



International Distribution Institute

CHOOSING JURISDICTION AND APPLICABLE LAW IN DISTRIBUTION CONTRACTS

Strategies and recent trends

2013 Annual Meeting of the International Distribution Institute

FRIDAY 14 JUNE AND SATURDAY 15 JUNE, MUNICH (GERMANY)



The **International Distribution Institute (IDI)**, the leading organization dealing with international distribution law, will hold its 2013 annual conference in Munich.

The conference is addressed to **lawyers and executives** involved in negotiating, drafting and managing international distribution contracts (agency, distributorship, franchising, etc.) and will deal with a number of topical issues which justify an in depth discussion between qualified experts in this field.

The conference is divided into a **main session** (on Friday 14 June) and three **parallel workshops** on specific issues (on Saturday 15 June, morning).

THE MAIN SESSION: STRATEGIES IN CHOOSING JURISDICTION AND APPLICABLE LAW IN INTERNATIONAL DISTRIBUTION

This year the main session (Friday, 14 June) is devoted to **one main theme**, i.e. choice of the applicable law and jurisdiction (national courts or arbitration) in international distribution.

In this context we will mainly discuss the strategies, and in particular the criteria that should guide you in making the best possible choice, with the involvement of lawyers and in house counsels.

Some of the topical issues will be: which law to choose; which law to avoid and how make the choice effective; how to manage a contract under a law that you cannot avoid; preferring the jurisdiction of national courts or arbitration; and, if arbitration is chosen, how to make it work effectively.

All these issues and many others will form the subject of debate between experienced lawyers and the audience, with the purpose of highlighting problems and possible solutions.

THE THREE SPECIALIZED WORKSHOPS

The second session (Saturday June 15, morning) will deal with **three parallel workshops** on the following themes:

FIRST WORKSHOP

Commercial agents and distributors' compensation claims: How to litigate and settle disputes on goodwill indemnity

Considering the large number of countries which grant a goodwill indemnity (or similar compensation) protection to commercial agents and, more recently, also to distributors, the principal needs to prepare himself for organizing contract termination in the safest and less expensive way.

One central issue is of course that of determining with reasonable certainty the likely amount of the goodwill indemnity to be paid. Another interesting issue is that of the strategy to follow for anticipating the request of the counterpart by proposing a termination agreement in advance.

As regards the first issue, we will analyse the criteria followed by Courts in several jurisdictions in order to calculate goodwill indemnity due to commercial agents and/or distributors with a practical approach, i.e. enabling principals to quantify the relevant risk.

As regards the second issue, a panel will examine the pro's and con's of negotiating in advance a termination by mutual agreement.

SECOND WORKSHOP

Distribution Joint ventures

Entering into a joint venture with a distributor/importer is an interesting alternative solution between the two extremes of a purely contractual relationship with a distributor and a wholly owned distribution company. The distribution joint venture is a quite complex deal which implies an agreement on several critical issues. This workshop will analyse pros and cons of JV vs distribution contracts as well as precautions to be taken when setting up a distribution JV in a foreign country.

THIRD WORKSHOP

The juridical and decisional independence of the franchisee: risks of requalification of the franchisee as employee and vicarious liability of the franchisor.

When the franchisee does not have a sufficient juridical and decisional independence, two risks should be considered by the franchisor. On the one hand, in several jurisdictions the risk exists that a franchisee may be qualified as an employee, and thus be subject to the rules on employment which will normally be quite more onerous than those applicable to independent contractors; the problem is that the criteria for deciding when a franchisee may be considered as an employee vary from country to country and it is therefore difficult to decide how the franchising agreement should be structured in order to avoid the risk of falling under labour law. On the other hand, in some jurisdictions, Courts tend to envisage a vicarious liability of the franchisor for acts or omissions of its franchisees, with serious consequences for the franchisor. The speakers of this workshop will examine the approach followed by some national Courts and will share their experiences on these topics.

Friday 14 June 2013

09:30 – 16:30

**STRATEGIES IN CHOOSING JURISDICTION AND APPLICABLE LAW IN
INTERNATIONAL DISTRIBUTION**

- 08:30 – 09:00 **Registration**
- 09:00 – 09:10 **Welcome**
Fabio Bortolotti, Chairman IDI
- 09:10 – 09:30 **Presentation of the IDI website**
Silvia Bortolotti, Buffa Bortolotti & Mathis, Torino; Member of the IDI Council and Secretary General IDI
- 09:30 – 10:00 **Introduction: the importance of the right choice; what happens in the absence of a choice?**
The choice of the appropriate solution with respect to applicable law and jurisdiction may have a substantial impact on the future life of the distribution agreement and on the outcome of possible disputes. Although there is often little space for discussing these matters when negotiating the contract, it is essential to have a strategy in mind and in particular to know which solutions are preferable and why. And, when it is difficult to reach an agreement, the negotiator should know what would be the solution in the absence of a choice with respect to the applicable law and the jurisdiction.
Fabio Bortolotti, Chairman IDI, Buffa Bortolotti & Mathis, Torino
- 10:00 – 10:30 **Choosing the governing law: which is the best solution?**
There is no "best" solution in general terms. Pro's and con's of the various options: (a) law of the principal/supplier/franchisor; (b) law of the agent/distributor/franchisee; (c) law of a third country; (d) general principles/lex mercatoria. Effectiveness of the choice: how to deal with internationally mandatory rules of the country of the agent/distributor/franchisee. Combining the choice of law with the choice of jurisdiction. Should the principal try to avoid such rules by choosing another law? Would such choice be effective? Is it preferable to accept the law of the other party and look for appropriate solutions within such context?
Jaap van Till, Van Till Advocaten, Amsterdam, IDI country expert for agency and distribution (the Netherlands)
- 10.30 – 11:00 **Choosing the jurisdiction. Analysing the main options through the experience of a civil law and two common law lawyers.**
Arbitration or domestic courts? Choice of forum in the agent's/distributor's country, or in the country of the principal/supplier? In case of a network (e.g. franchising), one forum for all contracts, or different jurisdictions?
Marco Hero, PF&P Rechtsanwälte, Munich, IDI country expert for franchising (Germany)
Jeffrey Brimer, Faegre & Benson LLP, Denver
Ted P. Pearce, Nexsen Pruet, PLLC, Charlotte
- 11:00 – 11:30 **Coffee break**
- 11:30 – 11:50 **The new European rules on jurisdiction and enforcement of judgments: Regulation 1215/2012 (Brussels 1 Regulation)**
After more than 10 years, Regulation 44/2001 has been replaced by the new rules contained in Regulation 1215/2012, which will apply from 10 January 2015. The speaker will analyse some of the main issues which may be relevant for agreements within the European area.
Ignacio Alonso, Advocacia Abogados, Madrid; IDI country expert for agency and distribution (Spain)
- 11:50 – 12:30 **PANEL: Agreeing on jurisdiction or arbitration as a means for avoiding mandatory rules protecting the other party. Is this choice always effective?**

A usual way used by principals for avoiding mandatory rules which protect the counterpart, in that of submitting the contract to a less protective law and to agree on jurisdiction or arbitration outside the country in question. Does such a choice prevent the other party to bring a claim before its courts in order to warrant the respect of mandatory rules? The panel will examine some recent cases (Belgian Court of Cassation, 3 November 2011; OLG Stuttgart, 29 December 2011; OLG München 17 May 2006) where choice of court or arbitration clauses have been considered ineffective because the respect of mandatory rules protecting agents would not be warranted. Another means for "circumventing" choice of forum or arbitration clauses is "rupture brutale" rule of French law: can French courts claim jurisdiction on the basis of these rules even in the presence of a valid arbitration or choice of forum clause?

CHAIRMAN: Pascal Hollander, Hanotiau & van den Berg, Brussels, IDI country expert for franchising (Belgium)

Sina Heller, Legal Counsel CDH (National Association of German Commercial Agencies and Distribution) legal/international/tax/economics department, Berlin

Nathalie Sinavong, Pinsent Masons LLP, Paris

12:30 – 13:00

Discussion

13:00 – 14:15

Lunch

14:15 – 15:00

PANEL: Litigating in "critical" countries: the examples of Russia, China and India.

There is great uncertainty about the actual problems that may arise when litigating in certain countries. A panel of experts will try to update the participants about the problems encountered and solutions found when litigating before the courts in Russia, China and India.

CHAIRMAN: Paul Jones, Jones & Co., Toronto; IDI country expert for franchising (China)

Vladimir Lobastov, Egorov Puginsky Afanasiev & Partners, Saint Petersburg, IDI country expert for agency and distribution (Russia)

Avninder (Avi) Singh, International Law Affiliates, New Delhi

15:00 – 15:20

When is arbitration appropriate in the field of distribution?

There are situations (mainly commercial agency agreements, direct franchising) which generally imply small disputes, for which arbitration is considered too expensive. At the same time arbitration may be a means for avoiding litigation. In most distributorship contracts, where more money is involved and where it is essential that the dispute is decided by experienced people, arbitration will be the preferred solution. However, solutions may vary according to the circumstances of the case.

Didier Ferrier, Professor of Law, University of Montpellier; Vice-President IDI; IDI country expert for agency, distribution and franchising (France)

15:20 – 15:40

How do arbitrators deal with distribution issues? Common trends in arbitral jurisprudence with special reference to ICC arbitration.

Arbitration is commonly used for deciding disputes in the field of distribution, particularly as regards distributorship contracts, exclusive importation agreements, etc.. Arbitration case law in this field may be an important source of information for parties and for litigators.

Emmanuel Jolivet, General Counsel, Deputy Director for ICC Dispute Resolution Services, ICC International Court of Arbitration, Paris

15:40 – 16:20

PANEL: How to get the best out of arbitration in distribution.

Arbitration is often criticized as being too expensive and lengthy. This may sometimes be true, but it is often due to wrong choices made by the parties. The panel will discuss a number of options where wrong decisions can be taken: choice of the arbitral institution; choice of the seat of arbitration; choice of the party arbitrator and chairman; choice of the counsel; determination of the litigation strategy.

CHAIRMAN: Michael Bühler, Jones Day, Paris

Maged Ackad, Ackad Law Office, Cairo; IDI country expert for agency, distribution and franchising (Egypt)

Ercument Erdem, Erdem & Erdem, Istanbul; IDI country expert for agency and distribution (Turkey)

Diederik de Groot, DLA Piper, Amsterdam

Diego Saluzzo, Grande Stevens, Studio legale associato, Torino. Former general counsel of IVECO

16:20 – 16:30 **Discussion**

Individual contacts with IDI Country Experts.

(16:30-17:00)

AFTER THE AFTERNOON SESSION THE IDI COUNTRY EXPERTS WILL BE AVAILABLE FOR INDIVIDUAL CONTACTS WITH THE PARTICIPANTS.

The updated list of the country experts present at the conference and available for individual contacts can be found at <http://www.idiproject.com/conference-contacts.html>

Request forms for meetings with the expert(s) will be enclosed in the informative sheets handed out at the conference.

General meeting of the members of the International Distribution Institute

(17:00-18:30)

In this general meeting, to which also non members are invited, the officers of IDI will inform the members about the current situation of IDI: the results achieved in 2012 and the plans for the following years.

The participants will be kindly invited to share their opinions about the activity of IDI and make suggestions for the future.

Social event: Gala Dinner

(20:00)

On Friday evening (June 14, 2013) a Gala Dinner will be held at Orlando Keller – Schuhbeck's, Platzl 4, 80331 Munich.

Reservations should be made in time due to the limited number of places.



Saturday 15 June 2013

09:00 – 13:00

FIRST WORKSHOP

**Commercial agents and distributors' compensation claims:
How to litigate and settle disputes on goodwill indemnity**

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As regards the second issue, a panel will examine the pro's and con's of negotiating in advance a termination by mutual agreement.

CHAIRMAN: **Jaap Van Till**, Van Till Advocaten, Amsterdam, IDI country expert for agency and distribution (the Netherlands).

09:30-11:00 **PANEL: The amount of goodwill indemnity generally granted to commercial agents in some European countries: an overview.**

The speakers will examine the criteria of calculation followed by their respective national Courts as well as the amounts generally granted.

CHAIRMAN: **Silvia Bortolotti**, Buffa Bortolotti & Mathis, Torino, Secretary General IDI

BELGIUM: **Ingrid Meeussen**, LVP Law, Brussels; IDI country expert for agency and distribution (Belgium)

CZECH REPUBLIC: **Petr Mrazek**, Vitek & Mrázek, Prague; IDI country expert for agency and distribution (Czech Republic)

DENMARK: **Peter Gregersen**, Horten, Copenhagen; IDI country expert for agency and distribution (Denmark)

ITALY: **Silvia Bortolotti**, Buffa, Bortolotti & Mathis, Torino; Secretary General IDI

NORWAY: **Carl Christiansen**, Reader law firm, Oslo; IDI country expert for agency and distribution (Norway)

POLAND: **Olga Szejnert-Roszak**, Drzewiecki, Tomaszek & Partners, Warsaw; IDI country expert for agency and distribution (Poland)

SPAIN: **Ignacio Alonso**, Advocatia Abogados, Madrid; IDI country expert for agency and distribution (Spain)

UK: **Edward Miller**, Reed Smith, London; IDI country expert for agency and distribution (UK)

11:00 – 11:30 **Coffee break**

11:30-11:50 **New trends in Egypt: a recent judgment of the Constitutional Court.**
Maged Ackad, Ackad Law Office, Cairo ; IDI country expert for agency, distribution and franchising (Egypt)

11:50-12:10 **Calculating the goodwill indemnity under German Law and its particularities in the case of service-station dealers.**

The criteria of calculation of the goodwill indemnity are subject to an extensive case law in Germany. German Courts have developed sophisticated methods for the calculation of the indemnity taking also into consideration the particularities of the business concerned such as the operation of a petrol station. The speaker will give an overview and examine the special aspects of the goodwill indemnity of a service station dealer in Germany.

Christopher Niemann, Leiter Legal Affair, ENI Germany GmbH

12:10-12:30 **Negotiating termination of an agency/distribution agreement in advance: when can this be the winning strategy?**

The usual way for the principal/supplier to terminate the agreement is to send a termination letter, with notice (or with immediate effect), if the principal has – or imagines to have – a reason for immediate termination. In certain cases, however, especially where there is no reason for immediate termination, it may be more appropriate to inform the counterpart in advance of the intention to terminate and to negotiate a termination by mutual consent. The panel will examine the pro's and con's of this strategy.

Jaap van Till, Van Till Advocaten, Amsterdam, IDI country expert for agency and distribution (the Netherlands)

12:30-13:00 **Discussion**

SECOND WORKSHOP **Distribution joint ventures**

Entering into a joint venture with a distributor/importer is an interesting alternative solution between the two extremes of a purely contractual relationship with a distributor and a wholly owned distribution company. The distribution joint venture is a quite complex deal which implies an agreement on several critical issues. This workshop will analyse pros and cons of JV vs distribution contracts as well as precautions to be taken when setting up a distribution JV in a foreign country.

CHAIRMAN: **Fabio Bortolotti**, Buffa Bortolotti & Mathis, Torino; Chair IDI; IDI country expert for agency, distribution and franchising (Italy)

09:30-09:50 **Why and when a distribution JV may be the best option.**

There are various situations in which a supplier may be interested in entering in a joint venture with a distributor of his products. One typical situation arises when a supplier wishes to market his products in a closed market where a foreign company would not be accepted. In this case a partnership with a local company may be the only means for entering this market. Another, common situation is that where a supplier wants to replace a successful distributor with a wholly owned company. Here, the option of involving the distributor in a joint venture may be the way for gradually replacing the distributor and warranting to the latter a compensation when he will finally acquire his shares. Entering into a joint venture is in most cases a transitional solution, which should be chosen only when there are sound reasons to do so. This requires an in depth preliminary evaluation of the objectives of the collaboration and the definition of the respective roles of the parties.

Fabio Bortolotti, Buffa Bortolotti & Mathis, Torino

09:50-10:10 **Establishing distribution with a local partner: the Indian experience.**

In some countries and under certain circumstances the JV can be a better way to penetrate a market. The speaker will analyze those aspects with respect to the Indian market.

Avninder (Avi) Singh, International Law Affiliates, New Delhi

10:10-11:10 **PANEL: Organizing a distribution joint venture: some critical strategic decisions.**

Establishing a joint venture normally implies the creation of a company which will be under the joint control of the two parties: principal and distributor. The distributor will often be the minority shareholder, having however the task to manage the company. This implies a careful balance of the respective powers. Agreeing on a common strategy may not always be easy since the objectives of

the parties may conflict. The members of the panel will discuss their experience in establishing and managing distribution joint ventures abroad.

CHAIRMAN: Fabio Bortolotti, Buffa Bortolotti & Mathis, Torino; Chair IDI; IDI country expert for agency, distribution and franchising (Italy)

Stefano Artuso, Spagnuolo Vigorita, Ceriani e Fossati – SCF Studio Legale, Venezia Mestre

Diego Saluzzo, Grande Stevens Studio Legale Associato, Torino

Lawrence Guo, Jade & Fountain, Beijing; IDI country expert for agency and distribution (China)

11:10-11:40

Coffee break

11:40-12:30

Organizing the contractual framework of a distribution joint venture.

The joint venture agreement: respective powers of the parties; autonomy of the local partner and possible limitations; veto rights of the minority shareholder; harmonizing the joint venture agreement with the bylaws of the JVC; the contents of the distributorship agreement (for instance: prices granted to the JV).

Christian Langbein, PF&P Rechtsanwälte, Munich

Cristobal Porzio, Porzio Rios & Asociados, Santiago, IDI country expert for agency and distribution (Chile)

12:30-13:00

Discussion

THIRD WORKSHOP

The juridical and decisional independence of the franchisee: risks of requalification of the franchisee as employee and vicarious liability of the franchisor.

When the franchisee does not have a sufficient juridical and decisional independence, two risks should be considered by the franchisor. On the one hand, in several jurisdictions the risk exists that a franchisee may be qualified as an employee, and thus be subject to the rules on employment which will normally be quite more onerous than those applicable to independent contractors; the problem is that the criteria for deciding when a franchisee may be considered as an employee vary from country to country and it is therefore difficult to decide how the franchising agreement should be structured in order to avoid the risk of falling under labour law. On the other hand, in some jurisdictions, Courts tend to envisage a vicarious liability of the franchisor for acts or omissions of its franchisees, with serious consequences for the franchisor. The speakers of this workshop will examine the approach followed by some national Courts and will share their experiences on these topics.

CHAIRMAN: Didier Ferrier, Professor of Law, University of Montpellier; Vice-President IDI; IDI country expert for agency, distribution and franchising (France)

09:30-09:50

The notion of franchisee, and its borderlines towards employment laws. The French case-law.

Didier Ferrier, Professor of Law, University of Montpellier; Vice-President IDI; IDI country expert for agency, distribution and franchising (France)

09:50-10:20

The requalification of the franchisee as employee in some European jurisdictions.

GERMANY: Katharina Wurm, PF&P Rechtsanwälte, Munich

THE NETHERLANDS: Tessa de Mönnink, De Grave De Mönnink Spliet Advocaten, Amsterdam; IDI country expert for franchising (Netherlands)

- 10:20-10:40 **The Japanese case-law on the application of employment rules to franchisees and on vicarious liability.**
Souchirou Kozuka, Gakushuin University, Tokyo; IDI country expert for agency, distribution and franchising (Japan).
- 10:40-11:00 **Franchisee or Employee and vicarious liability of Franchisors – the UK perspective.**
Natalia Lewis, Hamilton Pratt, Warwick
- 11:00-11:30 **Coffee break**
- 11:30-12:30 **PANEL: The vicarious liability of the franchisor for acts and omissions of the franchisees and their employees in some jurisdictions.**
Will your franchise agreement establish a franchise relationship, or will the franchisee be the franchisor's agent or employee as well as its franchisee? Will the franchisor be liable for the franchisee's wages, taxes, negligence and other torts, or workers' compensation claims? How is the law emerging and what can franchisors and their lawyers do to minimize the risk of liability?
CHAIRMAN: Carl Zwisler, Gray, Plant, Mooty, Mooty & Bennett, PA, Washington DC; IDI country expert for franchising (U.S.A.)
Dominic Mochrie, Osler, Toronto, IDI country expert for franchising (Canada)
Mariaelena Giordelli, Buffa Bortolotti & Mathis, Torino
- 12:30-13:00 **Discussion**

PRACTICAL INFORMATION

Venue:	Novotel München City, Hochstrasse 11, 81669 München
Language:	English
Documentation:	A CD Rom containing all documents discussed at the conference.
Fee:	800 € First participant 300 € for additional participants within the same premises of the same organization as the first participant (i.e. having the same address and VAT code) 400 € IDI members (subscribers) having a valid subscription on the day of the conference <u>The fee includes the coffee break, lunch and documentation.</u>
Gala dinner:	100 € per person. Please, remember that places are limited and must be reserved in time. Please add 21% (VAT) to your payment if you are in Italy.

A map where you can find the location of the conference is at the following url:
<http://www.novotel.com/gb/hotel-3280-novotel-muenchen-city/location.shtml>

Continuing Legal Education / Continuing Professional Development Credits

This conference has been accredited for CPD/CLE by "Consiglio Nazionale Forense (CNF)". Italian participants will receive the attendance certificate to be submitted to their regional bar in order to obtain the credits. We will be pleased to prepare an attendance certificate for anybody who will ask us for it. Please, send an email to editorial.board@idiproject.com in order to receive it.

Registration and cancellation

Registration by fax:	Please, fill in the registration form, and send it by fax or by email to: IDI Project Srl, Via Alfieri 19, 10121 Torino (Italy) fax: + 39 011 574 11 41 Email: editorial.board@idiproject.com Payment shall be made by bank transfer and confirmation of your registration will be sent after having received the registration form together with the evidence of the payment.
Payment:	Bank transfer. The payment should be transferred with <u>no cost to the organizers.</u> <u>NO CHEQUE PAYMENTS WILL BE ACCEPTED.</u>
Cancellation:	Cancellation request received in writing by IDI Project on or before 4 June 2013 will be subject to a 20% administration charge of the total fees paid. After that date no refunds are possible.

Hotel Accommodation

As far as the hotels are concerned, we kindly inform you that a limited number of rooms have been reserved in Novotel at special to the IDI conference participants. These rooms will be held until 26 May 2013 only. In order to receive the discounted rate, please request to the conference organizers the specific booking form to be filled-in and send to the hotel.

Furthermore, the following hotels are all close to the venue of the conference, but do not have any specific rates for participants to the IDI conference:

Motel One München Deutsches Museum ***: Rablstraße 2, 81669 München, motel-one.com
Holiday Inn Munich – City Centre ****: Hochstraße 3, 81669 München, munich-meeting-centre.de
Hilton München City Hotel *****: Rosenheimer Straße 15, 81667 München, hilton.de

REGISTRATION FORM

First Name Last name
Company Address
ZIP/ Postal code City
Country Value Added Tax (VAT) Code
E-mail Phone Fax.....

WORKSHOPS: (Saturday, 15 June 2013):

Please specify to which workshop you would like to attend (only one per person):

- I will attend the FIRST WORKSHOP
- I will attend the SECOND WORKSHOP
- I will attend the THIRD WORKSHOP

FEES: (in case of more participants, please fill in a separate form for each participant)

- (14-15 June 2013):**
- € 800: First participant
 - € 300: Additional participant
 - € 400: IDI member (subscriber), having a valid subscription on the day of the conference.
 - € 100 : Ticket for the gala dinner (please, specify the number of tickets:)

Please add 21% (VAT) to your payment if you are in Italy.

TOTAL AMOUNT: €:

PAYMENT:

Please make a bank transfer marked «14-15 June 2013 Conference», including a clear reference to the name of the participant. The payment should be transferred with no cost to the organizers at the following account:

Bank: Banca Sella, Piazza Castello, Torino (Italy)
Account Name: IDI Project s.r.l.
Account Number: 052879649600
ABI: 03268 CAB: 01000
IBAN: IT86X0326801000052879649600
SWIFT: SELB IT 2B

NO CHEQUES PAYMENTS ACCEPTED

Please complete this form and return it, with your payment made out to:

IDI Project Srl,
Via Alfieri 19,
10121 Torino (Italy)
Fax: + 39 011 574 11 41

Date

Signature

PRIVACY: All personal information is processed by IDI confidentially and in compliance with the provisions contained in the Italian Legislative Decree 196 of 2003. All personal information stored on our system is secured against unauthorised access. All users may exercise theirs rights provided by Article 7 of the Italian Legislative Decree 196 of 2003, by sending an informal request to privacy@idiproject.com