IDI International Distribution Institute

Drafting minimum purchase clauses: Can the supplier retain the right to determine the yearly minimum turnover?

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IDI
INTERNATIONAL DISTRIBUTION CONTRACT
(SUPPLIER-FRIENDLY)

5.4 (Minimum Turnover). The Distributor undertakes, during each year, to place orders and purchase Products for not less than the amount specified in Annex D-3 («Minimum Turnover»). For the years following those for which the Minimum Turnover is indicated in Annex D-3, the Supplier shall determine the Minimum Turnover for each year, taking into account the market conditions and the development of sales within his network.

5.5 (Consequences of non-attainment of the Minimum Turnover). If at the end of a year the Minimum Turnover in force for such year has not been at-tained, the Supplier shall be entitled, subject to giving one month’s no-tice, at his choice,

(a) to terminate this contract, under Article 19, or

(b) to can-cel the Distributor's exclu-siv-ity, or

(c) to reduce the extent of the Territory, by excluding the territories where the Distributor has made less promotion.

Minimum Purchase Clauses

justification

1. Means to enforce the obligation of the distributor to promote the trade of contract products.
2. Expression of the obligation of the distributor to safeguard the interests of the supplier.

Bundesgerichtshof (Germany) 11 December 1958

exclusivity

Typical contractual counterbalance for granting exclusivity.

Bundesgerichtshof (Germany) 8 May 2007

<u>Minimum purchase clauses may violate competition law.
According to art. 5 lit. a European Block Exemption Regulation
only exempted for a period of 5 years</u>

Minimum Purchase Clauses

unilateral right of the principal to determine the minimum turnover

individually

in principle permitted and valid

- no oppressive contract, § 138 BGB
- no violation of a statutory prohibition, § 134 BGB
- not infringing entrepreneurial indipendence
- reasonably exercised discretion revisible by judicial decision

general terms

§ 307 BGB:

(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision

1. is not compatible with … statutory provision from which it deviates,
2. or … attainment of the purpose of the contract is jeopardized.

Objective Criteria

object

- specific product
- specific market

distributor

- setting determining the distributor‘s activity
- not: principal/supplier
- not: other distributors

objective

- realistic minimum purchase figures
- reflecting the concerns of the distributor

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Balanced Sanctions

sanctions

- to terminate the contract
- to can-cel the exclu-siv-ity
- to reduce the extent of the territory
- to pay damages

flexibilization

- fault based (extraordinary notice of cancellation (§314 BGB), damages)
- counter-exception / rebuttal
- compensation
- transition period
- interim/preliminary sanctions
- breach of obligation to promote business

Further approaches

objection

- obligation to object
- obligation to adapt

expert

- fixing by an independent expert
- applying contractually agreed guidelines

agreement

- obligation to agree, transparent
- compelling reasons in terms of §314 BGB not discretionary, only clarification of §314 BGB
- not-agreement hardly a compelling reason
- agreement covering the complete contract period

Thank you very much

for inviting me and

for your patient attention

Prof. Dr. Burghard Piltz