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NEW CHALLENGES IN INTERNATIONAL DISTRIBUTION

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Workshop 2
The relationship between the distributorship contract and the contracts of sale between supplier and distributor

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I. Introduction

1. A distribution agreement necessarily implies a flow of sales from the supplier to the distributor.

However, the distribution agreement as a framework contract and the successive sale agreements concluded for the purpose of the distribution have a ***different content*** and can be governed by ***different laws***.

2. Indeed, the framework ***distribution agreement*** deals with the main rights and obligations of the parties, whereas the ***sales agreements*** are meant to transfer the property of the contractual products from the supplier to the distributor.

3. In an international context, the ***distribution agreement***, on the one hand, is governed by the law or the principles (like Unidroit principles, Lex Mercatoria or CESL) chosen by the parties or by the law determined by the conflict of laws rules (i.e. in the EU, Rome I Regulation).

In this regard, it is important to evoke the mandatory character of the Belgian Act of 1961 regarding the unilateral termination of exclusive distribution agreements concluded for an indefinite period of time. In fact, this legal act will be applicable, despite a choice of law by the parties according to its article 4 which states that *"If the dispute is brought before a Belgian court, the court will exclusively apply Belgian law"*.

On the other hand, ***sales agreements*** are, most of the time, governed by the supplier's general conditions applicable to all customers.

4. However, some issues require a different approach when the customer is a distributor who is bound to the supplier by a long term framework contract. Therefore the two sets of contractual dispositions that are necessary for a distribution relationship must be ***coordinated***.

5. In order to deal with this topic, we will first deal with the ambivalent nature of the distribution agreement i.e. the fact that the distribution of a product requires a framework agreement between the distributor and the supplier *and* a flow of sales agreements to transfer the products from the supplier to the distributor (section II).

Then we will deal with the issue of the binding character of general conditions which is often a source of dispute between the parties (section III.1).

After that we will deal with the possible contradictions that may arise from this ambivalent nature. In this matter, we will specifically deal with the case law concerning general conditions and the choice of law and jurisdiction clauses (section III.2).

Finally, we will briefly endeavor to assess if the European Common Sales law, which is today's topic, could be a useful tool in distribution law (section IV).

II. The ambivalent nature of the distribution agreement

6. The usual manner to structure a distribution agreement is to have a framework contract which deals with the main rights and obligations of the parties and a flow of sales agreements for the supply of goods to the distributor which are concluded within this framework contract.

Generally speaking, the ***distribution agreement*** is ***<u>defined</u>*** as:

> *"an agreement by which the supplier grants, to one or more distributors, the right to sell the products manufactured or distributed by the supplier, in their own name and for their account"*.

By such an agreement, the distributor and the supplier formalize their mutual willingness to ***<u>behave on the market as distributor and supplier</u>***, as part of the same network. Therefore, the distributor is granted ***<u>special rights</u>*** to promote and sell the supplier's products in his own name and for his own account. This kind of commercial agreement requires a structured framework that regulates the relationship between the parties.

7. The distribution agreement as a framework contract itself shall not be confused with the successive operations of buying-selling that can emerge within this framework.

This practical situation has been enshrined by ***<u>Belgian case law</u>*** and has become a ***<u>leading principle</u>*** in practicing Belgian distribution law. For example, in 2011, the Court of Appeal of Liege reiterated that:

> *"The essential characteristic of the distribution agreement is that buying-selling operations concluded between the parties in order to ensure the selling of the products of the supplier by the distributor are part of a contractual framework… A distribution agreement shall not be confused with successive mere buying-selling operations."* (*<u>1-</u> Liege,* 23/05/2011 <u>www.cass.be</u> 2010/RG/611).

8. This approach was also ***<u>confirmed by the Belgian Court of Cassation</u>***, e.g. in a case concerning the termination of an exclusive distribution contract between an Italian supplier and a Belgian distributor (<u>2-</u> Cass. 22 December 2005, Pas 2005, I, 2587).

In this case, the general sale conditions contained a ***jurisdiction clause in favor of the Italian court*** of Varese. On this ground, the judges of the Belgian first instance and appeal both declared their absence of jurisdiction.

It had been decided that the claims of the plaintiff seeking

1) payment of compensation because of undelivered orders,
2) * the reimbursement and the return of the stock
   * the payment of compensation because of the immobilization of the capital invested in the stock and
   * the payment of compensation because a loss of profit on the products in stock

were not related to the distribution contract, but to the sales contracts and that the Belgian courts were therefore without jurisdiction to deal with such requests because of the jurisdiction clause inserted within the sale contracts.

The appeal decision was challenged before the ***Court of Cassation***.

First of all, the Court stated that:

> *"Such a distribution agreement constitutes a framework contract that differs from the successive buying-selling agreements that are concluded between the parties (…)"*.

Then the Court of Cassation considered that the disputes were directly related to the distribution agreement and not to the sales agreement:

* Concerning the ***undelivered orders***, according to the Court of Cassation, the ***obligation of the supplier to provide goods*** to the distributor results directly from the distribution agreement and is an essential element thereof since it is the ***corollary of the right of the distributor to sell*** the goods to third parties.

* Concerning the claims related to the ***stock***, the Court stated that the ***obligation of the supplier to provide goods*** to distributor, implies the ***obligation for the distributor to sell these goods*** in order to realize the purpose of the distribution. In case this ***entails the constitution of a stock***, the rights and obligations related thereto, result from the distribution itself.

Therefore the Court considered that the Belgian judge should have declared himself competent because the jurisdiction clause in favor of the Italian court contained in the sales contract was not applicable to these issues directly related to the distribution agreement.

9. It clearly appears in case law that there are two types of contract for the purpose of the distribution. However it is up to the judge to interpret their scope of application and the scope of application of their clauses. The case decided by the Court of Cassation in 2005 also illustrates that the content of these two contracts is usually very different.

As a matter of fact, the distribution agreement deals with the ***main rights and obligations of the parties arising strictly from the distributorship***, such as:

- The right of the distributor to sell and promote the products of the supplier
- The products
- The territory / the clients
- The exclusivity or the shared exclusivity with other distributors
- The quotas the distributor undertakes to reach each month/year.
- Duration of the contract
- Non competition clause
- Promotional contribution/investments of the distributor
- Discounts on products
- Confidentiality
- Trademarks
- The way the distributor places his purchase orders to the supplier
- After sale service
- Termination
- The products in stock after termination
- To equip the shop in a particular way
- Assignment
- Jurisdiction clause and choice of law

On the other hand, the sales contracts and the general conditions applicable to the flow of sales concluded within the framework of the distribution agreement contain other ***contractual terms that are linked to the proper sale***, like

- The terms of supply
- Prices
- Payment terms
- Time and place of delivery
- Transfer of ownership and title or applicable Incoterms
- The quality and conformity of the goods
- Product liability
- Warranty
- Etc…
- And also jurisdiction and applicable law

10. Since the distribution agreement and the sales contracts have different contents, the notion of framework contract implies, for example, that Belgian doctrine and case law have never considered that a distribution agreement can be void in the ***absence of determination, from the beginning, of the sales price*** of the products in the distribution agreement contrary to the solution accepted in France in older case law (P. Kileste, Droit de la distribution, *La concession de vente*, Anthemis, Liège, 2009, p.11).

Indeed, the Belgian civil code rules concerning price determination in sales agreements are to be applied to these contracts only, and not to the framework distribution contract in which the price is not an essential element.

(art. 1583 : "Elle (la vente) est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé. » : the sale is concluded from the moment that the parties have agreed upon the good and the price, even if the good has not been delivered yet, nor the price paid)

III. Possible conflicts arising between clauses

11. Obviously, the risk of a ***conflict*** between the framework contract and the successive sales contracts ***is to be avoided***.

What would happen if the framework distribution contract provided for a jurisdiction clause or a choice of law clause but that the disputed sales agreement did not or the contrary?

12. The distribution agreement and the sales agreements are ***independent*** from each other. Indeed, since they ***serve a different purpose***, the clauses regulating to one contract should not affect the other one.

Moreover, these two different kinds of contract are ***not regulated by the same rules***. In my opinion, for instance the CISG or the CELS could not be applicable as such to the international distribution agreement. As a matter of fact, these rules have a specific sphere of application, i.e. the sale of goods which entails the obligation for the supplier to deliver the goods and to transfer the property and for the buyer to take delivery and pay the price.

The law applicable to the distribution contract has therefore to be defined according to the international private law rules, and more in particular according to the Rome I Regulation.

The applicable law could be the general provisions regarding contractual obligations or, if they exist, specific laws concerning distribution contracts. This is in particular the case for Belgium where the Law of 1961 concerns the unilateral termination of exclusive distribution agreements concluded for an indefinite period of time. Other issues concerning a distribution agreement are regulated by the Belgian civil code, especially the part concerning obligations.

For the sake of completeness, I have to mention that some case-law has applied CISG to the framework distribution contract.

13. In practice, the contents of one contract ***may in any case have an influence*** on the other one.

For example, the ***jurisdiction*** or the ***choice of law*** clause contained in the distribution agreement could expressly provide that it is also applicable to the sale agreements. However the jurisdiction clause is often broadly formulated e.g.: *"all disputes arising out of the relationship of the parties are regulated by Italian law"*.

This kind of wording implies that the judge will have to interpret it …

In such circumstances, international distribution contracts can generate a sort of never-ending 'battle of forms'.

Indeed, ***on the one hand***, there can be contradictions between the general sales conditions and the general purchase conditions. These contradictions are very often a source of dispute.

On the other hand, there can also be conflicts between the terms of the framework distribution agreement and the sales agreement itself, or the general conditions related to it. For this purpose, inserting the supplier's general conditions in the distribution agreement could offer legal integrity.

We will hereafter first deal with the binding character of general conditions and see some examples of case-law regarding conflicting clauses. Then we will deal with some case-law concerning more in particular jurisdiction clauses.

III.1. The binding character of general conditions

14. In Belgian law, this issue is regulated by the general principles on obligations in the Civil Code and by case law. Indeed, there is no provision in the Civil Code regarding the binding character of general conditions.

According to consistent case law, general conditions are not binding for the recipient unless this latter has been made aware of them and has accepted them. (*4 bis* - Les conditions générales, Questions spéciales, Anthemis 2009, 11-18).

In others words, general conditions must become part of the contractual terms.

There are thus ***two necessary and cumulative conditions*** to make contract terms binding on the other contractual party:

1) First of all, the contracting party must have had a ***fair and real possibility to become aware*** of the existence of the general conditions and of their content, before or at the latest, at the moment of the conclusion of the contract. Therefore, general conditions cannot be considered as agreed between the parties when they are not communicated at the conclusion of the contract (5-Comm. Tongres n° A/04/01960, 25 January 2005, Revue@dipr.be 2009, liv. 4, 51) or if the other party has not been able to be acquainted with them. (6-Civ. Furnes n° 09/494/A, 10 mars 2011 NjW 2011, liv. 247, 546).

2) Secondly, the contracting party must have ***accepted*** them. The acceptance can be express (signature of the general conditions itself or of the document mentioning it) or implied, but it must be certain (which is left to the appreciation of the judge, e.g. in case of silence of the other party in circumstances that makes the acceptance clear) .

Pursuant to these principles, a jurisdiction clause in the supplier's general condition must be communicated to the distributor "in tempore non suspecto" and must be accepted as specified by the Commercial Court of Brussels (*14-* 22.06.1989, *RDC* 1990,702).

Therefore, when it is proven that the contracting party had a fair and real possibility to become aware of the general conditions, no one may claim ignorance of the content of the general conditions when these are printed on the back of documents that he has been sent with a clear reference to them on the front of the said documents (7-Brussels, 31 mars 2006, www.cass.be). Of course, they must also be legible which, in practice, is not always the case. (8- Comm. Brussels, 11 January 2008, *DAOR,* 2008, 109).

15. Regarding B2B transactions between parties that have a *continuous commercial relationship*, it is not required that the general conditions are mentioned at the conclusion of every contract if it is previously demonstrated that the other party is aware and has accepted the general conditions consistently applicable.

Moreover, *article 25, al. 2 of the Belgian Code of Commerce* provides that «purchases and sales can be proven with an accepted invoice… ». For this reason, if an invoice is not protested upon receipt, a merchant may not contest the application of the general conditions printed on the invoice.

16. In case of a clash between the general conditions of both parties, what happens with the contradictory, incompatible clauses?

First it must be verified if the dispute does not concern an ***essential element*** of the contract because in this case, the whole contract shall be void.

Then, there are several conjectures in case law with respect to the binding character of general conditions:

- A few decisions give *priority to the buyer's general conditions* based on article 1602, 2 of the civil code providing that ambiguous agreement shall be interpreted against the seller. However this is a rule of interpretation of agreements whose validity is not disputed, which is precisely the question.

- With ***the theory of the neutralization of the contradictory terms***, due note is taken of the lack of agreement of the parties on the matter covered by the contradictory clauses. Therefore, the common rules (of the civil code) will be applicable in this case (*9-*Comm. Tongres 29 avril 2008 NjW 2011, liv. 243, 388). For example, in a case where the general conditions of both parties were contradictory regarding the competent jurisdiction, the commercial court of Brussels decided that Article 17 of the Rome Convention (now article 23) cannot be applied since the intention of the parties is not totally clear in the general conditions of sale. For this reason article 5, I° of BXL I Regulation must be applied (*3-*Tribunal de Commerce de Brussels 20/12/1991, RDC 1992, 919; *4-* Anvers (8e ch.) n° 2007/AR/2696, 7 May 2008 Limb. Rechtsl. 2008, liv. 4, 296,).

- ***The 'first shot' theory*** gives priority to the offerer's general conditions that should be applicable as soon as an agreement has been founded on the essential elements of the contracts. However this theory seems too unilateral and is not practically applicable in case of a counter offer. (*10-*Gand (7e ch.) 16 février 2009 T.G.R. - T.W.V.R. 2009, liv. 3, 176).

- On the contrary, ***the 'last shot' theory*** gives priority to the last document upon which the parties have given their agreement although it can be hard to determine when the negotiations have really ended. Several decisions have applied this theory considering that it is the most consistent with the rules about offer and acceptance. (*7-*Comm. Brussels, 11 January 2008, DAOR 2008, 109).

Priorities given to the buyer's general conditions and the 'first shot' theories have been disapproved by some courts and some authors (*7-*Comm. Brussels, 11 January 2008, DAOR 2008, 109, note L. Ballon 'The Battle of forms', p.112).

Therefore, by way of an example, the Commercial court of Mons has stated that if both parties use their own terms, only a ***combination of the theory of the neutralization and the theory of the last shot*** can be practically applied and if there is no reason to uphold the conditions of one over the conditions of the other, common law should be referred. In the case submitted to the Commercial Court of Mons,
* the seller has first referred to his own general conditions,
* then the buyer has ordered goods and referred to his general conditions,
* then the seller has confirmed the order continuing to refer to his general conditions.
Therefore, applying both theories:
* since both parties have been willing to apply their own conditions,
* since the seller has not accepted the conditions of the buyer, and,
* that it follows from the circumstances that there is no reason to uphold the conditions of the seller over the conditions of the buyer,
the court decided that common law should be referred to.
(*10* - Comm. Mons (2e ch.) n° A/08/441, 6 November 2008 DAOR 2009, liv. 89, 49).

III.2. Examples of conflicting clauses in case law: jurisdiction clauses

* French case law

17. In this case, the German supplier terminates the distribution agreement with his French distributor. The French distributor sues him before the French courts in order to obtain indemnities.

The German supplier invokes the absence of the jurisdiction of the French court because the 'commercial documents' (i.e. the ***general conditions*** related to the sale agreements) contain a jurisdiction clause in favor of a German court. Even if the binding character of such commercial documents is doubtful (indeed, the supplier's conditions/documents were unilateral) and has not been discussed, the judge of appeal decided that the ***clause was not only applicable to the sales but also to disputes concerning termination of the distribution*** because

- it emerges from the wording of the clause that it was applicable to all disputes arising out of the relationship of the parties,
- and because the framework distribution agreement was silent on this matter.

Therefore, the judge considered that the parties had only dealt with this issue through the commercial documents and that they had to be applied.

The Court of Cassation confirmed the appealed decision (*11-*Cass.fr., 1ère ch civ, 6 mars 2007, *Blaser Jagdwaffen c. Nemrof Frankonia,* www. Jidl.net, 2009; v.9, n°2).

The decision would have certainly been identical if the supplier's conditions had been expressly approved and signed by the distributor disregarding the general wording of the clause. Accepting these conditions, the supplier should have entered a reservation on its broad wording.

* Belgian case law

18. In similar cases, the Belgian courts took the opposite decision.

In line with the Court of Cassation case law mentioned earlier (*decision of 22 December 2005, whereby the Court considered that the jurisdiction clause in favor of the Italian court contained in the sales contract was not applicable to the issues directly related to the distribution agreement*), the court of appeal of Antwerp decided that the provision inserted in the distribution contract and according to which "***the agreement is subject to our general sale conditions***" must be ***interpreted restrictively*** and does not entail that the framework distribution contract is also subject to the jurisdiction clause contained in the general conditions.

In the same line, the court of appeal of Ghent also decided that a ***jurisdiction clause contained in the general sales conditions*** is ***only binding*** upon the parties ***with respect to issues related to the sale, delivery and payment of the products as such*** (*13-*Antwerpen, 23/10/2006, RW, 2009-10, liv 34, 1451; *12*-Gent, 22 may 2005, Revue@Dipr 2006/4, p.64).

Similarly, the Commercial Court of Brussels decided that the jurisdiction clauses that are pre-printed on writing paper that indicate the competent judge in case of litigation about payment or delivery of goods, do not bind the parties in the framework of their distribution relationship since ***the contracts have an essentially different character*** (*15-*Comm. Brussels 19/06/1988, *Droit de la distribution* 1987-1192, 1994, 106, *16-*Comm. Brussel 10 september 1991, *RDC* 1995, 418; WILLEMART en DESTRYCKER, *De concessieovereenkomst in België*, Antwerpen, Kluwer Rechtswetenschappen, 1996, 22).

III.3. Conclusion

19. To avoid interpretation and an unexpected application of a clause (to the distribution contract whereas the disputed clause was in the sale agreement or the general conditions), drafters should ***avoid general worded clauses*** and ***define the scope of application*** of the jurisdiction or the choice of law clause precisely and finally, ensure that there is ***no contradiction*** between the distribution agreement and the sales agreements.

IV. The applicable law: is the CESL an appropriate tool for distribution contracts?

IV.1. The CESL (Common European Sales Law) "at a glance"

20. Trade in goods and services is regulated by the law of the Member States. Despite harmonized implementation in some areas, the disparities between national contract laws still exist and they are a major obstacle to cross-border transactions within the EU internal market. In cross-border transactions between traders, dealing with foreign laws adds complexity and costs that can dissuade traders from expanding into other Member States. From this statement, the Commission proposed, in October 2011, the draft text of an optional Common European Sales Law (in the form of a Regulation) that will offer a single set of rules for cross-border contracts in all 27 EU member states, including provisions to protect consumers and will be a second contract law regime within the national law of each Member State.

The general objective of the proposal is ***facilitating the expansion of cross-border business*** to improve the establishment and the functioning of internal market and to enable traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.

21. The proposal has a broad scope of application as it can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so. Moreover, in relation to B2C contracts, the proposal comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders.

As the contracting parties would have the opportunity to agree on the use of the CESL – equally accessible to both of them – to govern their contractual relationship, negotiations about the applicable law could run more smoothly in cross-border transactions between traders. As a direct consequence, traders could save on the additional contract law related transaction costs and could operate in a less complex legal environment for cross-border trade on the basis of a single set of rules across the European Union.

22. For the reasons explained above, it sounds obvious to me at least that the CESL cannot be used for a framework distribution agreement. However it could be used as the applicable regime to sales agreements concluded within the framework of a distribution relationship and could have some impact on distribution in this regard.

IV.2. Application of CESL to sales agreements concluded within the framework of a distribution relationship

23. First of all, it is noteworthy that, given that consumers need special protection, the new proposal of regulation makes differences between B2B and B2C contracts, unlike the Vienna convention and that, at the same time it contains specific provisions applicable to traders, which is rarely the case in international instruments.

24. There are special provisions regarding the requirements of examination of the goods and notification of lacks of conformity in a contract between traders; the passing of risks; interests to be paid in case of late payment by traders….

More specifically, regarding ***pre-contractual information*** to be given by a trader dealing with another trader, article 23 provides for a "new" duty to disclose information concerning goods and related services. However, this duty does not apply in the same manner to all traders since article 23 also states that in determining whether the supplier is required to disclose any information, regard is to be had to all the circumstances, including the expertise of the supplier, the nature of the information; the likely importance of the information; … which leave a lot of room for interpretation which can be a source of dispute and also leaves a lot of margin of appreciation to the judge. Moreover, traders from Member States that do not provide for such duty of disclosure in their legislation will be unlikely to subject themselves to such duty.

25. Article 39 concerning ***conflicting standard terms*** is not specific to traders but has a direct link with the binding character of general conditions that we dealt with earlier. The proposed regulation has opted for the ***neutralization theory*** since it provides that :

> *"Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance"*.

26. Article 86 concerning ***unfair contract terms*** in contracts between traders must also be mentioned. Under the regulation, unfair terms are not binding. *In a contract between traders, a contract term is unfair for the purposes of this Section only if: it forms part of not individually negotiated terms within the meaning of Article 7*[i]*;* ***and*** *it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing*. Therefore it seems that this provision only concerns clauses that are obviously abusive but not general conditions that have not been clearly accepted (for this issue, article 39 must be referred to).

27. Compared to the Vienna Convention, the CESL can indeed be an improved instrument regarding sale agreements since it ***covers more issues of contract law*** like prescription, pre-contractual information. However, the text is still quite long, complicated and too uncertain as it makes use of numerous vague notions such as fair dealing and reasonableness whereas traders need quick and simple solutions with minimal scope for interpretation and dispute, but I am sure that the next panel will go into more detail about the content of the draft Europe Common Sales law and the comparison with the CISG.

* * *

[i] Article 7: ***individually negotiated contract terms***

1. A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.
2. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.
4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated.
5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.