



International Distribution Institute



Union Internationale des Avocats  
International Association of Lawyers  
Unión Internacional de Abogados

## CRITICAL ISSUES IN INTERNATIONAL DISTRIBUTION

Termination Indemnity to Distributors, «Illicit Commissions», Revision of EC competition rules

2009 Annual Meeting of the International Distribution Institute

FRIDAY 12 JUNE AND SATURDAY 13 JUNE 2009, BARCELONA (SPAIN)



The **International Distribution Institute (IDI)**, the leading organization dealing with international distribution law, will hold its 2009 annual conference in Barcelona.

The conference is addressed to **lawyers and businessmen** 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 the participants and qualified experts in this field. The conference has been organized in collaboration with the European Company Lawyers Association (ECLA) and l'Union Internationale des Avocats (UIA).

The conference is divided into a **main session** (on Friday 12 June) and three **parallel workshops** on specific issues chosen by IDI in collaboration with its members (on Saturday 13 June, morning).

## **THE MAIN SESSION INDEMNITY TO DISTRIBUTORS AND «ILLICIT COMMISSIONS»**

This year the main session (Friday, 12 June) is devoted to **two different themes** of general interest for those involved in distribution:

- recent developments of case law in some national jurisdictions which extend to **distributors**, acting as resellers, a **termination indemnity** similar to that of commercial agents (morning session);
- the problem of dealing with situations where commissions paid to agents may contravene rules aiming at combating bribery (afternoon session).

### **Morning session: the distributors' termination indemnity**

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Distributors who act as buyer-resellers and not as mere intermediaries play a role which is, in some cases, very similar to that of commercial agents. By introducing the supplier's products in a new market they often develop a customer base of which the supplier may benefit after contract termination. It is therefore not surprising that distributors wish to be indemnified for their efforts at the end of the contract. In some countries the distributors are protected through specific laws (e.g. Belgium) or by applying the same rules to agents and distributors (e.g. some Arab countries and some countries of Central America). In most countries no right to indemnity is foreseen, but in some cases the courts have recognized such a right, mainly by extending the rules on agency to distributors.

The session will first give an overview of national laws which recognize the distributor's right to a termination indemnity and thereafter deal with national case law on this issue. The speakers will in particular consider:

- The judgment of the Swiss federal Court of 22 May 2008, which affirms the right of the distributor to obtain the indemnity foreseen for commercial agents
- Several judgments by Portuguese courts which extend the indemnity due to commercial agents to distributors
- New trends in Spain towards recognizing a goodwill indemnity to distributors

Finally, possible strategies for suppliers and distributors for avoiding (or warranting) an indemnity will be discussed.

### **Afternoon session: Illicit commissions**

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In the last years there has been an increasing trend towards combating bribery, which also reflects on the drafting and negotiating of agency agreements, to the extent that in certain cases apparently innocent deals may entail unforeseen responsibilities for the principal. On the other hand, principals may in some cases invoke the violation of rules against bribery as an excuse for not paying intermediaries who have performed a fully lawful deal.

The session will first deal with the legal framework (OECD Convention on combating bribery, the Foreign Corrupt Practices Act of the US and other domestic laws) and with private initiatives (like the ICC Recommendations on combating extortion and bribery) and with the issue regarding payment of commissions to intermediaries who use them for corruption purposes.

Thereafter the speakers will deal with arbitral case law on illicit commissions, in order to see where arbitrators put the borderline between lawful and unlawful commissions.

The session will be concluded with a discussion about possible guidelines that a responsible principal should follow when dealing with situations which may give rise to conflict with anti-bribery rules.

### **THE THREE SPECIALIZED WORKSHOPS**

The second session (Saturday June 13, morning) will deal with three parallel **workshops** on the following themes:

#### **Critical issues in EC antitrust law in view of the revision of Regulation 2790/1999**

This workshop intends to analyze two critical issues which could be resolved within the context of the revision of regulation 2790/1999 which should be replaced in 2009.

These issues are:

- The **application of the antitrust rules to agency agreements**, where recent developments in a very special industry (oil distribution) tend to establish principles which are not appropriate for «normal» agency agreements, and thus risk to create great uncertainty for principals and agents when negotiating their contracts.
- The treatment reserved to **franchising agreements** in the vertical restraints regulation, which do not at present sufficiently take into account the specific needs of such contracts, particularly as regards the need of a strict control over the network (e.g. as regards possible internet sales by franchisees).

IDI will establish in the framework of this session a recommendation to be sent to the European Commission, explaining the point of view of our association.

#### **Dealing with distribution contracts in the Arab countries**

For many foreign exporters negotiating contracts with agents and distributors in the Arab countries is a complicated business, particularly because of the difficulty of understanding the local laws and the way they are implemented in practice. The workshop will give the possibility to meet a number of experts of these countries who will give valuable information about law and practice of distribution in the Arab world.

#### **Developing franchising internationally: Drafting and negotiating master franchising and area development (multi-unit) agreements**

Franchising networks are expanding across the borders and franchisors must choose the most appropriate strategies for approaching foreign markets. The speakers will discuss the two main alternatives, master franchising and area development agreements and a number of connected issues, such as the choice of applicable law and the selection of the most appropriate means for dispute resolution.

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For more information see the practical information hereafter.

More details about these events can be found in the following pages as well as in the IDI website ([www.idiproject.com](http://www.idiproject.com))

FRIDAY, 12 JUNE 2009

## TWO TOPICAL ISSUES IN INTERNATIONAL DISTRIBUTION: GOODWILL INDEMNITY AND ILLICIT COMMISSIONS

### MORNING SESSION

#### Goodwill indemnity in distributorship contracts: recent trends

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- CHAIRMAN** **Didier Ferrier**, Professor of Law, University of Montpellier; Vice-President IDI
- 09:15-09:35 **Welcome.**  
**Josep Maria Balcells**, Council Member ICAB Responsible for the International Department  
**Fabio Bortolotti**, Chairman IDI
- 09:35-09:50 **Presentation of the IDI website.**  
**Silvia Bortolotti**, General Secretary IDI
- 09:50-10:10 **General introduction: is the distributor (reseller) entitled to be compensated for the customer base developed during the contract?**  
The theoretical question: is there a sort of unjust enrichment of the supplier which should be compensated? The answers given by statutory rules: laws protecting distributors (Belgium); laws which dictate common rules for agents and distributors (Lebanon, some Arab countries, Central America). National jurisprudence which extends rules on agents to distributors: Germany, Switzerland, Portugal, Spain, etc.  
**Jaap van Till**, Van Till Advocaten, Amsterdam
- 10:10-10:30 **The indemnity to distributors under Austrian law.**  
Cases where Austrian courts extend the rules on the agent's indemnity to distributors. The method of calculation of the indemnity. The protection granted by § 454 of the Austrian commercial code.  
**Gustav Breiter**, Viehböck Breiter Schenk & Nau, Vienna
- 10:30-10:50 **The indemnity of distributors in Swiss law after the judgment of 22 May 2008 of the Federal court.**  
The judgment of 22 May 2008 of the Swiss Federal Court has reversed the previous jurisprudence which excluded the application by analogy to distributors of the rules on goodwill indemnity applicable to commercial agents. To what extent this principle is to be applied and how is the indemnity to be calculated?  
**André Thouvenin**, Thouvenin Rechtsanwälte, Zürich
- 10:50-11:10 **Coffee break**
- 11:10-11:30 **New trends in Portuguese case law regarding the distributor's indemnity.**  
Several judgments of Portuguese courts have recognized the principle that distributors may, in certain cases, be entitled to the goodwill indemnity provided by law for commercial agents.  
**João Gutierrez**, CNCM Sociedade de Advogados, Porto
- 11:30-11:50 **Spanish case law on distributors and a possible new statutory rules protecting distributors.**  
Spanish courts have recognized the principle that distributors may, in certain cases, be entitled to the goodwill indemnity provided by law for commercial agents, but there is the possibility to exclude it by agreement between the parties. On the other hand, the Government is preparing a preliminary draft of a Commercial Distribution Contracts Act with special provisions on goodwill indemnity for distributors.  
**Ignacio Alonso**, Advocacia Abogados, Madrid
- 11:50-12:20 **Conclusions: What are the appropriate strategies for suppliers?**

First solution: avoiding the distributor's law by choosing a different law; effectiveness of this approach and need to consider jurisdictional problems. Second approach: developing clauses which justify termination without indemnity (e.g. minimum turnover obligations). Third solution: choosing a different type of contract.

**Fabio Bortolotti**, Buffa Bortolotti & Mathis, Torino

12:20-13:00 **Discussion**

13:00-14:00 **Lunch**

## **AFTERNOON SESSION:**

### **Rules against bribery and "doubtful" commissions paid to agents and other intermediaries**

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CHAIRMAN **Francesco Benigni**, General Manager ECLA

14:00-14:20 **International and domestic rules aiming at combating bribery, with particular reference to contracts with intermediaries.**

The general legal framework: OECD Convention on combating bribery, the Foreign Corrupt Practices Act of the US and other domestic laws. The ICC Recommendations on combating extortion and bribery. To what extent do these rules apply to contracts with foreign agents and other intermediaries?

**François Vincke**, Chair, ICC Commission on Anti-Corruption

14:20-14:40 **Agreements with agents who might make an illicit use of the amounts received. What is the extent of the principal's responsibility?**

To what extent is the principal obliged to verify if the commissions he pays to his agent or intermediary are used for illicit purposes? What precautions should be taken in order to avoid problems. Possible due diligence by specialized institutions.

**Pedro Santos Montoya**, Chief Compliance Officer of the European Airspace and Defence company (EADS), Spain

14:40-15:00 **The consequences of bribery - who has the standing to sue?**

In case the intermediary has effected illicit payments, it is clear that the contract with the intermediary is void. How about the contract with the customer? Is this contract void? Does the customer have damage claims? Does a competitor have damage claims?

**Stephan Spehl**, Baker McKenzie, Munich

15:00-15:30 **Coffee break**

15:30-15:50 **Illicit commissions and international arbitration: how do international arbitrators look at the problem.**

There are several arbitral cases dealing with the issue of "illicit" commissions. It is discussed whether the matter of bribery is arbitrable, but the general trend is that arbitrators may deal with the matter and will apply the rule according to which corruption entails the nullity of the respective contract. More complicated are borderline cases where it is not clear if the commissions were used for the purpose of bribing.

**Emmanuel Jolivet**, ICC Court of arbitration

15:50-16:10 **Conclusions: possible guidelines for principals.**

How can principals avoid pitfalls when dealing with critical situations? Due diligence by specialized institutions. Clauses making clear that the agent/intermediary undertakes not to pay any bribe or other illegal payment. Avoiding excessive commissions, unless objectively justified.

**Leslie Thiele**, Whiteman Osterman & Hanna LLP, Albany (NY)

16:10-16:30 **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/docs/individual\\_contacts\\_2009.pdf](http://www.idiproject.com/docs/individual_contacts_2009.pdf)

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 2008 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 (21:00)**

On Friday evening (June 12, 2009) a gala dinner will be held at the restaurant Barceloneta, c/L'Escar 22, Moll dels pescadors.

Entry by ticket. Ticket price: € 100 for person (VAT included).

## **SATURDAY, 13 JUNE 2009**

### **FIRST WORKSHOP**

#### **Critical issues in EC antitrust law in view of the revision of Regulation 2790/1999**

The workshop aims at discussing two issues that might be considered when reviewing Regulation 2790/1999. The conclusions of the discussion will be transmitted to the European Commission.

**CHAIRMAN:** **Fabio Bortolotti**, Professor of Law, University of Torino; Buffa Bortolotti & Mathis, Torino; President IDI; Chair ICC Commission on Commercial Law and Practice (CLP)

09:30-09:50 **Agency agreements and Article 81 of the EC Treaty. New developments after the Spanish petrol distribution cases.**

**Belén Arribas Sánchez**, Monereo Meyer Marinel-lo Abogados, Barcelona

09:50-10:10 **Distinguishing between genuine and non genuine agency agreements: is it possible to give practicable guidelines?**

**Edward Miller**, Reed Smith, London

10:10-10:30 **Discussion**

10:30-11:00 **Coffee break**

11:00-11:20 **Selective distribution and franchising. Why the rules on selective distribution should not apply to franchising agreements.**

**Rocio Belda de Mergelina**, Garrigues, Madrid

- 11:20-11:40 **Franchising and Internet. Is it appropriate to apply the same principles which have been established for selective distribution?**  
**André Lombart**, CMS DeBacker, Brussels
- 11:40-12:00 **Proposals for a revision of Regulation 2790/1999.**  
**Fabio Bortolotti**, Professor of Law, University of Torino; Buffa Bortolotti & Mathis, Torino; President IDI; Chair ICC Commission on Commercial Law and Practice (CLP).
- 12:00-12:30 **Discussion and approval of the Recommendation to be sent to the European Commission.**

## **SECOND WORKSHOP**

### **How to deal with agency, distributorship and franchising contracts in the Arab countries: the law and its practical application**

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- CHAIRMAN:** **Olga Szejnert**, Drzewiecki, Tomaszek & partners, Warsaw
- 09:30-09:50 **General Introduction: how to approach agency and distributorship contracts in the Arab countries.**  
**Florian Amereller**, Amereller Legal Consultants, Dubai
- 09:50-10:10 **Egypt**  
**Maged Ackad**, Ackad Law Office, Cairo
- 10:10-10:30 **Saudi Arabia**  
**Stephan Jäger**, Amereller Legal Consultants, Munich
- 10:30-11:00 **Coffee break**
- 11:00-11:20 **United Arab Emirates**  
**Sven Klaiber**, Germany Trade and Invest, Cologne (formerly BFAI)
- 11:20-11:40 **Tunisia**  
**Sami Huerbi**, Dakhlaoui, Huerbi Avocats, Tunis
- 11:40-12:00 **Libya**  
**Mahmoud Hamza**, Mercedes Benz Egypt SAE
- 12:00-12:15 **The view of a European lawyer dealing with Arab countries**  
**Paolo Lombardi**, Buffa Bortolotti Mathis, Torino
- 12:15-12:45 **Discussion**

## **THIRD WORKSHOP**

### **Developing franchising internationally. Defining and controlling the right international expansion model (master, area development, etc.) strategically and legally.**

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- CHAIRMAN:** **Marco Hero**, Tigges Rechtsanwälte, Düsseldorf
- 09:30-09:50 **General Introduction: Basics of International Franchise Expansion.**

Are you ready for international growth? What are the key questions your client should answer together with legal counsel before going abroad with a franchise model?

**Marco Hero**, TIGGES Rechtsanwälte, Düsseldorf

09:50-10:10

**Key elements of master franchise agreements.**

The Unidroit guide on International Franchise agreements. How to structure a masterfranchise agreement. The main issues to consider when drafting the agreement.

**Lena Peters** Unidroit, Rome

10:10-10:30

**Area development and area representation strategies.**

Besides masterfranchising, area development and area representation provide two alternative expansion strategies for franchise-systems. What are the main elements and key differences of these two distribution models.

**Derk van Dam**, Ludwig & van Dam, Rotterdam

10:30-11:00

**Coffee break**

11:00-11:20

**How to co-ordinate legal services for an international franchise-system.**

As legal counsel you are limited to your jurisdiction. However, many franchise-systems do not want to deal with several lawyer nor to they have the ability to find the right specialist abroad. How can you support your franchisor client in this situation responsibly and efficiently.

**Mercedes Clavel**, JAUSAS, Barcelona

11:20-11.40

**The issue of applicable law in international franchising.**

The problem mainly arises when franchisor and franchisee belong to different countries: direct franchising and multi-unit franchising. Is it possible (or desirable) to choose the law of the franchisor's country? When will this choice be effective? How to warrant the greatest possible uniformity to contracts governed by different laws?

**Silvia Bortolotti**, Buffa Bortolotti Mathis, Torino

11:40-12.00

**Dispute resolution strategies in international franchising: arbitration or ordinary jurisdiction?**

In international franchise agreements, the right choice of venue significantly influences the efficiency of enforcing or defending claims. Many countries do not accredit nor enforce foreign public judgments. Arbitration can be an interesting option to be considered before you start a cross-border franchise.

**John Baer**, Sonnenschein Nath Rosenthal, Chicago

12:00-12:30

**Discussion**

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**Organizing Committee:**

**Fabio Bortolotti**, Buffa Bortolotti & Mathis, Torino

**Silvia Bortolotti**, Buffa Bortolotti & Mathis, Torino

**Ignacio Alonso**, Advocatia Abogados, Madrid

**Belén Arribas Sánchez**, Monereo Meyer Marinel-lo Abogados, Barcelona

**Sönke Lund**, Monereo Meyer Marinel-lo Abogados, Barcelona



## PRACTICAL INFORMATION

- Venue:** ICAB (Col·legi d'Advocats de Barcelona), Mallorca 283, E-08008 Barcelona
- Language:** English
- Documentation:** A CD Rom containing all documents discussed at the conference.
- Fee:** 800 € First participant  
250 € for additional participants within the same premises of the same organization as the first participant (i.e. having the same address and VAT code)  
200 € IDI members having a valid subscription on the day of the conference  
The fee includes the coffee break, lunch and documentation.  
ECLA, UIA and ICAB Members: 20% of discount on the total amount. Please specify your membership in the registration form or contact Carlotta Mazzetti at 0039-11-5741123 or editorial.board@idiproject.com  
Please add 20% (VAT) to your payment if you are in Italy.
- Gala dinner:** 100 € per person (VAT included). Please, remember that places are limited and must be reserved in time.

### Continuing Legal Education / Continuing Professional Development Credits

CLE Credits are granted for this event by the following countries:

Austria, Belgium (6 CPD), Denmark, France (EFB-Paris), Germany, Italy, Norway, The Netherlands.

### Registration and cancellation

- Registration on-line:** Registration can be made through the IDI website, at the page:  
<http://www.idiproject.com/conference-registration.ucw>  
In that case, you can pay with credit card or by bank transfer. After complete payment, you will receive a confirmation of your registration by e-mail or fax.
- Registration by fax:** Alternatively, you can fill in the registration form, and send it by fax to:  
IDI Project Srl,  
Via Alfieri 19,  
10121 Torino (Italy)  
fax: + 39 011 574 11 41  
In case of registration by fax, 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:** Credit card (only for on-line registration) or bank transfer. The payment should be transferred with no cost to the organizers.  
NO CHEQUE PAYMENTS WILL BE ACCEPTED.
- Cancellation:** Cancellation request received in writing by IDI Project on or before 2 June 2009 will be subject to a 20% administration charge of the total fees paid. After that date no refunds are possible.

### Hotel Accommodation and Tourist Information

Accommodation is not included in the registration fee.

For your information, the following hotels are close to the venue of Friday 12:

- Hotel Majestic\*\*\*\*\* <http://www.hotelmajestic.es/>  
Hotel Havana\*\*\*\*\* <http://www.granhotelhavana.com>  
Hotel Gallery\*\*\*\* <http://www.galleryhotel.com>  
Hotel Balmoral\*\*\*\*\* <http://www.hotelbalmoral.com/>

## REGISTRATION FORM

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

### WORKSHOPS: (Saturday, 13 June 2009):

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

- I will attend the FIRST WORKSHOP: Critical issues in EC antitrust law in view of the revision of Regulation 2790/1999.
- I will attend the SECOND WORKSHOP: How to deal with agency, distributorship and franchising contracts in the Arab countries: the law and its practical application.
- I will attend the THIRD WORKSHOP: Developing franchising internationally. Drafting and negotiating master franchising and area development (multi-unit) agreements.

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

- IDI Conference (12-13 June 2009):
- € 800: First participant
  - € 250: Second participant
  - € 250: Third participant
  - € 200: IDI member (subscriber), having a valid subscription on the day of the conference.
  - ECLA, UIA and ICAB Members: 20% of discount on the total amount.
- Please add 20% (VAT) to your payment if you are in Italy.
- € 100 (VAT included): Ticket for the gala dinner (please, specify the number of tickets: .....)
- TOTAL AMOUNT: €: .....

### PAYMENT:

Please make a bank transfer marked «12-13 June 2009 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](mailto:privacy@idiproject.com)