



International Distribution Institute

RE-BALANCING DISTRIBUTION AND FRANCHISING AGREEMENTS

**To what extent can “imbalanced” contract clauses
be modified or annulled by the courts?**

**IDI Conference 2023
Bologna 9-10 June 2023**

Protecting the “weaker party” against imbalanced or abusive clauses

Distribution and franchise agreements are almost always concluded between parties having a different negotiating power. Thus, the relationship between supplier and distributor, and especially that between franchisor and franchisee, is generally characterised by an imbalance between the parties.

Lawmakers and courts tend to deal with this issue by protecting in various ways the “weaker” parties against possible abuses of their counterparts. This “rebalancing” of the respective positions can be made by different means:

- Lawmakers can enact protective rules regarding specific situations (such as rules providing minimum terms for termination),
- The Courts can apply general rules (like good faith) in order to annul clauses implying specific situations of imbalance;
- Lawmakers are enacting rules (such as those on abuse of economic dependence) which enable Courts or administrative bodies to invalidate clauses considered to be unbalanced.

How can the invalid clauses be identified?

- The impact of this protective trend varies substantially from country to country, due to the difference of legal rules and principles in force.
- Thus, common law courts tend to privilege the strict observance of the provisions agreed between the parties, while civil law courts are more inclined to “correct” or annul imbalanced clauses.
- However, we can see a common trend in identifying most of the critical situations. This appears in particular when we look at the court cases we have collected.

The main purpose of the conference

We have decided to analyse especially the less foreseeable situations, where the Courts have stated the invalidity of specific clauses on the basis of a general principle, like good faith, imbalance, abuse of economic dependence.

These situations are not easy to identify and this is why we worked out, with the assistance of the speakers involved in this session, a list of cases decided by the Courts and administrative bodies of the various countries.

A general overview of the topics to be discussed

We will not deal with the protective rules which impose clearly identifiable limitations, like notice of termination terms, rules on precontractual information to franchisees, but we will concentrate on issues which imply a discretionary evaluation of the courts. These are:

- Implied exclusivity granted to franchisees: encroachment
- Unbalanced termination clauses
- Validity and effectiveness of post-termination non-compete clauses
- Unbalanced jurisdiction and arbitration clauses
- Clauses aimed at reducing risk of challenge of unbalanced clauses.

Thank you for your attention



Prof. Avv. Fabio Bortolotti
f.bortolotti@bbmpartners.com