

Changing Terms and Conditions during the Contract

The Right of the Principal to impose
unilaterally certain Modifications

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Delivery Agreements

(Prices). The prices payable by the Distributor, as well as possible discounts, shall be those set forth in Annex F-2. Such prices

- may be varied by the Supplier once every year and the new price list shall be applicable to the Distributor two months after such communication.
- are subject to change at any time, subject to two months' notice.
- may be varied by the Supplier at any moment, and the new price shall be applicable to all orders received after the new price has entered into force.

...'s dealer price list in the form from time to time in force applies to the sale of Contract Products to The price list currently in use is annexed to this Agreement as Annex (3). ... remains at liberty to adapt the prices in the price list, if four months' notice of this adaption is given to ... and ... is heard on the issue

Delivery Agreements

(Rules applicable to sales). Sales of the Products to the Distributor shall be governed by the Supplier's general conditions of sale, the currently applicable version of which is attached to this contract (Annex F-1).

...’s “International Conditions of Sale for Customers not resident in Germany” in the form from time to time in force shall apply without exception to all further Delivery Agreements with ..., without it being necessary to make a further agreement with ... to that effect or further to deliver to ... a copy of the “International Conditions of Sale for Customers not resident in Germany”. The form of the “International Conditions of Sale for Customers not resident in Germany” from time to time in force can be seen on ...’s internet web-page (<http://www.....>); the current form is annexed to this Agreement as Annex (2)

Distribution Agreements

typical subjects intended to be modified unilaterally

- territory
- customers
- minimum turnover to be attained
- commission in commercial agency contracts

Distribution Agreements

Section 308 (of the German Civil Code)

Prohibited clauses with the possibility of evaluation

In standard business terms the following are in particular ineffective

...

*4. (Reservation of the right to modify) the agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can **reasonably be expected of the other party** to the contract when the interests of the user are taken into account;*

- modification of the performance of the user
- reasonably expected: change in performance must be calculable and necessary, maintaining the balance of performance and counter-performance
- a general right to change the performance is ineffective, even if restricted to changes solely for the benefit of the distributor

Distribution Agreements

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...

5. *(Fictitious declarations) a provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made unless*
 - a) *the other party to the contract is granted a reasonable period of time to make an express declaration, and*
 - b) *the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time;*

Distribution Agreements

Section 315

Specification of performance by one party

- (1) *Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the **reasonably exercised discretion** of the party making it.*
- (2) *The specification is made by declaration to the other party.*
- (3) *Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is **binding on the other party only if it is equitable**. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.*

The clause must state serious grounds for an amendment and specify them in terms of their conditions and scope and take due account of the interests of the distributor in a recognisable and proportionate manner, in particular by providing him with adequate compensation.

Distribution Agreements

Conclusion:

- unilateral rights of amendment only limited possible
- the same applies to revocations of unilaterally granted extensions unless no legal position of the other party
- the more the dealer's *acquis* is infringed, the stricter the requirements for a unilateral right of amendment will be
- particularly high requirements apply to dealers with exclusive distribution rights
- calculability and necessity