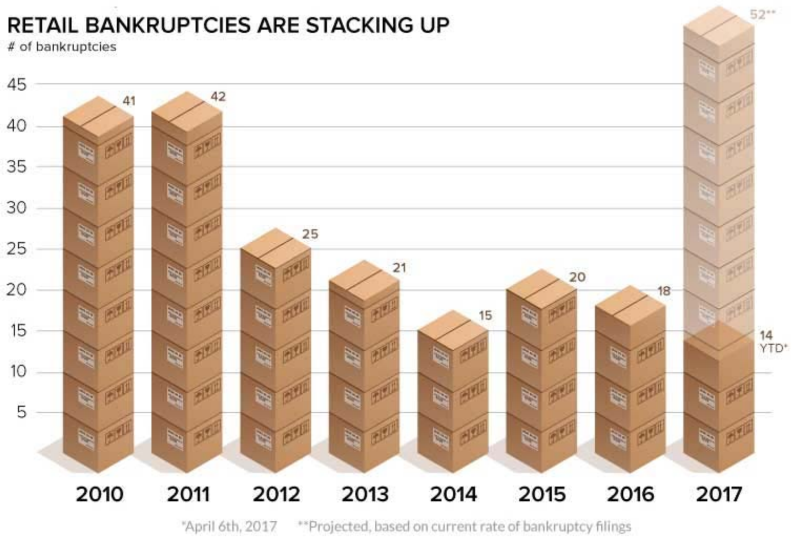
[18] In Spain we had well-know one *Galerías Preciados* in the 80's then purchased in the 90's by its direct competitor, El Corte Inglés. Sears was declared bankrupt in 2018 after more than 11 billion US dollars loses; and more recently the UK Debehhams in April 2019 after announcing losses of £500 millions

[19] https://www.wsws.org/en/articles/2019/04/16/debe-a16.html

[20] While sales online increases, salesin DS are decresing constantly from 2000. See the US evolution in http://www.megabolsa.com/wordpress/wp-content/uploads/2017/05/Facturacione-commercevscentroscomerciales.png

[21] https://en.wikipedia.org/wiki/Retail_apocalypse

And according to some analysis more than 50 big US companies in the Retail sector needed the bankruptcy in the mid-2017[22] and the trend continued in 2018[23] and still in the first months of 2019[24]



This said, bankruptcy is usually not an issue when negotiating the agreements with the DS because they usually propose the drafts and they are seen "too big to fall". In any case, this could imply issues of ownership of the products, clientele, insurance, payments…

3. COMMERCIAL ASPECTS TO DEAL WITH, AFTER THE AGREEMENT

3.1. General aspects

Once the agreement is signed (if it happens), or when the commercial relationship already exists, there are quite a lot of questions that could have been left open, that are constantly renegotiated or that need to be considered outside the agreement.

Usually there is only one agreement or relationship covering all the different shops of the DS. In few cases there could be attachments referred to particular shops but the agreement does not usually cover all the day-to-day aspects and most of the times it is surpassed. This means that the relationship is a constant and permanent negotiation where the agreement, in most cases, is not the essential part of the relationship.

3.2. The **commercial relationship** is also essential to increase your presence in the DS, not only in the current store, but in future openings. The **balance** can be between the acceptance of non-agreed conditions and the sanctions the

[22] See https://www.visualcapitalist.com/retail-apocalypse-everything-need-know/
[23] https://www.cnbc.com/2018/12/31/here-are-the-retailers-including-sears-that-went-bankrupt-in-2018.html
[24] https://www.businessinsider.es/bankrupt-companies-retail-list-2019-3?r=US&IR=T

DS could apply if you do not accept them. Again, the alternatives, your distinct value, and the strength of your Brand play a relevant importance in the development.[25]

Important to notice that once the brand is present in the DS, the bargaining power can be modified. The (*) relevance of the brand within the Section, (*) the lack of alternatives for the DS with competitors, (*) the loyalty of clients, (*) the alternatives for the Brand outside the DS… it seems essential to also build up this position.

Relationship with the DS, is essential and usually carried out in different levels: at a "*general level*" (negotiation between both DS and brand) where main questions are discussed; and at "*shop level*" where some more particular aspects are to be considered and where personal relationship will be more relevant than legal aspects.

At the **general level** it is advisable to have **following-up checking** to evaluate the respect to the contractual rules. Particularly at the beginning this seems to be essential. Possible deviances should be monitored, fixed and documented. It is quite frequent that once the agreement is signed, the temptation is to leave it in the drawer but future problems can arise from this.

At this level, to know and to manage the relationship between the different departments (sales/purchases) of the DS is also of importance.

On the other hand, how to **deal with each store** where the main concerns is to make the space profitable and increase the sales from a general point of view. Here the agreement is less important, but the Brand needs to focus on the personal relationship.

Some examples of this relationship could be not upsetting the managers to avoid *sanctions* in future locations, a contribution by the Brand to the *well-being* of the responsible persons, helping the shop at the DS with some good-faith personal assistance…

3.3. What to **offer** to the DS that was not foreseen in the agreement?

An interesting point for the brand's relationship is to be able to identify what can be offered to the DS in the day-do-day activity. And this, considering the two same levels.

Exclusivity in trademarks for a period. When a brand manufactures different products, a good point could be to grant exclusivity for some products, exclusivity in launching new products, special offers only at that DS

[25] In "*Negotiation Genius…*" the authors call this idea as "Educate your customers between deals": "How often do you reach out to educate them about your ability to provide them with new sources of value?... [I]f your customers do not understand your distinct value proposition, then that is exactly what you should be doing. It should come as no surprise that customers will value your input and insights most when they have the time to listen to you, when they are least concerned about cutting costs, and when they are under no pressure to commit to anything."

Collaboration in shops. Brand managers can be good observers of the situation in the Department in shops. In one case the general manager of the Brand had in fact a perfect image on how the department was working. The information shared with the responsible of the Section permitted to receive in exchange better conditions for the Brand's products.

3.4. Are **new conditions** imposed by the DS depending on the circumstances? How to deal with them?

DS and the agreements can include global figures, but relationship is quite active. Poor sales, new promotions of sales or discounts, price reductions in future years. Special presence of products depending on sizes, colours and models; the necessity of new launchings...

DS can change unilaterally the conditions (surfaces, restructuring areas). This is a very common issue and the Brand will need to be flexible but also firm.

So be aware to have your "homework" done and clear your negotiation position.