Greece

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Table of Contents

INTRODUCTION 1

1. COMMERCIAL AGENCY AGREEMENTS 3

1.1. Legislative Framework: Objectives 3
1.2. Contracting Parties: Concept of Commercial Agent – Material Elements of the Agreement – Scope 4
1.3. Exclusivity 5
1.4. Distinction of the Commercial Agent from Other Forms of Commercial Intermediaries 5
1.5. Rights, Obligations and Duties of the Contracting Parties: Incompatibility 7
1.5.1. Regarding the Commercial Agent 7
1.5.2. Regarding the Principal 8
1.5.3. Incompatibility 8
1.6. Commercial Agent's Fees (Commission) 9
1.7. Formalities 10
1.7.1. Registration with the Competent Tax Authority, Chamber of Commerce and Pension Fund 10
1.7.2. Form of Commercial Agency Agreements 10
1.8. Duration of the Agreement: Chain Agreements 12
1.9. Termination of the Agreement 13
1.9.1. Termination of Indefinite Term Agreements: Termination by Notice (Article 8(3) of the PD) – Immediate Termination (Article 8(8) of the PD) 13
1.9.2. Termination of Limited-Term Agreements: Lapse of Limited Term – Immediate Termination (Article 8(8) of the PD) 14
1.9.3. Termination Due to Death of the Commercial Agent 14
1.10. Clientele Compensation and Further Claims on Behalf of the Commercial Agent 15
1.10.1. Clientele Compensation 15
1.10.2. Further Claims on Behalf of the Commercial Agent 17
1.11. Effacement of a Commercial Agent's Rights 18
1.12. Non-competition Obligation upon Termination of the Agency Agreement 19
1.13. Arbitration Clauses: Applicable Law: International Jurisdiction and Prorogued Jurisdiction 19
1.13.1. Arbitration Clauses 19
1.13.2. Applicable Law 20
1.13.3. International Jurisdiction and Prorogued Jurisdiction 21

2. DISTRIBUTION AGREEMENT 23

2.1. Legislative Framework: *Mutatis Mutandis* Application of the PD in the Exclusive Distribution Agreement 23
2.2. The New Antitrust Regulation 720/2022/EC 25
2.3. Concept and Characteristics of the Distribution Agreement: Criteria – Distinctions 26
2.3.1. Concept and Characteristics of the Distribution Agreement 26
2.3.2. Criteria of the Exclusive Distributor's Integration in the Principal's Network 27
2.3.3. Distinction from the Commercial Agency and Other Intermediation Agreements 29
2.4. Duties and Obligations of the Parties 30
2.4.1. Main Obligations of the Supplier 30
2.4.2. Main Obligations of the Distributor 30
2.5. Distributor's 'Fees' 31
2.6. Form of Exclusive Distribution Agreements: Duration – Chain Agreements – Termination 32
2.7. Clientele Compensation and Further Claims on Behalf of the Distributor 33
2.7.1. Clientele Compensation 33
2.7.2. Further Claims on Behalf of the Distributor 33

INTRODUCTION

The need for manufacturers–wholesalers (suppliers) to supply products en masse and to develop new markets made it essential for them to collaborate with local associates (such as commercial agents–distributors).[1]

All the more since organizational and financial reasons require that agents–distributors are activated in those markets without actually setting up in the same. As a result, suppliers were able to expand their business and increase product sales with the assistance of local associates.[2]

As in all other forms of transactions, the relationships between suppliers and local associates led to respective disputes, thus creating the necessity to regulate the same, placing them under specific framework agreements and subjecting them to the corresponding rules of law. The most widespread forms of such cooperation are commercial agency, exclusive distribution and franchise agreements. This chapter will deal in section 1 with commercial agency agreements and section 2 with distribution agreements.

[1] S.G. Alexandris, *Termination of commercial agency agreements*, www.bahagram.com (2000).
[2] K. Pampoukis, *Introduction to the law of commercial agency agreements*, Armenopoulos 301 et seq. (1999).

1. COMMERCIAL AGENCY AGREEMENTS

1.1. Legislative Framework: Objectives

L. 2765/1941 was the first law to introduce the concept of commercial agents, the conditions that had to be met by professionals (qualifications of candidate commercial agents) and the rules for granting the relevant licenses. It also foresaw the establishment of a disciplinary board which was to examine cases of illegitimate conduct and derogations from professional ethics.

L. 2765/1941 was then amended and supplemented by L. 3814/1958 and L. 307/1976, but it continued to deal solely with procedural matters relating to the conduct of business through imports and/or exports. Consequently, the law left material issues unregulated, such as the termination of the commercial agency agreement and respective consequences, especially in relation to the commercial agent's claims for indemnification.[3]

In 1986, Council Directive 86/653/EEC *on the coordination of the laws of the Member State relating to self-employed commercial agents* was issued and published in Greek in the Official Journal of the EC, L. 382, 21 December 1986, p. 17 (Directive). This Directive required that the legislation of the Member States on commercial agents be brought into line with its provisions.

Greek law was harmonized with the Directive by means of Presidential Decree 219/1991 *on Commercial Agents in compliance with Directive 86/653/EEC* (PD), which was supplemented by Presidential Decrees 264/1991, 249/1993, 88/1994 and 312/95. Furthermore, additional reforms were enacted by virtue of Law 3557/2007. Note that the provisions of the PD also applied to the rights and obligations deriving from agreements concluded before it was entered into force on 1 January 1994 (*see* Article 11(2) of the PD).[4]

One interesting aspect of the provisions of the Directive was the option (discretion) given to national legislators under Article 17 thereof to select between two systems (the German and French) of calculating clientele compensation. The Greek legislature, like the majority of community legislatures, adopted the German system (lump sum compensation) over the French (full restitution of the losses suffered by the commercial agent due to the termination of relations with the principal), which was only adopted by France, the UK[5] (which follows a mixed system whereby the parties are permitted to freely select between the two, and if they fail to do so, the French

[3] On these regulations *see* K. Pamboukis, *Commercial agency. A Historical introduction*, *core of commercial agency law*, EpiskED 703 (1995).
[4] *See* Supreme Court 163/2011, DEE 2011, p. 931; Piraeus Court of Appeals 175/2011, DEE 2011, p. 831.
[5] Although UK is in the process of reviewing the application of retained EU law following the UK's withdrawal from the European Union, the Commercial Agents Regulations 1993, which implement Council Directive 86/653/EEC and govern the relationship between commercial agents and their principals in the UK, remain in force – https://www.legislation.gov.uk/uksi/1993/3053/made.

system applies) and Ireland.[6] More specifically, Article 9 of the PD provides that the amount of the commercial agent's indemnity (clientele compensation) cannot exceed the annual average of his fees. The PD further provides that such average is calculated on the basis of fees collected over the preceding three years and, in case the agreement was short-lived, the average of the respective period.

However, Greek law is harmonized with the provisions of the Directive, and the commercial agency agreements in Greece are now governed by the PD as in force.

1.2. Contracting Parties: Concept of Commercial Agent – Material Elements of the Agreement – Scope

In commercial agency agreements, the contracting parties are, on the one hand, the principal and, on the other hand, the commercial agent. Article 1(2) of the PD states that a commercial agent is a self-employed intermediary who has continuing authority (for a limited or indefinite term) to negotiate the sale or purchase of goods on behalf of another person or to negotiate and conclude such transactions in the name and on behalf of the same in return for a fee (commission).[7]

The material aspects of a commercial agency agreement are, therefore: (a) it is bilateral, (b) the stability/permanency of the relationship, (c) the continuing provision of services by the commercial agent, (d) the commercial agent is independent and can freely provide such services (he can freely organize his commercial activities and has his own commercial premises) and (e) the commercial agent acts in the name of and on behalf of the principal. This last feature (e) is also the main characteristic of this type of agreement. Those before it ((a), (b), (c), (d)) are not always standard or certain.[8] It is consequently clear from the foregoing points that the commercial agent executes the ancillary task of mediating sales in the name and on behalf of the principal.[9]

Despite the fact that there is no express provision in the PD to this effect, it also regulates agency agreements regarding the provision of services.[10] Article 14(4) of L. 3557/2007 already expressly states that the PD applies *mutatis mutandis* to commercial agency agreements that relate to the provision of services.

[6] On these provisions and a comparison thereof, *see* N. Tellis, *The commercial agent's clientele compensation*, p. 12 and in particular pp. 275 et seq. For information about the relevant legislation of EU Member States, *see* N. Tellis, Annexes A and B, pp. 348 et seq. (1997).

[7] *See* ECJ, Decision of 21 Sep. 2018, C-452/17 Reference for a preliminary ruling, Supreme Court 751/2019 NOMOS Data Base, Supreme Court 859/2014, Armenopoulos 2014, p. 1528, Supreme Court 539/2012, 724/2011, 163/2011, 29/2010; Athens Court of Appeals 5869/2011, 5302/2011, 2110/2008; Larissa Court of Appeals 2796/2016, DEE 2017, p. 1233.

[8] *See* Supreme Court 539/2012 and 1612/2002, EllDni 44, p. 174; Athens Court of Appeals 4503/2003, EllDni 45, p. 193; Athens Court of Appeals 6352/2003, EllDni 45, p. 192; Athens Court of Appeals 3099/1999, EllDni 41, p. 146.

[9] *See* Piraeus Court of Appeals 175/2011 and Athens Multi-member Court of First Instance 4348/2012.

[10] K. Pampoukis, *Introduction to commercial agency law*, Armenopoulos 53, 301–313 (1999) (despite the limited practical significance of 'Kommissionsagent'); A. Karagounidis, *Issues of termination and indemnification in distribution agreements*, EpiskED 376, 379–380 (2003); Athens Multi-member Court of First Instance 3710/2001, EEmpD, 2003, p. 593; Athens Court of Appeals 3857/1983, Armenopoulos, 1984, p. 717. About the previously existing lacuna regarding the provision of services, *see* Supreme Court 509/2003; furthermore, *see* Supreme Court 139/2006 where it is argued that the provisions of the PD should apply *mutatis mutandis* to all intermediary contracts (such as agreements of exclusive distribution).

1.3. Exclusivity

Exclusivity is a usual but not characteristic term in commercial agency agreements, and therefore the parties are free to determine the content of the relevant provision as per Article 361 of the Greek Civil Code.

Consequently, the agency agreement may include an exclusivity clause under which the principal assigns the handling of his affairs exclusively to the agent within a specific geographical territory.[11]

1.4. Distinction of the Commercial Agent from Other Forms of Commercial Intermediaries

Other widely spread forms of commercial cooperation are distribution and franchise agreements.[12]

The difference between a commercial agent and a distributor, who purchases and sells the goods of the principal under terms determined by the latter, lies in the kind (quality) of business risk which they assume. That is to say, the commercial agent may lose his commission if the sale of goods is frustrated, whereas the distributor, who is a merchant in the financial sense of the term, runs the risk of not selling the merchandise purchased from the principal and thereby the risk of suffering losses from not collecting the price for the goods.[13]

Furthermore, the distributor operates as an independent businessman and not as an auxiliary, his profit being the difference between the sale and purchase price of the goods. On the contrary, the commercial agent is paid a commission on the agreements he concludes.

Moreover, franchise agreements belong to the category of commercial agency and distribution agreements. The common feature of franchise agreements is stability and the permanent contractual relationship between the franchisor and the franchisee, which seeks to promote the former's sales. On the contrary, brokerage and commission agency agreements are, in principle, circumstantial in nature. The franchise agreement cannot be placed under a single category of agreements due to the fact that it embodies different types of legal relationships and is viewed by literature as a mixed form of agreement.[14] However, what strongly sets it apart from a commercial agency agreement is the quality of the business risk assumed

[11] *See* Supreme Court 28/2020, 724/2011 NOMOS database.

[12] Apart from the references below, *see also* I. Soufleros, *The legislative enactment of the analogous application of PD 219/1991 on commercial agents to certain other permanent intermediation agreements in commerce (Art. 14(4) of Law 3557/2007) – an initial assessment in the light of the recent case law of the Supreme Court and ECJ*, DEE 496 (2008); G. Nikolaidis, *Thoughts on the mutatis mutandis application of the provisions on commercial agency of goods to other similar intermediation agreements, XrID 843* (2006); *I. Soufleros, Directive 86/653/EEC on commercial agents and mutatis mutandis application of the national legislation incorporating it into Greek law – comments on the decision of the ECJ of 10.2.2004 in case C-85/2003,* Mavronas v. Delta, DEE 976 (2004); S.G. Alexandris, *Termination of commercial agency agreements*, www.bahagram.com.

[13] K. Pamboukis, *Introduction to the law of commercial agency agreements*, Optima Publications 312 (1999).

[14] D. Avgitidis, *Clientele compensation in franchise agreements*, EpiskED 344 et seq. (1998).

under the meaning discussed above with respect to the distributor. The allocation of risk between the contracting parties is the critical element in determining the type of agreement. The same cannot be ascertained *in abstracto*, only *in concreto*.

Lastly, commission agency and brokerage agreements are similar to commercial agency agreements when they are performed on a permanent/continuous basis.

More specifically, brokerage always concerns the provision of private services to the public in return for a consideration. A broker is an independent businessman (individual or legal entity) who permanently provides services for a fee, usually in a specific territory (occasional provision of services does not meet the requirements for the *mutatis mutandis* application of the PD). In order to provide such services, the broker maintains premises and personnel which he hires and terminates as per his discretion. The services provided by the broker to the public can concern one or more principals on behalf of whom he acts either in his name or in their name directly. Respectively, the relationship of the broker with the principals can be similar to either a commercial agency for the provision of services or a commission agency. It may be similar to the former since such an agent acts in the name and on behalf of the principal, or it may be similar to the latter since such an agent acts in his name but on behalf of the principal (Article 90 of the commercial law). Under the above distinction, the relationship of all brokers with their principals is identical or at least similar to that of a commercial or commission agent.

In these cases, given the lack of specific legislative provisions concerning (permanent) commission agency and brokerage agreements, there exists an involuntary (authentic) legislative lacuna. Consequently and in light of the provisions of Article 14 of L. 3557/2007, where other circumstances are detected (such as the permanency of the agreement, the obligation to provide information on a continuous basis, the restraint of trade clause, the obligation to transfer clientele) that make it necessary to protect the commission agent and the broker, the provisions of the PD can be *mutatis mutandis* applied.

In cases of permanent/continuous commission agency and brokerage agreements, Greek courts jurisprudence[15] was divided concerning the *mutatis mutandis* application of the PD and the issue of compensating the commission agent or broker. Of course, this was not the case in exclusive distribution agreements, as we shall *see* below in section 2. In view of the above, two decisions of the Supreme Court[16] referred the entire issue to the Plenary Session of the same for final ruling. Already, the Supreme Court in Plenary has (27 June 2013) handed down Decisions 15/2013 (concerning a permanent travel brokerage agreement) and 16/2013 (concerning a commission agency agreement), which ruled in favour of the *mutatis mutandis* application of the PD, in all intermediation agreements, provided of course that the respective criteria are met. More specifically, the court found that there exists an involuntary legislative lacuna (primary lacuna) which makes it possible for the PD to be *mutatis mutandis* applied on all other intermediation agreements.

[15] *See* indicative decisions of Supreme Court 1121/2010 and 539/2012, which do not accept the *mutatis mutandis* application of the PD to postal agents and Decision 445/2012, which accepted the *mutatis mutandis* application on travel agents.
[16] *See* Supreme Court 103/2012, relating to commission agents and 445/2012, relating to brokers.

1.5. Rights, Obligations and Duties of the Contracting Parties: Incompatibility

1.5.1. Regarding the Commercial Agent

According to Article 4(1) of the PD:

> *the commercial agent must, upon exercising his activities, look after the interests of the principal and always act in good faith. In particular, the commercial agent must: (a) engage with diligence in negotiations and potentially in the conclusion of the transactions assigned to him; (b) communicate to his principal all necessary information available to him; and (c) comply with reasonable instructions given by his principal.*

Therefore, a fundamental obligation of the commercial agent, also constituting the *essentiale negotium* of the agreement, is to care for the principal's interests (obligation of care for the principal's interests).[17] This obligation is essential for designating a legal relationship as a commercial agency agreement since it signifies that the agent is not a neutral intermediary and that he henceforth restricts his freedom to cooperate with other suppliers.

All the other obligations indicatively referred to in points (a)–(c) of the provision are expressions of the obligation of care for the principal's interests. In particular, the obligation to comply with the principal's reasonable instructions, which derives from the obligation of care for the principal's interests, is nothing more than the principal's managerial right. It is noted, however, that the exercise of said right on behalf of the principal may not affect the core of the commercial agent's independence when he is exercising his duties. Similarly, the obligation of confidentiality is also derived from the obligation of care for the principal's interests.

The obligation of care for the principal's interests is primarily *positive*, i.e., an obligation to act: The agent must advance the interests he administers by his activity as an intermediate; i.e., he must do what is in the interest of the principal.

Since it is evident that he who diligently cares for another's interests is not permitted to harm the same, this obligation also has a *negative* aspect, i.e., the prohibition to harm such interests. Therefore, the agent must also forgo any action that harms or can harm the principal's interests. In this sense, performing activities on behalf of the principal's competitors is harmful. Therefore, the obligation to forgo competition derives from the negative content of the obligation to care for the principal's interests and of course applies even without an express legislative or contractual provision.

Note that Article 4(1) of the PD determines only the basic obligations of the agent, from which the parties may not derogate (Article 4(4) of the PD). However, based on the principle of freedom of contract, the parties may enter into agreements that do not affect the above obligations and are delineated by the above general clauses (prohibitive tort, established principles of morality and good faith). For example, the minimum guaranteed result clause is governed by the principle of freedom of contract and is limited only in extreme cases when it exceeds the above limits or when the clause is particularly onerous for the agent. Indicatively, the

[17] *See* Athens Supreme Court 778/2019, EpiskED (2020/54), Court of Appeals 961/2008 DEE 343 (3/2009).

inclusion by the parties of a clause for the attainment of a minimum limit of connection activations usually falls within their freedom of contract and does not contravene the above general principles, especially when it constitutes a feasible objective that is not onerous for the commercial agent.[18]

Furthermore, as provided in Article 4(2) and (3) of the PD, the commercial agent is entitled to request from the principal the necessary documentation relating to the goods concerned, the information necessary for the performance of the agency agreement, and to be notified by the principal within a reasonable period once the former anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent would normally have expected. Lastly, the commercial agent must be informed by the principal within a reasonable period of the latter's acceptance or refusal of a commercial transaction which the commercial agent has procured as well as of any non-execution thereof.

1.5.2. Regarding the Principal

The obligations of the principal are described in Articles 4(2) and (3) of the PD. More specifically:

> *The principal must, during his relationship with the commercial agent, act lawfully and in good faith. In particular, the principal must: (a) provide the commercial agent with the necessary documentation relating to the goods concerned; and (b) provide to the commercial agent the information necessary for the performance of the agency agreement, and in particular notify the commercial agent within a reasonable period, once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected. In addition, the principal must inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.*

In other words, the fundamental obligation of the principal is to act in good faith towards the agent. This obligation is broken down into the specific obligations above.

A noteworthy point is the principal's obligation to notify the agent of the rejection of a commercial transaction in which the latter has mediated. Of course, this does not mean that the obligation is exhausted in making such notification; rather, it is extended to the consequential obligation according to which a refusal to enter into a contract cannot be arbitrary.

1.5.3. Incompatibility

According to Article 1(4) of the PD:

> *The following in particular may not act as commercial agents: (a) a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or*

[18] Supreme Court 4/2015, XrID 2015, p. 441; Supreme Court 804/2015; Supreme Court 539/2012, NoB 2012, p. 1463; Supreme Court 1042/2009.

association; (b) a partner who is lawfully authorized to enter into commitments binding on his partners; and (c) court-appointed administrators, liquidators or bankruptcy trustees.

1.6. Commercial Agent's Fees (Commission)

According to Article 5 of the PD:

> *the Commercial Agent is entitled to the agreed remuneration. In the absence of an agreement on this matter between the parties and without prejudice to the application of special provisions, a commercial agent shall be entitled to a remuneration determined as a percentage of the value of the agreement in which he mediates or which he concludes on behalf of the principal as per the practice that is customary in the place where he carries on his activities. If there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction. Any part of the remuneration which varies according to the number or value of business transactions shall be deemed to be a commission within the meaning of this Decree.*[19]

According to Article 6 of the PD:

> *Regarding a commercial transaction concluded during the period covered by the agency agreement, the commercial agent is entitled to a commission: (a) where the transaction has been concluded as a result of his actions; or (b) where the transaction is concluded with a third party whom he has previously established as a customer for transactions of the same kind; or (c) where he is entrusted with a specific geographical territory or group of customers and the transaction has been entered into with a customer belonging to that area or group. In the case of a commercial transaction concluded after the agency agreement has been terminated, the commercial agent is entitled to a commission: (a) if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and if the transaction was entered into within a reasonable period after that agreement was terminated; and (b) in accordance with the conditions mentioned in paragraph 1 of this article, if the order of the third party reached the principal or the commercial agent before the agency agreement was terminated. A commercial agent shall not be entitled to a commission if that commission is payable to the previous commercial agent, unless it is equitable, because of their activity, for the commission to be shared between the commercial agents.*[20]

Therefore, as arises from Articles 5 and 6 of the PD, the fee of the commercial agent is the percentage of commission on the value of the sales made by the principal. In practice, this percentage is usually strictly defined in the commercial

[19] *See* Supreme Court 403/2020 NOMOS Data Base; Athens Multi-member Court of First Instance 4348/2012.

[20] *See* Supreme Court 806/2015, E7 2016 p. 42; Athens Court of Appeals 2596/2009; Supreme Court 806/2015, E7 2016 p. 42; Thessaloniki Multi-member Court of First Instance 6949/2015, Armenopoulos 2016 p. 1148.

agency agreement and therefore is beyond dispute.[21] Furthermore, if administrative costs (e.g., personnel salaries, means of transportation and advertising) and sales promotion costs are deducted from this amount, the net profit of the commercial agent is what remains.[22]

Lastly, according to Article 7(1) of the PD, the claim for commission exists as of the time and to the extent that one of the following applies: (a) the principal has executed the transaction; (b) the principal should, according to his agreement with the third party, have executed the transaction; (c) the third party has executed the transaction.[23]

1.7. Formalities

1.7.1. Registration with the Competent Tax Authority, Chamber of Commerce and Pension Fund

A necessary requirement is that the commercial agent must be registered as such in the relevant chamber of commerce or the commercial section of other chambers, the tax authority of the place where he practices his profession and the merchants' pension fund. From this obligation of registration in a chamber is excluded the commercial agent who is recognized by a Member State of the European Union (EU) or the European Economic Area, he is established in its area, and he performs occasional commercial representation in Greece. However, whenever an office, a branch office or any other kind of establishment is set up in Greece by him, the requirement of registration in the General Trade Register will arise (*see* Article 1(3) of the PD).

However, the agreement entered by an agent without the prior fulfilment of the above requirements shall be deemed effective since the conditions for applying Article 174 of the Greek Civil Code (forbidden transactions) are not met.[24]

1.7.2. Form of Commercial Agency Agreements

Concerning the issue of a commercial agency agreement's form, Article 13 of the Directive provides two alternative possibilities for Member States: (1) choosing an informal conclusion of the commercial agency agreement; and (2) choosing the written form for concluding the commercial agency agreement.

The first possibility provided by the Directive mirrors the principle of informality in commercial agency agreements. This principle generally applies in commercial law and commercial contracts due to the speed of transactions. This option

[21] I. Dryllerakis, *Mutatis mutandis application of the provisions regarding commercial agents in the distribution agreement*, ECC 1252 (2006).

[22] S.G. Alexandris, *Note to decision 4A61/22.5.2008 by the Swiss Federal Court*, NoB 436 (2009).

[23] For Interpretation of Arts 5, 6 and 7 of the PD, *see* ECJ, Decision of 13 Oct. 2022, C-64/21, Reference for a preliminary ruling, Supreme Court 403/2020 & 1090/2019; 724/2011; 165/2015, NOMOS Data Base; Athens Court of Appeals 2596/2009, 961/2008 and 1494/2017; Athens Multi-member Court of First Instance 9099/94, EEmpD 1995, p. 563; Thessaloniki Multi-member Court of First Instance 159/1990, Armenopoulos 1990, p. 123; E. Perakis, *General part of commercial law* 406 (1999); T. Liakopoulos, *General commercial law*, vol. I 183 (1998); N. Tellis, *Amendment of legislation regarding commercial agents by P.D. 312/1995*, EpiskED 663 (1995).

[24] *See* Patra Court of Appeals 310/2002, EEmpD, 2003, p. 597; K. Pampoukis, *Introduction to commercial agency law*, Armenopoulos 53, 304 (1999).

provides for an informal conclusion of the commercial agency agreement while it establishes the commercial agent's right to demand a signed document that will refer to its content and subsequent amendments. In fact, this right is so essential that any waiving thereof (in advance) is invalid.

The second possibility is to require that a document is drafted as a condition of the validity of the commercial agency agreement. The second choice is provided in Article 13(2) of the Directive, according to which paragraph 1 does not prohibit a Member State from providing that the agreement is valid only if executed in writing. Indeed the two above solutions cannot coexist in one legislative act since they contradict each other.

The Greek legislator, with the initial wording of Article 8(1) of the PD *(for application of the present Presidential Decree, the commercial agency agreement must be made in writing*), seemed to have adopted the second option provided in the Directive. Indeed, in this way, it exceeded its *authorization* to comply with the Directive since it was provided that the document is a precondition for applying the PD and not a precondition for the validity of the agreement. However, the Greek legislature did not expressly provide that the agreement is valid only if drafted in writing as required by the Directive.

Following intense criticism in literature and in view of the unequal treatment of Greek commercial agents and the consequent competitive disadvantages they faced as compared to their colleagues in other Member States which adopted the first option provided by the Directive (principle of informality of commercial agency agreements), the Greek legislature by virtue of PD 312/1995 added Article 8(1) verse 'b', according to which: *Each contracting party has the right to receive from the other, after a request to that effect, a signed document stating the content of the agreement and subsequent amendments thereof. This right may not be waived.* However, the first verse was not abolished, and consequently, the Greek legislature caused greater confusion instead of bringing about the desired security of law.

The Supreme Court expressed its opinion on this matter by its Decision 1301/2006. It ruled that:

> *The commercial agency agreement is made informally, since the 'signed document' referred to in the provision of paragraph '1b', Article 8 of the PD, as added by paragraph 1, Article 6 of PD 312/1995, does not constitute a contractual form, but is provided in order to facilitate the parties as to proof regarding the content of the agreement.*

The decision correctly placed the matter closer to the prevailing view and in favour of the informal character of entering into commercial agency agreements. This decision is also important following subsequent developments in the legislation. It constitutes a guide for courts in judging the status of commercial agency agreements and the application of the PD to those that were informally concluded before the enactment of Article 14(3) of L. 3557/2007, i.e., before 14 May 2007.

The national legislature, with the aim of attaining security in transactions and lifting all doubts, after the issuance of Supreme Court Decision 1301/2006, clarified by Article 14(3) of L. 3557/2007 that the informal character of commercial agency agreements also applies in Greece. Thus, paragraph 3 of the above article replaced Article 8(1) point (a) of the PD as follows: *The implementation of the present*

Presidential Decree does not require adherence to the written form. It is also noted that verse two of paragraph 1b was abolished: *This right may not be waived*.

Therefore, irrespective of whether there exists a written or verbal agreement, the commercial agent has the same rights in both cases. Thus, the only *side effect* of any failure to draft the commercial agency agreement in writing is merely to cause difficulties in proof of the content of the agreement. Its validity, as well as the application of the provisions of the PD that afford protection to the commercial agent, remains unaffected. Indeed, the probative value of the document is limited. Therefore, the contracting parties are not barred from using any means in order to persuade the judge that the content of such document was, e.g., erroneous from the beginning or that it has ceased reflecting reality.[25]

Note that, in practice, this new provision mainly operates in favour of the objectively weaker party, i.e., the commercial agent, who, in view of his negotiating disadvantage, is susceptible to potential pressure in the direction of surrendering in advance (waiving) his rights.[26] Jurisprudence tends to favour the commercial agent, and therefore it is always in the interest of the supplier to seek the written form of agreement.

1.8. Duration of the Agreement: Chain Agreements

The commercial agency agreement may be concluded for a limited or indefinite term.

Of course, if the parties continue to perform the limited-term agreement after its duration has lapsed, it is converted into an indefinite-term agreement, as per the express provision of Article 8(2) of the PD.

In practice, there often occur successive limited-term agreements, also called *chain agreements*. These agreements are of limited terms but are renewed over several years without negotiation of their main terms, which (terms) continue to apply. Indeed, these agreements are modified by subsequent agreements only as to some of their points. Therefore, they do not constitute an object of negotiation; rather, the supplier sends the agent a new agreement having the same main content and structure as the previous (expired) one.

It is accepted that whereas these consecutive (chain) agreements do not constitute indefinite term agreements, they should be dealt with as such *mutatis mutandis*. Thus, if the principal does not intend to renew the existing limited-term agreement (the last of a succession thereof), he must notify the agent in due time of such intention, observing the deadline of Article 8(4). Such non-renewal is equated to termination.[27,28]

[25] N. Tellis, *The written form in commercial agency agreements*, Arm. 305 (2001); D. Koutsoukis, *The informal character of commercial agency and similar agreements*, ECC 294 (2008); S.G. Alexandris, *The mutatis mutandis application of the provisions of PD 219/1991 in the exclusive distribution agreement: The written form in commercial agency agreements*, note to Supreme Court 364/2014, NoB (2014) 1657, 212/2006 – NoB 701 (2007) & 1670/2008.

[26] N. Tellis, *Recent developments in legislation in the law of commercial agency and distribution*, EpiskED 958 (2007).

[27] *See* (indicatively) S.G. Alexandris, *Notes to Supreme Court 1554/2008*, NoB 117 (2009). Also, in recent case law, Supreme Court 885/2020, NOMOS Data Base.

[28] ECJ, Case C-3/2004, decision of 16 Mar. 2006, ECC 2006/658.

1.9. Termination of the Agreement

1.9.1. Termination of Indefinite Term Agreements: Termination by Notice (Article 8(3) of the PD) – Immediate Termination (Article 8(8) of the PD)

In Article 8(3) of the PD, which repeats the respective provision of Article 15 of the Directive, it is stated that: *Where an agency agreement is concluded for an indefinite period, either party may terminate it by notice*. Furthermore, paragraph 4 of the same article states that:[29]

The period of notice shall be one month for the first year of the agreement, two months from the beginning of the second year, three months from the beginning of the third year, four months from the beginning of the fourth year, five months from the beginning of the fifth year, and six months from the beginning of the sixth year and onwards. The parties may not agree on shorter periods of notice.

In addition, paragraph 8 of the same article states that:

The commercial agency agreement may be terminated at any time without observance of the terms of paragraph 4 because of the failure of one party to carry out all or part of his obligations, and where exceptional circumstances arise.

A combined reading of the above provisions indicates that the indefinite term commercial agency agreements may be terminated either by notice, observing the terms set in Article 8(4), or by immediate termination at any time (without observing any term of notice), provided, however, that serious grounds justifying such a termination apply.[30] The wording of Article 8(8) of the PD repeats the respective provision of Article 16 of the Directive, which refers to: (a) failure of one party to carry out all or part of his obligations; and (b) cases where exceptional circumstances arise. In interpretation thereof, it must be accepted that the provision refers to *serious grounds* in the sense of Article 672 of the Greek Civil Code. Note that in this case, the Greek legislature had, in the original wording of paragraph 8, defined force majeure as also constituting serious grounds. However, this was a narrower expression than the one used by the community legislator, and for this reason, the provision was modified by Article 6(2) of PD 312/1995 as it stands today.

The terms set for termination by notice may not be shortened by virtue of an agreement between the parties (Article 8(4) of the PD).

It is also noted that unless there is a contrary agreement between the parties, the end of the term of notice must coincide with the end of a calendar month (Article 8(6)).

[29] In the present section, *see* indicatively D. Androutsopoulos, *The commercial agency agreement*, 265 et seq.; N. Tellis, *The commercial agent's clientele compensation*, 54 et seq; S.G. Alexandris, *Termination of commercial agency agreement*, www.bahagram.com (1968).

[30] ECJ, Decision of 17 Oct. 2013 (C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*), Supreme Court 885/2020, DEE 389 (2021); Athens Court of Appeals 1873/2008, DEE860 (2008); Thessaloniki Multi-member Court of First Instance 7259/2020, NOMOS Data Base, Athens Multi-member Court of First Instance 5012/2018, NOMOS Data Base; Athens Single-Member Court of First Instance 13461/2018, NoB 2019, p. 542.

Furthermore, the possibility of setting terms of notice longer than those of paragraph 4 is provided for; however, in this case, the term applying for the principal may not be shorter than the term applying for the agent (*see* Article 8(5)).

The provisions regarding termination by notice of Article 8(3), (4), (5) and (6) of the PD are also applied when a limited-term agreement is converted into an indefinite-term agreement. Indeed, in this case, the period which had elapsed at the time when the agreement was of limited term is also taken into consideration when calculating the term of notice (Article 8(7)).

However, in spite of the above and according to relatively recent developments in case law,[31] the termination of an indefinite-term commercial agency agreement is valid even without notice. In fact, due to the relationship of trust that must exist between the contracting parties, the termination of the commercial agency agreement without notice or even abusively is always effective. Thus, due to the absence of the required condition of mutual trust between the contracting parties, the commercial agent is not entitled to seek the continuation of the agreement but only indemnification for damages (positive, consequential, etc.) instead.

1.9.2. Termination of Limited-Term Agreements: Lapse of Limited Term – Immediate Termination (Article 8(8) of the PD)

Limited-term commercial agency agreements may be terminated before their expiry – which (expiry) entails the *ipso jure* termination of the agreement (argument from Article 8(2) of the PD) – only by means of an immediate termination (Article 8(8) of the PD).

At this point, note that the PD has brought absolutely no change in relation to what is applied under the pre-existing legislative framework. The only difference is the *positive* formulation of Article 8(8) and the special provisions regarding grounds that allow for the termination of an agreement at any time. Therefore, what has been referred to above regarding immediate termination in the framework of the previous legislative framework continues to apply.

In any case and as already mentioned, the limited-term commercial agency agreement is *ipso jure* terminated upon expiry of its duration (argument from Article 8(2) of the PD). Of course, if the parties continue to perform the agreement, it is converted into an indefinite-term agreement, as noted above.

1.9.3. Termination Due to Death of the Commercial Agent

According to the wording of Article 9(1) (d) of the PD, *the right of indemnity or restoration of damages is also established when the agreement is terminated due to the death of the commercial agent*. It arises that the new law provides expressly that the death of the commercial agent constitutes *ipso jure* grounds for terminating the agreement and establishes a claim for compensation which falls to his successors.

[31] *See* Supreme Court 698/2020, Qualex Data Base=NOMOS Data Base & 804/2015; Supreme Court 1864/2014, EEmpD 2015, p. 325.

In the previous legislative framework and as per Article 675(1) of the Greek Civil Code, the death of the commercial agent also constituted grounds for the *ipso jure* termination of the commercial agency agreement. Furthermore, its continuation by the agent's successors was excluded on the grounds that the agreement is based on a relationship of trust between the parties.[32]

1.10. Clientele Compensation and Further Claims on Behalf of the Commercial Agent

1.10.1. Clientele Compensation

According to Article 9 of the PD, the commercial agent has the right to claim clientele compensation; i.e., he has the right to be indemnified under the condition that he has contributed new customers or has significantly advanced business with existing customers. This is the most important claim on behalf of the commercial agent.

In particular and according to Article 9 of the PD:

> *1 (a) The commercial agent shall be entitled to compensation, after termination of the commercial agency agreement, if and to the extent that, he has contributed new customers to the principal or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers and the payment of this compensation is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Such circumstances shall include the application of a non-competition clause within the meaning of Article 10 hereof. (b) The compensation amount may not exceed a figure equivalent to indemnity compensation for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the agreement goes back less than five years the compensation shall be calculated on the average for the period in question. (c) The grant of such indemnity shall not prevent the commercial agent from seeking other damages he has sustained, as provided in the provisions of the Civil Code.*

The above provisions ensure that clientele compensation is a special claim for indemnification, lying in the balance between recompense and leniency. Indeed this justifies its characterization as a type of reasonable or fair indemnity, as becomes apparent especially from the wording of Article 9(1) (a) of the PD, as in force.

[32] For cases of possible termination of the commercial agency agreement that are not provided for in the PD, such as dissolution of the legal entity (of the commercial agent), bankruptcy of the contracting parties, placement of the contracting parties under judicial protection, fulfilment of a severability clause, merger of companies, transfer of the enterprise represented, transfer of the agent's enterprise, termination of the commercial subagency contact (note that subagency is permitted according to para. 2b, Art. 1 of the PD), extinguishing obligations (e.g., confusion of the identities of principal and agent, as per Civil Code 453), revocation of the commercial agent's licence according to the previous law but also today in the sense of failure on the part of the agent to meet the conditions of case a), para. 3, Art. 1 of the PD – *see* S.G. Alexandris, www.bahagram.com and the further references there to G. Nikolaidis, *Termination of commercial agency and clientele compensation*, 23 et seq.

Article 9 of the PD sets three equal preconditions, all of which must apply concurrently:

(1) Contribution of new customers or significant increase of business with existing customers by the commercial agent during the course of the agreement.
(2) Retention of significant benefits for the principal, resulting from business with such customers after the agreement is terminated.
(3) That payment of the compensation is *equitable*, taking into account all circumstances of each specific case, and especially the commission which the commercial agent is deprived of and which concerns business with these customers.[33]

In other words, clientele compensation, as formulated in the PD, constitutes a contractual claim for remuneration with a strong social-protective character since, in a way, it is:

> *the agent's compensation for the fact that upon termination of the agreement (and not earlier) the stable clientele that he has created is transferred as an economic asset to the principal's sphere of ownership.*[34]

Furthermore, clientele compensation is, according to the PD, a fair and one-off indemnity. Its designation as being one-off implies that the compensation is a specific amount determined by law and independent of actual damages. In addition, its designation as reasonable is significant because it allows the court the discretionary power to determine its amount without permitting the amount to exceed the limit set by the law.[35]

Note also that clientele compensation is not the full indemnity of common law in the sense that it does not aim at fully restoring the actual loss sustained by the agent due to termination of the agreement.[36]

In literature, it has been held that the calculation of the commercial agent's clientele compensation must be effected based on the Commission's Report.[37]

[33] From the ample jurisprudence available *see* indicatively Supreme Court 620/2022, 28/2020, 78/2019, 765/2019, 1135/2019, 1369/2019, 1374/2019, 4/2015, 1129/2011, 734/2011, 53/2007, 139/2006, NOMOS Data Base; Patra Court of Appeals 495/2021, Athens Court of Appeals 2110/2008, Athens Single-Member Court of First Instance 13518/2018, NOMOS Data Base.

[34] *See* Supreme Court 1374/2019, EEmpD 837 (2020) & 139/2006, Armenopoulos 2006 (1034) = EpEmpDik 2006 (307).

[35] *See* G. Nikolaidis, *Termination of commercial agency and clientele compensation*, 93 et seq. A. Sakkoulas publications 2000; *see also* N. Tellis, *The commercial agent's clientele compensation*, 7 et seq. Sakkoulas publications 1997, where he disputes the one-off character of the compensation, noting that its calculation is not made in abstract but in light of the respective circumstances.

[36] S.G. Alexandris, *Termination of commercial agency agreement*, www.bahagram.com.

[37] *See* Commissions Report COM (96) 364 and the mentioned calculation method followed in Germany; regarding the way this calculation is made, *see* K. Pampoukis, *Introductory note to Larissa Court of Appeals 29/2005*, EpiskED 119, 123 (2006); N. Tellis, *The commercial agent's clientele compensation* (opinion) NoB 16 (2007).

The commercial agent who judicially claims the awarding of clientele compensation must describe in his lawsuit, fully and clearly, those elements that constitute preconditions for the application (background facts) of the invoked rule of law, i.e., in this case, Article 9(1) (a) of the PD. In this way, he meets the requirements set by paragraph Article 216(1) (a) of the Greek Code of Civil Procedure regarding the necessary content of an action.[38,39]

More specifically, the commercial agent must invoke in his lawsuit and prove the following that:[40]

(a) the commercial agency agreement has been terminated by the principal;
(b) the commercial agent himself contributed new customers to the principal's business or significantly increased the principal's business with existing customers;
(c) the principal continues to derive substantial benefits from business with such customers after the termination of the agreement;[41,42]
(d) payment of the indemnity is *equitable*, having regard to all the circumstances and in particular the commission lost by the commercial agent from business transacted with such customers.

1.10.2. Further Claims on Behalf of the Commercial Agent

Further to awarding clientele compensation and as set out in Article 9(1)(c) of the PD, Greek courts tend to award a commercial agent's right to indemnity pursuant to the general provisions of the Greek Civil Code. Hence, insofar as a commercial agent suffers further damages beyond the loss of his clientele and respective commissions, he may seek indemnity based on the general provisions of the Civil Code. This may occur where, e.g., a commercial agent's reputation was damaged or where a commercial agent, based on legitimate expectations, made extensive investments shortly before the notice of termination. Thus, in the event of termination of the agency agreement, a commercial agent shall be entitled to claim, in addition to the

[38] Supreme Court 1369/2019 NOMOS Data Base & 1805/2007, NoB 2008, p. 143 with note by S.G. Alexandris, and Supreme Court 704/2007, ECC 2007, p. 970.

[39] However, *see also* N. Tellis, *The commercial agent's clientele compensation*. Lawful way of calculating the claim – Preconditions for definition of the object of the lawsuit, ECC 2006, p. 1100, setting increased conditions for defining such object.

[40] *See* Supreme Court 1129/2011, 176/2010, 1042/2009, 592/2008 NOMOS Data base, Thessaloniki Court of Appeals 942/2022 DEE 2022, page 62= NOMOS Data base, 267/2021, NOMOS Data Base.

[41] As per Art. 216 of the Greek Code of Civil Procedure, it is not necessary to also state the amount of the benefits to be retained in the future, since a correct interpretation of Art. 9, PD 219/1991 is that the basis of calculation of the indemnity is the commissions from contracts to be concluded with customers introduced by the agent, of which he is being deprived due to the termination. The principal may assert and forward counter-proof in support thereof, that the benefits he retains after termination are either not actually retained or are lower in amount than the commissions that the agent is deprived of (Supreme Court 1805/2007, NoB 2008, p. 143, with notes by S.G. Alexandris; Thessaloniki Court of Appeals 493/2008, EpiskED 2008, p. 810 with Note by K. Pamboukis; Supreme Court 704/2007, NOMOS).

[42] Concerning the lawsuit, it is sufficient for the plaintiff to invoke and prove the loss of commissions (in this case the distributor's benefits), without being required to specify the amount of the benefits (*see* Supreme Court 212/2006).

foregoing clientele compensation, compensation for any further damages pursuant to tort provisions.[43]

Not only this indemnity requires liable and illegal (in breach of contract) behaviour on behalf of the principal, but also this behaviour must be causally linked with the damage suffered by the commercial agent.[44]

Such indemnity is the compensation for lost profits (Article 298 of the Greek Civil Code),[45] reimbursement of expenses (Article 722 of the Greek Civil Code),[46] compensation for abusive behaviour (abuse of rights – Article 281 of the Greek Civil Code),[47] compensation for unfair competition[48] or due to the violation of the provisions of Law 3599/2001 'On free competition' regarding the abuse of a dominant position.[49]

1.11. Effacement of a Commercial Agent's Rights

Pursuant to the provision of Article 17(5) of the Directive and the respective provision of Article 9(2) of the PD that incorporated the said, it is set out that a commercial agent loses his rights for indemnity or for any further compensation if he fails to notify the principal of his intention to raise such claims within one year. Thus, a peremptory time limit is set and the lapse of which is taken into account *ex officio* by the court, as per Article 280 of the Greek Civil Code. Note that the law does not provide any particular form regarding such notification.

The purpose of the said notification is not to prolong the principal's uncertainty regarding the agent's intentions of raising these claims. Such prolonged uncertainty would lead to the prolonged commitment of significant funds on behalf of the principal. As a result, the principal will not be able to invest these funds in the development of his commercial activities.

From the foregoing, it arises that the purpose of such notification is indeed fulfilled if the agent timely notifies the principal of his intentions. Thus, the agent is not required to file a relevant lawsuit or proceed with any other judicial action and is not obligated to determine the amounts that will be claimed or the grounds on which such claims will rest. After all, the agent's claims, either for clientele compensation or further indemnity, are directly determined by law.[50]

[43] Supreme Court 1281/2008, NOMOS; Athens Court of Appeals 374/2019 NOMOS database, 2110/2008, DEE 2008, p. 984; Athens Multi Member Court of First Instance 6311/2011 NOMOS database.
[44] Athens Court of Appeals 1873/2008, DEE 2008, p. 860.
[45] Supreme Court, Plenary Session 20/1992 EllDni 33, p. 1455; Supreme Court 849/2002 EllDni 43, p. 1612.
[46] Supreme Court 1805/2007, NoB 2008, p. 143.
[47] Supreme Court 704/2007, DEE 2007, p. 970. *See also* Supreme Court, Plenary Session 17/1995 and Supreme Court, Plenary Session 62/1990.
[48] Athens Court of Appeals 2110/2008, DEE 2008, p. 984.
[49] Supreme Court 1554/2008, NOMOS.
[50] *See* respectively Supreme Court 734/2011 and 1554/2008.

1.12. Non-competition Obligation upon Termination of the Agency Agreement

Article 10 of the PD, which is practically identical to Article 20 of the Directive, regulates the post-contractual *restraint of trade clause*. This article is a typical example of intervention in the freedom of contract of both the commercial agent and the principal. It is considered necessary to balance conflicting interests and find an acceptable solution so that the principal's justified interests are protected without, however, taking advantage of the commercial agent's weaker negotiating position.

The non-competition clause reflects, therefore, a justified interest of the former principal. However, undoubtedly, it has an impact on the agent's entrepreneurial and economic freedom.

This clause is valid provided that the following requirements are concurrently met: (a) the said clause has been agreed in writing, and (b) it pertains to the territory assigned to the agent as well as to the products (and services, pursuant to Law 3557/2007), which were the object of the agency agreement. The effective term of the non-competition clause may not exceed one year as of the termination of the agreement (Article 10(2) and (3) of the PD).[51]

It is correctly argued that failure to stipulate a reasonable consideration renders the said non-competition clause an excessive contractual obligation on the part of the commercial agent. Indeed, on the one hand, its application is not necessarily associated with the principal's justified interest, and on the other hand, it presents itself as extremely harsh on the agent due to the complete absence of consideration.[52]

Finally, this provision is *jus cogens*, and as such, there can be no agreement to the contrary between the parties with regard to its maximum term. However, the parties are free to agree on a shorter effective term.

1.13. Arbitration Clauses: Applicable Law: International Jurisdiction and Prorogued Jurisdiction

1.13.1. Arbitration Clauses

It is possible to include an arbitration clause in a commercial agency agreement with respect to possible future disputes.[53,54] This clause, and as per Article 264 of the Greek Code of Civil Procedure, shall entitle the counterpart – opponent – to raise an objection requesting that the case be referred to arbitration.

Therefore, the contracting parties may agree to resolve by means of arbitration all the disputes arising from the agreement, indicatively, from its interpretation,

[51] *See* Supreme Court 765/2019 & 1596/2017 NOMOS database.

[52] *See* M.Th. Marinos, *The post-contractual non-competition clause in commercial agency: Contribution to the interpretation of Article 10, P.D. 219/1991*; S.G. Alexandris, *Termination of the commercial agency agreement*, www.bahagram.com (1999).

[53] E. Vassilakakis, *Issues of international jurisdiction and applicable law on distribution agreements* DEE 2004, p. 857 (opinion) (2000); P. Pamboukis and G.S. Nikolaidis, *In particular on the validity of jurisdiction clauses pursuant to Regulation (EC) No. 44/2001 and the applicable law, which appear to deprive the exclusive distributor from the goodwill indemnity and the terms and conditions under which the exclusive distributor is entitled to it*, NoB 2568 (2008).

[54] *See* Supreme Court 1400/2008, Database ISOKRATES.

performance, failed performance, termination or validity thereof, based on the procedure and the provisions of Articles 867–903 of the Greek Code of Civil Procedure (insofar as the parties do not wish to refer to international arbitration).

However, in agreements with elements of *alienage*,[55] a recognized international arbitration institute is usually stipulated as the competent venue (e.g., the International Chamber of Commerce and London Court of International Arbitration), and, as such, reference is made to the governing rules thereof.

It is pointed out that arbitration clauses must be adjusted to the circumstances of the respective contract *in concreto*, taking into account the type of potential disputes, the contractual relationship and applicable law.

The rule that arbitration clauses are valid even where the respective contract may be identified as an adhesion contract[56] applies.

In particular and regarding cases of agreements with elements of *alienage*, it is pointed out that the convention on the recognition and enforcement of foreign arbitral awards, which was signed in New York on 10 June 1958 (United Nations Treaty Series, volume 330, p. 3, hereinafter referred to as the 'New York Convention'), states in Article II(3) that:

> *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

1.13.2. Applicable Law

Apart from the arbitration clause, the contracting parties are free to determine the national law that will govern the agreement by virtue of an applicable law clause.[57] This choice, however, may not circumvent mandatory national or European Community law provisions that apply within the EU and have been adopted for ensuring public interests (of a political, social or economic nature).[58] As a consequence, the right of the parties to contractually determine governing law is limited by *jus cogens* rules of the legal order which is closely connected with the agreement (Article 9, Rome I Regulation[59] on contractual obligations and Article 16, Rome II Regulation[60] on non-contractual obligations).

[55] *See* L. 2735/1999 on international commercial arbitration.

[56] Perakis, *General commercial law*, 150.

[57] *See* P. Pamboukis & G.S. Nikolaidis, *'In particular on the validity of jurisdiction clauses pursuant to Regulation (EC) No. 44/2001 and the applicable law, which appear to deprive the exclusive distributor from the goodwill indemnity and the terms and conditions under which the exclusive distributor is entitled to it'*, NoB 2008, p. 2568; M. Varelas, *Distribution Agreements* (revised by Perakis) (2009); also P.S. Giannopoulos, *Issues of applicable law on commercial agency and distribution agreements*, XrID 486 (2007).

[58] As defined in the Opininon of Advocate General Wahl of 15 May 2013, *United Antwerp Martime Agencies (Unamar) NV,* Case C-184/12,EU:C:2013:301, para. 43

[59] Regulation (EC) 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations.

[60] Regulation (EC) 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations.

Therefore, in a commercial agency agreement, the Directive's provisions which aim to protect the free establishment and fair competition within the internal market, may not be circumvented through an applicable law clause.

More specifically, Articles 17 and 18 of the Directive (as rules of immediate effect), which guarantee certain rights of the commercial agent upon termination of the agency agreement, shall apply even if the parties have contractually chosen a different national law to govern their agreement (*see* ECJ (already Court of Justice of the European Union) ruling in the *Ingmar GB Ltd*[61] case – *Agro Foreign Trade*[62] *cases, and the opinion of the Advocate General in the Unamar*[63]).[64]

In the absence of choice, the applicable law on contractual obligations is determined according to Rome I Regulation (Article 4 – Presumption: Law of the country of the party required to effect the main obligation described in the contract).

Regarding non-contractual obligations and according to Rome II Regulation (Article 4(1)), there applies the law of the place where the indirect damage occurred or may occur.

1.13.3. International Jurisdiction and Prorogued Jurisdiction

Irrespective of the issue of applicable law, there is also the issue of which courts will be competent to adjudicate disputes between the parties in the event of litigation. This may be stipulated in the agreement by virtue of a clause determining jurisdiction. Insofar as the parties have not agreed otherwise, the courts that have been chosen as per above shall have exclusive competence over disputes.

In case the parties have not stipulated a jurisdiction clause, then the general rule provided in Article 7(1)(a) of Regulation 1215/2012/EC[65] that proceedings are brought before the courts of the place of performance continues to apply. This place is identified as the place where the delivery of goods or the provision of services, respectively, took place or should have taken place. In other words, such place is directly determined by the Regulation, without the intervention of a conflict rule or the relevant substantive law provisions indicated by such a (conflict) rule. Therefore, in order for the place of performance to be determined, the law applied to the merits of the dispute is not taken into account, thus avoiding the paradox of investigating the case on the merits prior to (and for the purpose of) ruling on the existence of international jurisdiction of the court.[66]

[61] ECR 2000 I-9305 – http://curia.europa.eu.
[62] *See* Judgement of 16 Feb. 2017, *Agro Foreign Trade & Agency Ltd,* C-507/15, EU:C:2017:129, paras 30-36
[63] *See* Judgement of 17 Oct. 2013, *United Antwerp Maritime Agencies (Unamar) NV,* C-184/12, EU:C:2013:663, paras 39-40
[64] *See also* Greek Jurisprudence: Athens Multi-member Court of First Instance 1367/2022, Qualex database
[65] Regulation (EC) 1215/2012, which applies from 10 Jan. 2015, amended Regulation (EC) 44/2001. Concerning judgments in legal proceedings before 10 Jan. 2015 (EC) 44/2001 still continue to apply, Supreme Court 423/2018 NOMOS Data Base.
[66] Supreme Court 1542/2014, 4467/2010, 1697/2013, Athens Court of Appeals 717/2009, NOMOS Data Base.

Of course, it is a prerequisite for the application of the Regulation that the habitual residence or the domicile, in the case of legal entities, of the defendant is located in the territory of a Member State. For the purpose of ascertaining whether a legal entity's domicile is located in the territory of a Member State and pursuant to Article 60(1) of the said Regulation, the statutory seat or the place of central administration or the principal place of business is taken into consideration.

In addition, any auxiliary contractual obligations shall fall within the jurisdiction of the place of performance of the main contractual obligation. This is also the view of the ECJ, which, accepting the *accessorium sequitur principale* rule, has ruled that when more than one obligation arising from the same contract is in question, international jurisdiction is determined based on the place of performance of the main contractual obligation.[67] As a consequence, all of the plaintiff's contractual claims may be brought before the court that will be determined as competent, including those which pertain to indemnity due to termination of contract or to the reimbursement of expenses incurred by the plaintiff for the purpose of advertising and promoting the defendant's products.

Finally, with regard to the plaintiff's claims relating to tort, it should be determined whether Article 5(3) of Regulation 44/2001 EC may apply. Pursuant to this provision, a defendant who has his habitual residence or domicile in an EU Member State may be sued *in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur* (note: Regulation (EC) 1215/2012, which applies from 10 January 2015, amended Regulation (EC) 44/2001. Concerning judgments in legal proceedings before 10 January 2015 (EC) 44/2001 still continue to apply).

[67] ECJ, 15 Jan. 1987, Shenavai/Kreischer, 266/85, ECR 1987, 239, recital 19; *see*, likewise, Thessaloniki Court of Appeals 2727/1999, Armenopoulos 1999, p. 1744, annotated by Arvanitakis.

2. DISTRIBUTION AGREEMENT

2.1. Legislative Framework: *Mutatis Mutandis* Application of the PD in the Exclusive Distribution Agreement

Contrary to commercial agency agreements, distributors and distribution agreements are not directly regulated on a community or national level. Distribution agreements are therefore unregulated agreements.

As a result and in the absence of a specific framework, when it came to resolving respective disputes, the jurisprudence and literature provide the implication of Articles 361 (freedom of contract), 648 et seq. (independent services agreements) and 713 et seq. (provisions on mandates) of the Greek Civil Code as well as to those of Article 91 of the Greek Commercial Law (provisions on orders).[68]

Thereafter and following the enactment of Presidential Decree 219/91 *on Commercial Agents in compliance with Directive 86/653/EEC*, the matter of its *mutatis mutandis* application in distribution agreements was heavily discussed in jurisprudence and literature.[69]

The matter of the *mutatis mutandis* application of Directive 86/653/EEC on self-employed commercial agents on other intermediation agreements was brought before the ECJ,[70] following a request for a preliminary ruling filed by the Athens Multi-member Court of First Instance.[71] By virtue of a reasoned order, the ECJ ruled that the Directive is not automatically applied *mutatis mutandis* in other intermediation agreements, but it noted that the national legislator is free to enact provisions ensuring the protection of commission agents (it is noted that the case concerned a commission agency agreement).

Finally, the Greek Supreme Court (Areios Pagos), with its benchmark Decision 139/2006 of the A Chamber, found that there exists a genuine (involuntary) legislative lacuna which makes it possible for the PD to be *mutatis mutandis* applied on

[68] Indicatively Supreme Court 812/1991 and 887/1974; A. Karagounidis, *Issues of termination and compensation in distribution agreements*, EpiskED 376 (2003).

[69] Supreme Court 1374/2019, 751/2019, NOMOS Data Base, 849/2002, NoB 2003, 47; Athens Court of Appeals 236/2006, NoB 2006; Athens Court of Appeals 1714/2005, DEE 2005, 838; Athens Court of Appeals 1729/2005, EpiskED 2005, 1059 with introductory note by K. Pamboukis; Athens Court of Appeals 7371/2003, EpiskED 2004, 438; Athens Court of Appeals 9155/2002, DEE 2004, 677; Thessaloniki Court of Appeals 1876/2002 and Athens Court of Appeals 7303/2002, EpiskED 2003, 437 et seq. and respective thesis of A. Karagounidis with numerous references to literature and case law; Thessaloniki Multi-member Court of First Instance 627/2001, DEE 2001, with note of N. Kiprouli & D. Koutsoukis, *The mutatis mutandis application of PD 219/1991 in distribution agreements*, note on Athens Court of Appeals 986/2005, DEE 2005, 705 also with numerous references to literature and case law, especially para. 10 p. 706.

[70] ECJ Decision of 10 Feb. 2004 (C-85/03 *Mavronas v. Delta Etaireia Symmetochon AE*).

[71] Athens Multi-member Court of First Instance 3710/2001.

all other intermediation agreements.[72] The judgment of Supreme Court Decision 23139/2006, which was thereafter followed by a series of decisions of the same court,[73] was finally adopted by the Greek legislature with a significant deviation. By virtue of Article 14(4) points (a) and (b) of L. 3557/2007, the *mutatis mutandis application* of the PD was established solely with respect to commercial agency agreements concerning the provision of services as well as exclusive distribution agreements (it is noted that the PD provides solely for agency agreements regarding the sale of products and not the provision of services). The new provision reads as follows:

> *4. The provisions of the PD, as in force, are* mutatis mutandis *applied in the following agreements: (a) Agency, which concerns the provision of services, (b) exclusive distribution, provided that as a consequence of said agreements, the distributor acts as part of the commercial network of the supplier.*

This provision was enacted in spite of Supreme Court Decision 139/2006, which qualified the *mutatis mutandis* application of the PD in all intermediation agreements bearing the characteristics (*see* below under section 2.2.1) of a commercial agency agreement.

At this point, it is noted that the aforementioned provision is not incorporated in the PD, nor it amends the same as was the case with Presidential Decrees 264/1991, 249/1993, 88/1994 and 312/1995. On these grounds, it was correctly included in a law, provided that it does not concern a (due) introduction of the Directive on self-employed commercial agents in Greek law and could not rely upon the authorizing provisions referred to in the preamble of the PD.[74]

Unfortunately, the aforementioned (limited) choice of the Greek legislature created some confusion. Consequently, the discussion as to whether the PD is applied in all intermediation agreements was once again rekindled, and as a result, the matter was brought before the Plenary of the Supreme Court[75] (*see* above

[72] *See* reasoning of Supreme Court 139/2006, which was commended by literature (save minor exceptions), indicatively observations of S.G. Alexandris, NoB 2006, p. 1115; Introductory Note of K. Pampoukis, EpiskED 2006, p. 420; Note of H. Soufleros, DEE 2006, p. 653; Observations of N. Elefthreriades, EEmpD 2006, p. 321; D. Koutsoukis, EllDni 2006, p. 754; N. Vervesos, XrID 2006, p. 855; S. Tsiros, NoB 2006, p. 1681, Note E.N. XrID 2006, p. 541; Note A.D.M, Armenopoulos 2006, p. 1034; but *see also* criticizing observations of I. Dryllerakis, EEmpD 2006, p. 316 as well as contrary report of the retired reporting Supreme Court Judge E. Tsakopoulos, read by Supreme Court Judge I. Papanicolaou. Also *see* respective thoughts of Decision 4A-61/22 May 2008 of the Swiss Federal Court, NoB 2009, p. 436, with positive observations of S.G. Alexandris titled *Clientele compensation of the distributor under Swiss law: Clientele compensation of the distributor under Greek Law*.

[73] Indicatively Supreme Court Decisions 212/2006, NoB 2007, p. 701 and 53/2007, NoB 2007, p. 1382 as well as Supreme Court 1805/2007, NoB 2008, p. 148, all with comments of S.G. Alexandris, NoB 2009, p. 445.

[74] H. Soufleros, *The enactment of the* mutatis mutandis *application of PD 219/1991 on commercial agents in other continuous intermediation commercial agreements (Art. 14 (4) of L. 3557/2007) – A first glance in light of recent Supreme Court and ECJ jurisprudence*, DEE 2008/496.

[75] *See* footnote 15 above. Also Supreme Court 697/2012; Ch. Tsenes *The grounds of PD 219/1991 application in framework distribution agreements*, EpiskED 628 (2011); I. Dryllerakis, *The mutatis mutandis application of PD 219/1991*, DEE 668 (2011); Th. Katsas, *The mutatis mutandis application of PD 219/1991 in services intermediation agreements in the form of brokerage*, DEE 2012; I. Dryllerakis, *Clientele compensation in services*, *see* Members Forum, www.syneemp.gr.

section 1.4). As already mentioned, the Supreme Court in Plenary issued Decisions 15/2013 (concerning a travel broker agreement) and 16/2013 (concerning a commission agency agreement), which uphold the *mutatis mutandis* application of PD 219/91 in all intermediation agreements, provided of course that the respective criteria set by the PD are met. This ruling was based on the finding that, as already mentioned, there exists *an involuntary lacuna, which the legislator should have predicted and covered (primary lacuna)*.[76]

From the aspect of domestic law, it is noted that the validity of clauses in distribution agreements is examined in light of the provisions of Articles 174, 178, 179, 288, 281, 371–373 of the Greek Civil Code (to the extent that the code's *jus cogens* provisions are *mutatis mutandis* applied in distribution agreements).

2.2. The New Antitrust Regulation 720/2022/EC

In general, from the aspect of EU Law, the examination of distribution agreements is regulated by Articles 81 and 82 of the EC Treaty (already Articles 101 and 102 of the TFEU), Council Regulations 2790/1999/EC (already Regulation 330/2010/EC) and 1400/2002/EC as well as Articles 1, 2 and 2a of L. 703/1977 (already L. 3959/2011). It needs to be emphasized that in distribution agreements, the distributor is normally the weak contracting party, especially when taking into consideration that it is common for the distributor to be financially dependent on the supplier. Consequently, his protection must be ensured not only upon the execution of the agreement but also throughout its duration.

However, the expiry of Regulation 330/2010/EC led to the adoption of a newer Regulation. On 1 June 2022, the new Regulation 720/2022/EC on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (also known as VBER) entered into force.

A fundamental change regarding exclusive distribution agreements is the introduction of 'shared exclusivity'. According to paragraph 51 of the Regulation 330/2010/EC Guidelines, 'a territory or customer group is exclusively allocated when the supplier agrees to sell his product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into his territory or to his customer group by the supplier and all the other buyers of the supplier within the Union, irrespective of sales by the supplier'. Under the new Regulation 720/2022/EC, the possibility of a 'shared exclusivity' has been introduced. This means that exclusivity can be granted to more than one distributor, up to a maximum of five.

Another new element of the new Regulation 720/2022/EC is that according to Article 4(b)(i) and paragraph 220 of the new Regulation Guidelines, suppliers may

[76] *See* Supreme Court 709/2018 EEmpD 2019, p. 550; Supreme Court 1372/2018, NOMOS Data Base; Supreme Court 515/2016, E7 2017, p. 851, Supreme Court 355/2015, E7 2015, p. 1149; Supreme Court 804/2015; Supreme Court 852/2015, XrID 2015, p. 692; Supreme Court 191/2016, E7 2017, p. 286; Athens Multi-member Court of First Instance 186/2017, EEMPD 2017, p. 329; Supreme Court 1372/2018, NOMOS Data Base; Supreme Court 709/2018 EEmpD 2019, p. 550; Supreme Court, 515/2016, E7 2017, p. 851.

not only impose an active sales restriction on their direct distributors but also require them to prohibit their own customers from actively selling into territories or customer groups that the supplier has allocated exclusively to other distributors or reserved for itself.

Finally, Regulation 720/2022/EC allows suppliers to set up different distribution systems in different areas and to protect them against each other. More specifically, exclusively allocated systems may now be protected against active sales by distributors from selective distribution territories (*see* Article 4 (c)(i) Regulation 720/2022/EC) and from free territories (*see* Article 4 (d)(i) Regulation 720/2022/EC). In addition, selective distribution systems may be protected against active and passive sales by distributors from exclusive distribution territories (*see* Article 4(b)(ii) Regulation 720/2022/EC) or by distributors from free territories (*see* Article 4(d)(ii) Regulation 720/2022/EC).

2.3. Concept and Characteristics of the Distribution Agreement: Criteria – Distinctions

2.3.1. Concept and Characteristics of the Distribution Agreement

The distribution agreement, deriving from the freedom of contract principle (Articles 5(1) of the Greek Constitution and 361 of the Greek Civil Code), is a creation of modern economy and a vehicle which serves the needs of intercompany cooperation. The parties are, in principle, free to form their contractual relation and shape the content of the distribution agreement to the extent that no *jus cogens* provisions are violated.

The distribution agreement may function and appear in practice as exclusive or non-exclusive.[77] As far as the *exclusive distribution agreement* is concerned, it is a continuous, reciprocal, contractual agreement, of limited or indefinite time, by virtue of which the producer or wholesaler (supplier) undertakes the obligation to exclusively sell products to his counterpart (distributor) with the purpose of the latter reselling them in a specific geographical territory. Furthermore, the supplier is obliged to supply and support the distributor throughout the agreement. The distributor, however, undertakes the obligation to exclusively buy the respective products from the supplier and pay the agreed price, as well as to sell the same in his own name and on his own behalf and risk. The distributor is further obligated to organize his business in such a way that it can be integrated into the producer's commercial network as he is obligated to respect the latter's commercial terms and conditions regarding, e.g., advertising, trademarks and customer service.[78]

In this way and contrary to a commercial agent, the distributor: (a) does not act in the name and on behalf of the supplier; (b) does not receive a commission; and (c) is not obligated to attribute profits to the supplier.

[77] *See* Supreme Court 42/2015, XrID 2015, p. 533; Supreme Court 804/2015; 1325/2019, NOMOS Data Base; Athens Multi-member Court of First Instance 3809/2018, NOMOS Data Base.

[78] Indicatively Supreme Court Plenary 15/2013 and 16/2013; Supreme Court 139/2006, Athens Court of Appeals 2110/2008, DEE 2008/984; Athens Multi-member Court of First Instance 5/2012, NOMOS Data Base.

At this point, it needs to be noted that the meaning of exclusivity may vary, and therefore, it demands specification. Depending on the agreement, exclusivity may mean that the supplier is prohibited from directly selling products in the territory of the distributor, or it may mean that any other party is prohibited from directly selling products in the said territory or even both.

Respectively, legal consequences vary as well. When the distributor is exclusive, the supplier selling products directly in the former's territory grounds is a breach of contract bearing all respective legal ramifications, such as the distributor's right to seek damages or terminate the agreement. However, the mere stipulation of a specific territory or type of customer simply enlarges the business volume demanding the payment of a fee and does not justify a right of compensation in case of a contractual breach unless it is combined with exclusive rights of the distributor.

2.3.2. Criteria of the Exclusive Distributor's Integration in the Principal's Network

As is clear, the exclusive distribution agreement is very much similar in its fundamental (crucial) elements to the agency agreement.[79] This is the reason why Article 14(4) point (b) of L. 3557/2007 establishes the *mutatis mutandis* application of the PD on exclusive distribution agreements since, *as a consequence of said agreements, the distributor acts as part of the commercial network of the supplier*.[80]

The meaning of this phrase needs to be specified in individual typological elements. In other words, those criteria, which are the main *typical* characteristics of a commercial agent's activity, need to be identified, and then it needs to be examined ad hoc whether the same can be identified in the case of an exclusive distributor.[81]

In light of the fundamental principle of equality stipulated in Article 4(1) of the Greek Constitution and the principle of *bona fide* deriving from Article 288 of the Greek Civil Code, jurisprudence has established the following criteria:

(a) If the distributor acts as part of the commercial network of his counterpart having the same weak position and intense dependency on the producer as a commercial agent, whom the community legislator had in mind when establishing the provisions of the Directive. Furthermore, it is examined if the distributor has the same level of integration in the distribution network as his counterpart.
(b) If he contributes to the growth of his counterpart's clientele, having to a significant extent, duties comparable to those of a commercial agent, being connected with the sales network of the producer/wholesaler in the way the latter is.
(c) If he undertakes the responsibility not to compete with his counterpart.
(d) If his clientele is known to his counterpart during the agreement and upon its termination, the same is handed over to the latter.

[79] S.G. Alexandris, *Note on decision 4A61/22.5.2008 of the Swiss Federal Court*, NoB 2009/436; K.D. Limberopoulos, *Commercial agent: Distributor, parallel roads*, NoB 18 (2008).
[80] *See* Supreme Court 1374/2019 and 139/2006.
[81] H. Soufleros, *The enactment of the* mutatis mutandis *application of PD 219/1991 on commercial agents in other continuous intermediation commercial agreements (Art. 14 (4) of L. 3557/2007): A first glance in light of recent Supreme Court and ECJ jurisprudence*, DEE 2008/496.

(e) If, in general, the financial activity and benefits of the distributor are similar to those of an agent[82] (regardless of their typical legal characterization).

It must be noted that the crucial element which will lead to the *mutatis mutandis* application of the PD in the distribution agreement, as well as all other intermediation agreements, is neither the exclusivity clause (which may or may not be stipulated) nor the need to protect the distributor. Instead, the crucial element is whether or not the supplier is in a position to draw benefits (make sales) for the clientele contributed by the distributor or whether his affairs have been significantly advanced throughout the duration of the agreement, preserving such benefits after the agreement is terminated.[83]

However, based on the Supreme Court Decisions 42 and 804 of 2015 – NOMOS database, the application of the legal framework providing for clientele compensation was refused to non-exclusive distribution agreements on the grounds that the distributor had not assumed a non-competition obligation vis-à-vis the principle.[84] Said case law seems to differentiate from previous Supreme Court Plenary decisions, something which led to the same being criticized by literature (*see* Elias Soufleros, DEE 2016 pp. 614 et seq.). More specifically in the case of a non-exclusive distribution agreement, the provisions of the Greek Civil Code (GCC) relating to the mandate (Articles 713 et seq., including Articles 724 and 725) shall apply by analogy, in the absence of specific legislation, due to the special relationship of trust which governs the parties to the agreement. In accordance with the above provisions, the Principal is entitled to revoke the mandate at any time, freely and indefinitely, without being bound by any restrictions, as well as to terminate the contract without giving any reason. However, in view of the intrusive nature of this provision, it is not excluded that the contracting parties may agree (Article 361 GCC) that the termination of the contract is subject to a time limit (notice). Due to the nature of the mandate contract as a relationship of trust, the revocation or termination, even if it is abusive, is never invalid, but the Distributor is entitled to claim compensation for any positive or negative damage suffered as a result of the revocation or termination of the mandate, in accordance with the provisions of the CC. In particular, the Distributor possesses a right for compensation in case of circumstances attributable to the principal's sphere of responsibility, especially when the termination is deemed untimely and lacking a serious reason. Therefore, the culpable and damaging exercise of the right to terminate a contractual relationship establishes compensation liability for the terminating party.[85]

[82] Supreme Court 823/2015, 804/2015 and 139/2006 NOMOS database; Athens Court of Appeals 2110/2008, DEE 2008/984; Athens Court of Appeals 874/2002, EllDni 44/248; Supreme Court 212/2006, DEE 2008/932; Athens Court of Appeals 236/2006, DEE 2006/793; Supreme Court 1805/2007, NoB 2008/143 with note of S.G. Alexandris.

[83] *See* Supreme Court Plenary 15/2013, 16/2013 and also D. Koutsoukis, Distribution Agreements 48 et seq. (E. Perakis ed.); Athens Multi Member Court of First Instance 3/2021 NOMOS database.

[84] *See also* recent decisions of the Supreme Court upholding the prohibition of the *mutandis mutandis* application of the PD in the non-exclusive distribution agreements : 1308/2024, 485/2024, 317/2024, Qualex database

[85] Thessaloniki Single-member Court of First Instance 15933/2024, Supreme Court 1299/2023. Qualex database

The Distributor shall have the same right (Article 723 GCC) in the event of circumstances within the Principal's control, in particular if the termination is untimely and unjustified. The Distributor is not entitled to claim the recognition of the invalidity of the termination and the performance of the agreement, since the conditions of the relationship of trust required by the above provision are not met. Thus, the termination of the contract terminates the contract and the Distributor cannot claim loss of profits for the period after the termination. Only if the contract sets a time limit for termination and the principal does not respect this time limit, the distributor can claim damages, provided that the principal has acted in an unconventional manner that has caused him loss, and only for the period of the time limit set and to be respected for termination.

Therefore, in accordance with the case law, in cases of clientele compensation in non-exclusive distribution agreements, the provisions mentioned above of the Greek Civil Code shall apply.[86]

2.3.3. Distinction from the Commercial Agency and Other Intermediation Agreements

For the distinction of a distribution agreement from a commercial agency agreement and other intermediation agreements, *see,* in detail, section 1.4. However, distribution agreements may be differentiated among themselves, depending on the terms and conditions included therein. More specifically, there are the following types of distribution agreements:

(a) *Exclusive supply agreements*,[87] under the meaning of Regulations 2790/1999/EC (Article 1(c)) and 1400/2002/EC (Article 1(e)) concerning the application of Article 81(3) of the EC Treaty on vertical agreements (the first in general and the second specifically for the car industry). Based on this agreement, the supplier is obligated or induced to sell the contract products only or mainly to one buyer within the community (and for the purposes of L. 703/1977 within Greece), in general, or for a particular use. This type of agreement constitutes the *extreme type* of limited distribution, and as such, it falls under the meaning of the provisions of L. 3557/2007. All the more since, as a rule, such an extensive exclusivity will be accompanied by obligations which, at minimum, correspond with those of a distributor.

(b) *Exclusive customer allocation agreements*[88] based on which the supplier agrees to sell his products only to one distributor for resale to a particular group of customers. At the same time, the distributor is usually limited in his active selling to other (exclusively allocated) groups of customers. Placing this type of agreement under the aforementioned provisions is also dictated by the fact that in the framework of commercial agency agreements, the exclusive

[86] *See* also recent decisions, Supreme Court 150/2023, 710/2023, NOMOS database, Athens Multimember Court of Appeals Athens Single member Court of Appeals 1243/2020, 376/2021, Qualex database, Thessaloniki Single-member Court of First Instance 15933/2024 Qualex database.

[87] *See* Commission notice – guidelines on vertical restrains p. 57 paras 192–202.

[88] *See* Commission notice – guidelines on vertical restrains p. 49 paras 168–173.

assignment of geographical territory and the exclusive assignment of a category of (potential) clients are approached in the same way, as is evident in Article 6(1) point c of PD 219/1991.

(c) *Selective distribution agreements*,[89] where the supplier undertakes the obligation to sell the goods or provide the services stipulated in the agreement, directly or indirectly, solely to selected distributors, based on predetermined criteria and provided that the same undertakes the obligation not to resell them to non-authorized distributors. Such an agreement lacks the conceptual elements of the exclusive assignment of a specific geographical territory and/or of a specific clientele (found in an exclusive supply agreement and/or an exclusive customer allocation agreement), as it also lacks the prohibition of competition.[90]

2.4. Duties and Obligations of the Parties

2.4.1. Main Obligations of the Supplier

The main obligation of the supplier in an exclusive distribution agreement is to sell his products exclusively to the distributor in the agreed territory and to continuously support him (i.e., provide documents, certificates or advertising leaflets regarding the products, machinery, know-how, trademarks, information about the relevant market and methods of marketing).[91] Such support must concern the distributor's overall activity as defined in the respective agreements and must also take into consideration his reasonable interests.[92]

Other obligations can also arise *in concreto* from the principle of good faith, taking into consideration the level of the distributor's incorporation in the supplier's network. Nevertheless, it is accepted that the supplier is obliged to inform the distributor on time with regard to the difficulties relating to the proper supply of products and radical changes in the distribution network or in technology, which may have an influence on the distributor's business.

2.4.2. Main Obligations of the Distributor

In the absence of legislative regulation, the duties of a distributor are shaped and defined by the content of the distribution agreement. The parties are, in principle, free to shape their contractual relation as well as the content of the agreement to the extent that no *jus cogens* provisions limiting contractual freedom are violated.

[89] *See* Commission notice – guidelines on vertical restrains p. 51 paras 174–188.

[90] For these distinctions, also *see* H. Soufleros DEE 2008/496 and S.G. Alexandris NoB 2009/447.

[91] *See* Supreme Court 28/2020 NOMOS database, Thessaloniki Multi-member Court of First Instance 21602/2003; Thessaloniki Court of Appeals 1876/2002, EpiskED 2003, pp. 437 et seq.; Athens Multi-member Court of First Instance 7635/2000, DEE 2000, pp. 1093 et seq.; Athens Court of Appeals 9658/1995, DEE 1995, pp. 154 et seq.; Athens Single-Member Court of First Instance 11330/2018, NOMOS Data Base; Athens Single-Member Court of First Instance 11330/2018, NOMOS Data Base.

[92] The supplier's obligation to protect the distributor's interests derives from the fiduciary obligation established in Art. 288 of the Greek Civil Code.

In general, both the distributor and the supplier have enhanced fiduciary duties as well as an enhanced obligation to protect the interests of their counterpart.

For the *mutatis mutandis* application of the PD, the obligations of the distributor must resemble those of a commercial agent. Such resemblance is detected, especially when the distributor or other intermediates undertake obligations similar to those undertaken by a commercial agent under Article 4(1) of the PD. More specifically to:

(a) abstain from competing with the principal throughout the agreement as well as after the termination of the same;
(b) maintain confidentiality;
(c) constantly and exclusively promote the products of the principal in the territory contractually assigned to them, being at the same time subject to the latter's authority regarding the course of sales or purchases as the case may be;
(d) advertise the goods even at their own expense; and
(e) inform the principal of their clientele.

These obligations do not have to be accumulatively stipulated in an agreement. The lack of one can be compensated by the intensity of another. The same constitutes these intermediates an integral and decisive part of the commercial network of the principal since their commercial activity directly benefits the latter. In other words, the principal does not draw benefits solely from the fulfilment of his counterpart's main contractual obligation. He also benefits from the specific obligations burdening the same, with the fact that he is informed of their clientele and can use it after the termination of the agreement through other intermediates, therefore, continuing to draw financial benefits.[93]

2.5. Distributor's 'Fees'

Specific provisions regarding the height of the distributor's fees are not found in the law. However, as far as commercial representatives are concerned, Article 5(1) of the PD provides that in the absence of a respective agreement, the fees should be those that are customary in the place and industry type where the agent is bestirred. Moreover, the PD states that if in the absence of a precedent of the aforementioned fees cannot be determined, the agent is entitled to a reasonable fee.

Therefore, if the conditions for the *mutatis mutandis* application of the PD in a distribution agreement (be it exclusive or not) are met, the distributor's fees will be determined as per Article 9 of the PD.[94]

Article 9 of the PD provides that the amount of the commercial agent's indemnity (clientele compensation) cannot exceed the annual average of his fees. The PD further provides that such average is calculated on the basis of fees collected over the five preceding years and, in case the agreement was shorter-lived, the average of the respective period.

[93] *See* Supreme Court Plenary 15/2013 and 16/2013.
[94] Indicatively *see* Supreme Court Plenary 15/2013 and 16/2013; Supreme Court 139/2006.

Having noted the above, it is established that the indemnity of a commercial agent is calculated based on the agreed sales commission. Yet, how is the indemnity of a distributor calculated since he does not receive a commission but buys and sells products instead?[95]

The answer is found in the Supreme Court's Decision 139/2006, which ruled that the distributor's *commission* is determined by the profit emerging from the difference between the purchase and selling prices of the respective products. However, provided that the distributor's indemnity must be *equitable*,[96] the question of whether gross margins or net profits should be taken into consideration remains. The aforementioned decision does not provide an answer.

In financial terms, the profit of a business resulting from trading a product (and, in this case, products purchased under the distribution agreement) has several scales. More specifically, profit is first defined by the gross operating results, which emerge from the deduction of the cost of sales from the net turnover. Of course, in order to accurately establish the pre-tax profits of a business, the cost of sales must also include the appropriate proportion of administrative expenses as well as distribution and finance costs of the products.

As per above, it could be concluded that the indemnity of the distributor is determined on the basis of the net profits, which were frustrated due to the termination of the agreement on behalf of the supplier. Indeed, this conclusion is indirectly supported by jurisprudence.[97]

2.6. Form of Exclusive Distribution Agreements: Duration – Chain Agreements – Termination

Despite the fact that according to Article 158 of the Greek Civil Code, distribution agreements are entered into informally,[98] in practice, detailed agreements are drafted (*see* section 1.7.2). Provided, of course, that the conditions for the *mutatis mutandis* application of the PD are met (*see* section 2.2.2), matters concerning the form of such agreements, their duration and their termination are regulated by the same.

[95] With respect to the below mentioned regarding the calculation of the distributor's indemnity, *see* S.G. Alexandris, *The* mutatis mutandis *application of PD 291/91 in the exclusive distribution agreement: Distributor's indemnity* (comments on Supreme Court Decision 139/2006, NoB 2006, p. 1115).

[96] Such indemnity must be '*equitable*', having regard to all circumstances of each specific case and, in particular, the commission lost by the commercial agent from business transacted with such customers (*see* Supreme Court 139/2006). For the conditions under which indemnity is due to the distributor *see* s. 2.6.

[97] *See* indicatively Supreme Court Plenary 22/1995, EllDni 1995, p. 1538 which rules that in case lost profits are claimed the defendant may request the deduction of *any expenses avoided*; also Thessaloniki Court of Appeals 1876/2002 refers to net profits without determining the calculation method of the same. On the contrary, *see* Athens Multi-member Court of First Instance 4384/2012 which sets as a prerequisite for a grounded lawsuit to mention the gross profits. *See also* N. Tellis, *Commercial agent's clientele compensation*, DEE 2006/1103 who is in favour of gross profits.

[98] *See* Supreme Court 355/2015, E7 2015, p. 1149; Supreme Court 191/2016, E7 2017, p. 286; Supreme Court 191/2016, E7 2017, p. 286.

2.7. Clientele Compensation and Further Claims on Behalf of the Distributor

2.7.1. Clientele Compensation

As already established, the *mutatis mutandis* application of the PD in distribution agreements is consistent in Greek jurisprudence and literature. More specifically, it is consistently accepted by jurisprudence[99] that in order for Article 9 of the PD to be applied and clientele compensation to be due, the following three equivalent conditions must be accumulatively met:

(1) The commercial agent must have contributed new clientele or significantly increased business volume in the course of the agreement.
(2) The principal must continue to derive substantial benefits from such clientele or business volume after the termination of the agreement.
(3) The amount of the indemnity is *equitable*.

If the aforementioned conditions are accumulatively met, then all that is mentioned above (under section 1.10.1) for the commercial agent is applied *mutatis mutandis* to the distributor. The Athens Multi-member Court of First Instance in its 1367/2022 decision, noted on the mandatory nature of Article 9 of the PD in its *mutandis mutandis* application to other intermediation agreements and in regards to the Applicable Law in Arbitration Clauses. While the ECJ, in its *Maronas* case,[100] ruled out the automatic *mutandis mutandis* application of the 86/653/EEC Directive in the abovementioned agreements, the *jus congens* statue of Article 9 of the PD (which prohibits its circumvention despite the applicable law) and its enforcement by analogy on distribution agreements, is upheld as a national rule of Direct Applicability.[101] With regard to the calculation of the distributor's fees and the amount of clientele compensation, *see* section 2.4.

2.7.2. Further Claims on Behalf of the Distributor

With respect to further claims of the distributor, the conditions of the commercial agent apply (*see* section 1.10.2).[102]

[99] Supreme Court Plenary 15/2013 and 16/2013; Supreme Court 1596/2017, 852/2015 & 139/2006; Supreme Court 704/2007; Supreme Court 852/2015; Supreme Court 1596/2017; Athens Multi-member Court of First Instance 186/2017, EEMPD 2017, p, 329.
[100] ECJ Decision of 10 Feb. 2004 (C-85/03 Mavronas v. Delta Etaireia Symmetochon AE).
[101] Athens Multi-member Court of First Instance.1367/2022, Qualex database.
[102] *See* Supreme Court 852/2015; Supreme Court 1559/2017, Decision concerning the clientele compensation and further claims which arise by the Greek Civil Code; Supreme Court 1596/2017; Athens Multi-member Court of First Instance 186/2017, EEMPD 2017, p. 329.