IDI

International Distribution Institute

REPORT ON THE 2006 IDI CONFERENCE

CURRENT ISSUES OF INTERNATIONAL DISTRIBUTION LAW

[Drafting and negotiating choice of law and choice of jurisdiction clauses in agency, distribution and franchising contracts]

Venice, 22nd June 2006

The International Distribution Institute (IDI), from 2004 leading organisation dealing with the law on international distribution, held its second annual conference in one of the most prestigious locations of the city of Venice (Italy), the "Scuola Grande di San Giovanni Evangelista".

The conference, addressed to both lawyers and businessmen involved in negotiating, drafting and managing international distribution contracts, dealt with a number of relevant issues on the matter. Among those: the basic problems of the choice of law, ranging from mere description of the various possibilities, to the recent developments in law and jurisprudence; the choice of jurisdiction, with particular attention to the choice of forum clauses and the new Hague Convention on Choice of Court Agreements; a brief but valuable survey on the new laws on franchising (in Italy, China, Belgium and Sweden, with particular reference to the Unidroit model law); an updated overview of the EU antitrust rules on distribution; and tricky business of drafting effective minimum turnover clauses in international agency and distribution agreements.

The conference was attended by attorneys and company lawyers not only from Europe, but also from America, Asia and Australia.

MORNING SESSION

The choice of the applicable law: contract strategies and practical problems.

After the welcome of the Chairman, Klaus MEYER SWANTEE (Retired Partner of *Derks Star Busmann*, Amsterdam. Member of the IDI Council), Fabio BORTOLOTTI made a brief introduction on the importance of the IDI website, as an important tool for practitioners dealing with distribution. Then the conference was opened by André THOUVENIN, who introduced the subject of the choice of law for practitioners and businessmen who do not usually have to deal with this issues.

Choice of law strategies for agency and distribution agreements.

André THOUVENIN (*Thouvenin Rechtsanwälte* and IDI Country Expert for Switzerland), introduced the subject referring to the choice of law as to the agreement of the parties to submit their contractual relationship to the provisions of a particular law. The choice of law is therefore subject to a wide range of considerations:

- on the side of the principal. Selecting the law of his own country presents several advantages: the familiarity with the provisions (and a better evaluation of the risks

connected); the possibility to conclude standardised agreements; the cutting of foreign proceedings costs with the election of the place of jurisdiction at his registered office; the psychological advantage with prospective partners, for further distribution territories. Some drawbacks can be identified in the missed opportunity to check the advantages of the law proposed by the distributor;

- on the side of the distributor. If no choice of law is specified in the contract, normally the law of the country of the distributor shall apply, according to the provisions contained in the 1980 Rome Convention (i.e. characteristic performance) and the laws concerning international private law. That is either the law of the registered office of the distributor, or the law of the country where the distributor conducts the majority of his business activities;
- on the place of jurisdiction. The selection of a jurisdiction forum that is not familiar with the law applicable to the contract, might lead to an incorrect application of the law and to serious difficulties in appealing against a ruling to a superior court.

The intervention is concluded with a strong suggestion to conclude agency or distribution agreements making sure that the applicable law and the place of jurisdiction correspond, so that the appointed judge may apply his own country law, and his decision may be examined without difficulties in case of an appeal to a superior court.

How to deal with mandatory rules of the agent's country, especially with respect to goodwill indemnity.

Fabio BORTOLOTTI (*Buffa Bortolotti & Mathis* and IDI Country Expert for Italy) underlined the importance of mandatory rules in agency agreements, with particular reference to the goodwill indemnity, as one of the most problematic issues in drafting this kind of contracts and the difficult of choosing the best possible solution in the interest of one of the parties.

Looking at the problem from the point of view of the principal, the choice of law is a widely accepted clause in agency and distribution contracts and the main question that arises is the following: is the applicable law chosen by the parties effective when it avoids the application of mandatory rules protecting the agent, that would have been otherwise applicable?

Thus Mr Bortolotti focused on the distinction between simple mandatory rules (present in almost every national jurisdiction) and internationally mandatory rules (i.e. rules, the application of which cannot be avoided, not even by choosing a different applicable law), with particular reference to the Ingmar decision of the European Court of Justice. Referring to the mentioned case, he also pointed out the differences in the application of internationally mandatory rules on goodwill indemnity by European or extra-European Courts.

Can a foreign supplier avoid the application of the Belgian law of 1961 on distributors by choosing his own law?

Ingrid MEEUSSEN (*Lafili, Van Crombrugghe & Partners* and IDI Country Expert for Belgium) explained that the Belgian Law on Distributorship of 1961 recognises to distributors a right to indemnity for contracts concluded for an indefinite period of time. The agreement cannot be terminated by either parties, except with a reasonable notice period or a fair indemnity, to be agreed upon at the moment of the termination. In case the parties do not specify the amount of termination indemnity, it will be fixed by Belgian Courts, according to recent case law, in an amount varying from three months until 48 months of profit.

Ms Meeussen also pointed out that this law is an internationally mandatory rule and will be applicable whenever the distribution contract covers whole or part of Belgian territory and

whatever other law will be applicable to the contract. Particularly, the decision of the parties to select an applicable law different from the Belgian law, does not avoid the application of the mandatory rules contained in the Law of 1961. The only way to avoid the application of the abovementioned rules, is to insert a choice of forum clause, in favour of a foreign court, or an arbitral clause in the contract.

Dealing with local laws on franchising when operating abroad. The practical experience of a company lawyer.

After a brief introduction on the company structure of the Benetton Group (that has not, in fact, a franchising network, but a distribution system based on an international network of partners), Stefano ARTUSO (General counsel *Benetton Group*, Treviso) described various legal problems related to this choice of distribution.

First of all a company-lawyer should take into account the different national laws applicable to such a distribution system, among others, the laws on franchising; then he should approach the issue in two different ways: bottom-up (full knowledge of the company activities aimed at the distribution of its products) and top-down (analysis of the various legal forms of distribution, with particular reference to the franchising contract), in order to select the most valid solution applicable to the distribution system of the company.

He analyses the core common to all national franchising laws: the franchisor will retain the property of immaterial goods (such as trademarks, patents, industrial designs and, above all, know-how); these immaterial goods should be qualifying (without them, there is no franchising contract); the franchisor is entitled to a money consideration, paid by the franchisee for use of the franchising material (in particular know-how).

Mr Artuso concludes his intervention explaining why Benetton Group does not use a franchising network: the material provided to distributors is not qualifying enough for the application of the rules on franchsing (in fact the most important concession is the use of Benetton trademark as shop signs); the shopkeepers do not pay for the abovementioned material, but only for the clothing purchased and resold. The most appropriate question is not whether a franchising network is advisable, but what is your company activity: the answer will lead to the most effective solution.

A general overview of the main options: arbitration, courts of one of the parties, courts of a third country.

Gustav BREITER (*Viehböck Breiter Schenk & Nau*, and IDI Country Expert for Austria) introduced one of the main problems in drafting a cross-border contract: the place of jurisdiction and the choice between national Courts and arbitration, with particular consideration for the different interests of the parties. Finding a solution satisfying both parties is very difficult: choosing the place of jurisdiction of one of the parties, implies that the other one has to accept a foreign jurisdiction from the beginning on. The fairer solution should be the choice of an arbitration in a third country, so that any influence is avoided and they may have an institutional support from different organizations concerning the constitution of the tribunal, the collecting of costs and the exchange of statements between the parties. Furthermore, national law on civil procedure are not, in principle, applicable to arbitration cases and, most important, particularly outside the European Community, the judgements are enforceable according to the 1958 New York Convention on International Commercial Arbitration.

A drawback in choosing an arbitration cause, concerns the costs involved in agency relationships: the advance payment for the arbitration institution and for the judges is out of proportion compared to the amounts in question. Moreover, in some cases there can be

uncertainties if the arbitration clause can be validly concluded, expecially where the agent or distributor is an individual, or in cases of specific national protection for distibutors. The main disadvantage, however, seems to be the fact that there is only one instance, so there are no possibilities left against the judgement.

Mr Breiter concluded saying that arbitration is necessary if it is the only way to obtain the recognition of a judgement in a foreign country (provided that the New York Convention is appplicable); it might be useful in some distribution cases, but not in most of commercial agency cases.

When no arbitration clause is agreed upon by the parties, national Courts will have jurisdiction and, in drafting the contract, it is necessary to consider the place of jurisdiction: in both agency and distribution agreements the weaker party will be the claimant in most cases.

Mr Breiter did not recommend the agreement on the court of a third country as place of jurisdiction, since in this case both parties would face a foreign legal system.

The conclusion of his intervention was that, even though a fair compromise might be to provide in the contract a non-exclusive jurisdiction clause in the claimant's country, the best solution is to consider very carefully the different possibilities available for each case and each contract.

ICC arbitration and international distribution. How do international arbitrators deal with international agency, distribution and franchising contracts? An overview of ICC arbitral case law.

In his intervention, Emmanuel JOLIVET (General Counsel, *ICC International Court of Arbitration*) analysed several arbitral awards on the applicable law in distribution agreements.

1) The determination of the applicable law is a preliminary issue to deal with in many disputes. As far as the parties choose the applicable law, two basic approaches can be found in the ICC case-law: the traditional approach (determining the national law applicable to the contract) and the *lex-mercatoria* approach (with the application of general principles of law, varying from one arbitrator to the other), although in most cases the parties prefer to choose a single national law applicable to the agreement (following the principle of the parties' authonomy, recognized in many international conventions and texts).

He mentioned several law-cases presented before the ICC, among others: Case No. 9032 of 1998 about the claim of damages for lack of renewal and for breach of the contract by the principal; Case No. 6379 of 1990 based on the attempt to avoid the application of Belgian mandatory rules by choosing a different applicable law (Italian, in particular); Case No. 8161 of 1995 about the calculation of the compensation upon termination of the agency contract under German law; Case No. 10422 of 2001 on an international distribution contract concluded between an European supplier and a South American distributor; and Case No. 8147 of 1996 on commercial agency, all to be found in the "Arbitral Cases" Section of the IDI Website.

Mr Jolivet also exposed a yet unpublished but relevant example: Case No. 8451 of 1998, based on an exclusive distributorship agreement for the distribution of Russian cars in Spain.

Apart from the classical typologies of distribution agreements, namely agency, distributorship and franchising contracts, many more problems may arise with occasional intemediary contracts, because the boundary between the intermediary contract and agency contract is not clearly determined.

Mr Jolivet concluded his intervention pointing out that the main consequences derived from the awards indicated, relate to four core points: the continuation or termination of the

contract, the parties' right to indemnity and compensation, the restitution of stocks and the restitution of commercial signs and materials.

Choice of court clauses in international trade: the new Hague Convention on Choice of Court Agreements.

Andrea SCHULZ (First Secretary of *The Hague Conference on Private International Law*) introduced the topic enlighting the role and function of the inter-governmental organization of The Hague Conference on Private International Law and explaining the genesis of the 2005 Hague Convention on Choice of Court Agreements.

She analyzed the scope of the Convention, as outlined in Article 1, its applicability, and the rules on jurisdiction (the negotiators decided that a case should be considered international unless the residence of the parties is in the same contracting State and all the elements of the case are connected only with that State), as well as the most important operative provision under Article 3: the definition of the exclusive choice of Courts Agreements. The idea at the basis of this Convention is to strenghten the autonomy of the parties and to reassure them on the effective applicability of their choice.

Her analysis of the Convention also covered form requirements (the choice must be in writing or in any other means of communication rendering the information accessible), rules addressed to different courts and particular issues concerning litigation on IP rights (validity, piracy cases, contractual litigation).

PANEL on practical problems of choice law and jurisdiction.

The conference continued with a discussion panel on practical problems connected with the choice of law, chaired by Klaus MEYER SWANTEE.

The other members of the panel were Carl CHRISTIANSEN (*Raeder Law Firm* and IDI Country Expert for Norway), Pedro DA COSTA MENDES (*SAR – Sociedade de Advogados*), Petr MRÀZEK (*Vitek & Mràzek Law Office* and IDI Country Expert for the Czech Republic) and Tatyana SLIPACHUK (*Vasil Kisil and Partners* and IDI Country Expert for Ukraine).

The panel discussed about the high costs of arbitration, that prevent agency cases (normally small claims cases) to be widely submitted to arbitration and the practical experience various members of the panel had in their respective countries and with *ad hoc* and national institutional arbitration.

Ms Slipachuk pointed out that in Ukraine, during the past five years, the percentage of cases connected with international agency before the international commercial court c/o the national Chamber of Commerce and Industry, amounts to about 5% and the main cost of arbitration is actually the cost for legal representation, rather than the cost of the arbitral institution itself.

The problem of mediation also emerged from the discussion, as an alternative form of dispute resolution in the context of long-running relationship between principal/agent and supplier/distributor. Mr Meyer Swantee underlined that although in many countries mediation is gaining an increasing attention, it could not be considered a general solution for every country.

AFTERNOON SESSION

The afternoon session was devoted to three separate workshops:

1) New laws on franchising and the UNIDROIT model law, chaired by Lena PETERS (*UNIDROIT* Secretariat).

Ms Peters introduced the subject-matter dealing with the new Chinese Measures on Commercial Franchising of December 2004 and the relation between the UNIDROIT model law on franchising and the national legislations. Fabio Bortolotti enlighted the new Italian regulation on franchising, as well as did Nicole VAN CROMBRUGGHE (*Lafili, Van Crombrugghe & Partners*, Belgium) for the Belgian law of December 2005, while Cecilia OGVALL (*MAQS Law Firm* and IDI Country Expert for Sweden), gave a brief report on the draft law on franchising in Sweden.

2) Distribution contracts within the EU: complying with the European antitrust rules, chaired by Didier FERRIER (Professor of Law, *University of Montpellier*; vice-chair IDI and IDI Expert for France).

The workshop was introduced by Michael SVENDSEN (*MAQS Law Firm* and IDI Country Expert for Denmark) who analysed the basic rules on vertical agreements and gave various examples on recent case-law developments. The discussion continued with the intervention of Paolo CESARINI (UE *European Commission*), who expressed very clearly the point of view of the European Commission on the subject, followed by a discussion panel on the approach to take with respect to exclusivity clauses, resale price maintenance, recommended price and export prohibitions. Members of the panel were Marie DU GARDIN (*Fidal*, France), Olga SZTEJNERT (*Drzewiecki, Tomaszek & Partners*, IDI and IDI Country Expert for Poland) and Michael SVENDSEN.

3) Drafting and Enforcing minimum turnover clauses in agency and distribution contracts, chaired by Erwin GÂRTNER (*Gärtner, Stübel, Baumann & Partners*, Germany, Council Member and IDI Country Expert for Germany).
Silvia BORTOLOTTI (*Buffa, Bortolotti & Mathis*, Italy, Council Member and Secretary General of IDI) explained the main purposes of minimum turnover clauses in agency and distribution agreements, and their typical contents.
A discussion panel on practical experience in negotiating and managing minimum turnover clauses followed. The panel was composed by Silvia BORTOLOTTI, Edward MILLER (*Reedsmith*, England and IDI Country Expert for UK), Christoph Martin RADTKE (*Lamy & Associés*, France) and Agnès SZENT-IVANY (*Sándor Szegedi Szent-Iványi & Komàromi Attorneys at Law*, Hungary and IDI Country Expert for Hungary).

Individual contacts with IDI Experts.

At the end of the afternoon session, some time was set aside for individual contacts between participants and the IDI experts to discuss their specific problems. Besides the IDI Experts already mentioned as speakers, Experts were available from Brazil, Greece, Lithuania and Spain.

The conference offered an important opportunity to exchange views and information among practitioners dealing with international distribution contracts and the problems arising from international arbitration as a means for solving international disputes. In particular, participants appreciated the speakers' high level of expertise as well as the fact that the discussion centred on practical issues of great relevance to those active in the field of international distribution.

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