

CASE STUDY 1

Terminating a contract because the agent is selling competing products

Futura Spa, an Italian company manufacturing casual wear appointed in 2003 Mr. Gerhardt Müller as its exclusive agent for Germany.

The agency contract expressly provided the agent's obligation not to distribute any competing products. The clause was drafted as follows:

Article 3. - The Agent shall not represent, manufacture, sell or distribute (or be involved either directly or indirectly in the manufacture, sale or distribution of) any products which are in competition with the Products, for the entire term of this contract. He shall especially not engage, in acting as distributor, reseller, commission agent, agent or in any other similar way in the territory or elsewhere, for the benefit of third parties who manufacture or sell products which are in competition with the Products. Shall be considered as competing products any type of casual wear.

The agency contract was made for an indefinite period could be terminated with a notice of six months.

The contract could also be terminated without notice in case of substantial breach, according to the following clause:

Article 19. Each party may terminate this contract with immediate effect, without respecting a period of notice, by simple communication served in conformity with Article 20, in case of a substantial breach by the other party of the obligations arising out of this contract, Any failure by a party to carry out all or part of his contractual obligations resulting in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, The parties agree to consider in any case as a substantial breach which justifies the termination without notice the violation of the non-compete obligation contained in Article 3.

The Agent represented and distributed since 2004 jackets of a competing company, Marlene srl. There is no doubt that the Marlene jackets are competing products in the sense of Article 3.

However, since the competing jackets did not substantially impact on the sales of Futura, the latter never objected.

There is evidence that Futura knew that the Marlene jackets were distributed by Mr. Müller (such jackets were displayed near to Futura's products in the agent's show-room and there is correspondence showing that Futura knew that Mr. Müller was distributing such products).

There is no evidence of an express (oral or written) agreement permitting Müller to distribute the competing jackets.

Mr. Müller is performing well his task as Futura's agent. However Futura has been contacted by Mr. Schmidt who seems to have better connections in business and who could substantially increase the business.

Consequently Futura would like to terminate the agency agreement as soon as possible, and therefore envisages the following options:

- (a) terminating the contract without notice under Article 19, invoking the breach of article 3, or
- (b) asking the agent to stop distributing the Marlene jackets within 15 days and terminating the contract for breach if he does not.

The questions to be discussed are:

- whether the above options would be admissible under the law of the members of the panel, and
- whether the answer would be different if the contract contained the following non-waiver clause:

Any tolerance by one of the parties of conduct pursued by the other party in breach of the terms of this contract shall not constitute waiver of the rights deriving from the breached terms, nor of the right to require faithful fulfilment of the performance due.

CASE STUDY 2

Invoking non attainment of minimum purchase obligation by distributor after several years

White Cube GmbH having its business place in Stuttgart, Germany, appointed the French company Gloria SA as its exclusive distributor for the French market. The parties agreed on the following minimum purchase clause:

Article 6 - 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 parties shall agree on the Minimum Turnover for each year, taking into account the market conditions and the development of sales within his network.

The clause does not state anything about the consequences of the non-attainment, except that the breach of Article 6 is included in the list of circumstances which justify termination without notice.

The parties have agreed on minimum turnovers for the years 2008 and 2009 but they did not discuss minimum turnovers for the year 2010.

Hereunder are indicated the agreed turnovers and the turnovers actually attained by the distributor during the years 2008-2010:

Year	Agreed turnover	Actual turnover
2008	€ 1.200.000	€ 900.000
2009	€ 1.400.000	€ 1.200.000
2010	-	€ 1.100.000

In March 2011 White Cube decides to establish a wholly owned company in France and to terminate the distribution contract.

White Cube intends to terminate the distributorship contract without notice because of the non-attainment of the minimum turnovers in 2008 and 2009. Furthermore it would like to request damages resulting from the non-fulfillment of the minimum purchase obligation in those years, corresponding to the lost profit on the difference between the agreed turnover and the actual one.

The members of the panel are asked to discuss whether these requests would be founded in case of a contract submitted to their national law and whether the result would be different if the distributorship contract contained the following non-waiver clause:

No relaxation, forbearance, delay or indulgence by either party in enforcing any of the terms and conditions of this Contract shall prejudice, affect or restrict the rights of that party under the Contract, nor shall any waiver by either party of any breach of the Contract operate as a waiver as a waiver of any subsequent or continuing breach of the Contract. Any waiver of a party's rights, powers or remedies under the Contract must be in writing, dated and signed by an authorized representative of the party granting such waiver, and must specify the right and the extent to which it is being waived.

