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The Juridical Nature of Distribution (Network) Contracts from the Polish Perspective

I. The economic and legal concept

The distribution of assets or services is primarily an economic phenomenon being the intermediary link between manufacture and consumption stages of professional trade activity. In a strongly globalized, commercialized and "internetized" world, the allocation and sale of goods or services (hereinafter as: "products") through the networks of professional intermediaries seems to be the significant method of cross-border business strategic cooperation, especially for huge manufacturers or suppliers with the worldwide ambition to expand (automotive manufacturing, agriculture machinery, petroleum industry, electronic & communication equipment, household improvement, furniture, newspapers, etc.). However, it begins to play a more significant role also on a local scale, in domestic business-to-business (B2B) and business-to-consumer (B2C) relations. This kind of commercial teamwork has been classified and documented by Polish legal authors and case law. Its rapid and remarkable advance in contractual practice shall be dated particularly from 2004, when Poland had joined the European Union. The public (state) courts show some awareness of economic inequities that inhere in distribution business particularly for distributors but, unlike arbitrators, the judges are not ready, so far, for the precise identification and relevant judgment of such contractual B2B cooperation format, mainly due to the poor understanding of its economic "ratio", what results rather from business usage and contractual practice than from statutory law. They got used to apply traditional obligation law rules codified in the Polish Civil Code ("PCC"), avoiding their modification or adaptation to the new, economic challenges. So as before, the main task to guide and enlighten the ambiguities in the relationship between supplier and distributor is vested in private law scholars.

One can separate two elementary models of sale of goods and provision of services in modern trade: a direct and an indirect one. In the model of direct trade it is the producer (supplier, manufacturer, service provider) who directly engages himself financially and logistically in the process of spreading out of manufactured goods or rendered services (retailing, outlets) on his behalf throughout the network of retailers or salespersons (e.g. concessionaires, jobbers, middlemen, entities or individuals) employed by him or self-employed but salaried on employee's basis (sometimes may obtain a commission based on sales).[1] On the other hand, the system of indirect sale or service provision (German: Absatzmittlung, Polish: pośrednictwo handlowe) is more complicated, what might be based on the holding of branch or subsidiary companies established or purchased by a producer or on the network of sovereign middlemen (agents, canvassers, dealers, distributors) who render professionally their intermediary service of resale of goods and/or rearrangement of services on their own account and behalf (so called "qualified distributorship"). If there are more intermediaries running the resale business, one may consider it a distribution system (network).[2] The indirect model seems to be more

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[1] Compare: *D. Ferrier*, Droit de la distribution, 6th ed., Paris 2012, § 1; *W. J. Kocot*, in: System Prawa Prywatnego (ed. *Z. Radwański*), vol. 9 (*W. J. Katner* ed.), Warsaw 2010, § 9, para 134, p. 176-177; *M. Martinek/F. Semler/S. Habermeier*, Handbuch des Vertriebsrechts, 2nd ed., München 2003, § 1, para 11.

[2] See more, *K. Schmidt*, Od starego prawa przedstawicielstwa handlowego do nowoczesnego prawa dystrybucji. Prawo handlowe, praktyka handlowa i prawo kartelowe, Kwartalnik Prawa Prywatnego

convenient from the economic point of view, because the costs and risk of a supplier are sufficiently low, comparing with other types of retailing. The more complex and competitive products of high quality and famed brand are to be supplied (cars, production equipment, computers, cell-phones, TV- or radio-sets, washing machines, cosmetics, books, etc.), the higher logistic and distributorship outlay is likely. Distributors are the professional entities (never physical persons) that are self-reliantly responsible for the promotion and resale outcome. They engage in business independently, using their skills and best efforts to bring manufacturer's products on to the market. For manufacturers the effective costs of dealer's or agent's participation in the retail network are customarily narrowed to their remuneration, discounts or reduction of price of resold goods or rendered service, or invoice payment deferral [in Poland so-called "merchant credit" (kredyt kupiecki)]. In the case of arrangement of the net-dealership, the expenditures for selection of dealers and the maintenance of network have to be added. The direct sale is inexpedient form of supply when the producer is a large, international entrepreneur because such model of sale of goods is useless and overpriced in case of global, commercial expansion. The manufacturing, investments in quality of products, promotion, distribution, sale and after-sale service in many countries with diverse legal (e.g. consumer protection law) or marketing systems at the same time would be a time- and money-consuming activity with too high risk of failure for suppliers.

There is no one standard, uniformed scheme that could help all of us to characterize the distribution agreement. Its juridical nature is compound, strongly connected with the economics, formed instinctively by contractual practice due to fair expectations of business and the challenges of fast globalizing trade. Such experiential type of contract is hardly subject to any overview. The majority of civil and common law systems is very familiar with the problem. The present position of Polish jurisprudence, to some extent, reminds of the controversies among French legal scholars in the second half of the XXth century, as to how to portray the exact juridical character of the distribution contract.[3] The approach to the subject is fourfold: that the distributorship contract (1) represents a particular type of commercial sale of products; (2) that regards distributor as a commercial agent acting on its own account but for the benefit of the principal; (3) that it is similar to franchising or distributive franchising contracts with the licence de marque and (4) that it is sui generis (customary) distributorship agreement with its two subtypes: the exclusive distribution or purchase contracts and the selective dealership.[4]

Without doubt, amongst all named (regulated in statutory law) and unnamed (combined, mixed) contracts the distribution relationship does have standard attributes connecting it strongly with contract of sale. The obligation to purchase products for further resale with the transfer of property is inevitably the key provision within the terms of the distribution framework contract. As in the case of the seller, the performance of the distributor is the most distinctive performance what is important regarding e.g. the

2008, no. 4, p. 1048 et seq.; *S. Włodyka/M. Spyra*, in: System Prawa Handlowego, (*S. Włodyka* ed.), vol. 5, Warsaw 2011 (3rd edn.), chapter 9, para 83, p. 628.

[3] See for further details: *C. Champaud*, La concession commercial, pub.: Revue Trimestrielle de Droit Commercial, vol. 16 (1963), p. 455-469 ; *T. E. Carbonneau*, Exclusive Distributorship Agreements in French Law, pub.: International & Comparative Law Quarterly, vol. 28 (1979), p. 91 et seq.; *J. Guyénot*, The French Law of Agency and Distributorship Agreements, London 1976, p. 185-190. See also *D. Ferrier*, see fn. 1, paras 53-56.

[4] See e.g., *A. Koch*, Formy pośrednictwa handlowego w eksporcie na tle wybranych systemów prawnych państw EWG, Warsaw 1981, p. 55-78; *W. J. Kocot*, see fn. 1, para 135; *K. Kruczalak*, Prawo handlowe. Zarys wykładu, Warsaw 2008, p. 445-446, p. 469-473; *K. Kruczalak/E. Rott-Pietrzyk*, System Prawa Handlowego (*S. Włodyka* ed.), vol. 5, Warsaw 2011 (3rd edn.), chapter 7, paras 217-219; *S. Włodyka*, Strategiczne umowy przedsiębiorców, Warsaw 2000, p. 277 et seq.

choice of law problem. To that respect, both contracts do match suitably.[5] Nonetheless, the distribution contract is more complex, and for many reasons its function cannot be limited to the acquisition of goods only. This relationship begins but does not end on a purchase of products by a distributor from a supplier. It does also mean that parties are not free from further obligations after the transfer of property of goods sold. Unlike the contract of sale, distribution is not a one-shot transaction and lasts for a certain period. The crucial element of each distribution relationship is a mutual obligation to collaborate and co-ordinate respective efforts in order to achieve the objectives of the contract before or after the purchase of products (compare art. IV.E.-2.201 DCFR).

The net dealership agreement usually consists of the important clauses regarding exclusivity, bonuses or discount accounting formula, promotion and advertising conditions, brand and trademark protection settings, periodicity of deliveries, the obligation of reliability, non-competitive clause, etc.[6] The main target of the conclusion of a distribution contract is the expansion and maintenance of the market of goods, mainly a well-known brand product in strategic cooperation with the producer or supplier. The resale, unlike a regular sale, is always justified by commercial motivation of the purchaser, whose dealings are never intended for personal use of the purchased products. The distributor resales products that were manufactured or delivered by the supplier acting in the economic interests of the latter, but at the same time his main task is to make his best endeavors to overcome and uphold his own business on the market as an independent reseller. So the protection and soliciting orders or the producer's standards of achievement aren't on his top list. This cross-purpose is often the critical point of disagreement and clash between the parties.[7] The distributor stands for a few tasks of a commercial representative of the supplier and his brand (takes delivery, issues and hands over of documents for carriage, protects the brand and the supplier's trademarks, maintains an inventory of the products, he is responsible for after-sale service or customer assistance, performs warranty work, etc.), but they are not the foremost elements of the relationship. At the first place the distributor advances his own economic strategy of controlling the trade of the product and continuous increase of market share. Nowadays the distributor's business in the resale of goods may often prevail entirely over the interest of the supplier or

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[5] In the absence of the choice of law clause in international distribution contracts, the provisions of the UN 1980 Vienna Convention on Contracts for the International Sale of Goods (the CISG came into force in Poland on the 1st of June 1996) should apply to the terms of distribution agreements in part at least referring to the obligations of seller (supplier) and buyer (distributor) and the remedies for breach of contract. See, for further discussion and controversies: *T. Bridge*, International Sale of Goods. Law & Practice, New York, Oxford 1999, para 2.18; *J.O. Honnold*, Uniform Law for International Sales, the 3rd edn., The Hague 1999, para 56.2; *P. Huber/A. Mullis*, The CISG. A New Textbook for Students and Practitioners, Sellier 2007, p. 48; *W. Kocot*, Zawieranie umów sprzedaży wg Konwencji Wiedeńskiej, Warsaw 1998, p. 15; *J. Lookofsky*, Understanding the CISG, the 3rd edn., Austin-Boston-Chicago-New York-Netherlands 2008, p. 18; *M. Lurger*, Die Anwendung des Wiener UNCITRAL – Kaufrechtsübereinkommens 1980 auf den internationalen Tauschvertrag und sonstige Gegengeschäfte, (in:) Österreichische Zeitschrift für vergleichendes Recht 1991, p. 419; *M. Pazdan*, in: Konwencja wiedeńska o międzynarodowej sprzedaży towarów. Komentarz, Krakow 2001, paras. 11, 13; *P. Schlechtriem/I. Schweizer*, Commentary on the UN Convention on the International Sale of Goods, 3rd edn., Oxford 2010, para 14, p. 34. Compare also some court's decisions: Oberlandesgericht (OLG) Koblenz of the 17th of Sept. 1993, 2U 1230/91**,** International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods, UNILEX, (M. J. Bonell ed.), Transnational Publishers Inc., New York, D.1993-23; OLG Düsseldorf of 11th of July 1996, 6U 152/95, UNILEX, op. cit. D.1996-9, The Metropolitan Court of Budapest in cases: of the 19th of March 1996, publ.: www.cisgw3.law.pace.edu /cases/960319h1.html; and *Celli S. p. A* v. *Agrolang BV* as of the 15th of April 1997, www.cisgw3.law .pace.edu /cases/970415n1.html.

[6] See e.g. *Kruczalak/Rott-Pietrzyk*, see fn. 4, para 221 (e).

[7] Compare e.g. *Martinek/Semler/Habermeier*, see fn. 1, § 3, para 9.

producer. The scale of the turnover is more important than the supplier's brand or even the quality of products resold. The lower the resale price is the better. Unlike a standard contract of sale, the distribution is based on the long-lasting and obligatory B2B cooperation in the products' resale.[8] The supplier has little or no responsibility for the distributor's activity, although he likely could be liable to the distributor's customers (consumers) for any lack of conformity, the defects in or injury or damage caused by the products. This alliance is the specific feature of both: customary and net distribution.

Distribution is not the same as the contract of sale freely associated with the independent provision of some services (e.g. promotion of goods, storage, marketing, charter of means of transportation), where a purchaser offers them and charges a supplier additionally for their performance on a separate basis. Such collateral contracts as a whole ought to be considered the distribution when the service rendered is incessantly built in the economic strategy of consistent proliferation of market, satisfying interests of both parties, and strengthens their collaboration in the allocation of supplied products. The mutual nature of distribution relationship should also be judged based on all collateral agreements at the same time. Then, in order to identify such complex type of cooperation one factor is unambiguously desired: the reciprocity of benefit and risk. The resale of products purchased by a distributor, though run on his own account and behalf, must also be productive and gainful for the supplier. The more successful the rotation of products by the distributor is, the more profitable it is for his supplier. In such circumstances the supplier shall also be obliged to take further risk, giving the distributor some extra profit (discounts on sale price, bonuses, etc.) or covering part of the distributor's expenditures that directly serve the brand or supplier's goodwill (e.g. promotion, advertising, marketing, transport).

Furthermore, the distributor cannot be directly linked with a commercial agent or any type of commissioned sales representative, because he does not act on account of the principal – supplier and at all times purchases the goods himself and not for any remuneration. Though, under Polish leading doctrine, distributorship, commercial agency and franchise contracts belong to the parallel categories of commercial representation[9], the agent's commercial activity shall be associated with its principal's business in a more direct way. Unlike distributors, agents shall be qualified to the class of dependent commercial representatives. The relationship between agent and principal is founded to a greater extent on the sales representation, and not on a contract of sale. The agent is not obliged to resale products but to sale them on the supplier's account as his representative acting on his behalf (intermediary) or in a principal's name (proxy, attorney-at-law).[10] The agent acts for the limited purpose of soliciting orders for goods what the principal will be liable for. The principal typically retains control over credit matters, settling on the terms of sale to the customer and is responsible e.g. for sale assistance, order administration, collection and inventory carrying costs. The distributor has almost full command over its own day-to-day commercial operations. Unlike the principal, the supplier cannot directly control the minimum sale price established by the distributor for his clientele. The only payment received by the agent is a percentage commission on each

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[8] *Kocot*, see fn. 1, para 143, p. 185; *Kruczalak*, see fn. 4, p. 96 et seq.; *Kruczalak/Rott-Pietrzyk*, see fn. 4, para 221(a).

[9] There is a number of PCC provisions on contract of mandate or agency that might be applied to the distribution by analogy, as provided for in para 2 below.

[10] Art. 758 of the PCC. See *W. Czachórski/A. Brzozowski/M. Safjan/E. Skowrońska-Bocian*, Zobowiązania. Zarys wykładu, the 11th edn, Warsaw 2009, para 1133; *E. Rott-Pietrzyk*, in: System Prawa Prywatnego (*Z. Radwański* ed.), vol. 7 (*J. Rajski* ed.), the 3rd edn., Warsaw 2011, § 77, p. 631, § 79 paras 42-49.

sale contract value or an agreed fee for the number of contracts effectively concluded.[11] Instead, the compensation received by the distributor is the margin of profit on the products sold – resulting from the difference between the sale price of product negotiated with the supplier and the resale price paid in fact by customers.[12] As a result, the distribution contract meets rather the criteria of business cooperation agreement than of a type of commissioned sales representation.

The dissimilarities between distribution and franchising are more difficult to be drawn up. The greater part of academics is willing to regard the latter as a particular type of selective distribution agreement.[13] But, unlike the selective distribution, franchising requires a much closer cooperation between the parties, often on the exclusivity basis. A franchisee enters into a business relationship with a franchisor in order to distribute products in a unique and regularized fashion. The manner of distribution must be strictly coordinated with a franchisor, who agrees the particular products to be distributed under his brand and know-how. Each participant of the franchise network takes advantage of the central support of the franchisor that is in charge of the formation of valuable goodwill. A franchisee is characteristically licensed to use the manufacturer's trademark in connection with the franchisee's business in a way similar to enterprises de fourniture.[14] The franchisee's business is associated not only with the trademark or other symbol designating the franchisor but also with his service mark, trade name, logo type, and advertising. The distributor might be allowed to use trademarks or the logo type of the supplier for a fee but he shall never be identified with his business and hardly uses know-how of the producer's enterprise.[15] The franchisor permits the franchisee to benefit from a proven product and marketing system. The franchisee's distribution activity is independent from the formal point of view, but a franchise makes economic sense only if it is structured in the form of network organized and supervised by the franchisor that may impose a business format on the franchisee and tightly control virtually all aspects of the franchisee's commercial activity. The franchisee is granted of the right to get involved in the business of offering, manufacturing and/or selling products under the marketing plan or system recommended by the franchisor. The delivery of products by the franchisor is only a secondary performance accompanying the know-how and trademark (the franchising package) rendered accessible for the franchisee.[16]

But, as it is also emphasized in foreign literature, it is frequently the presence of the fee that distinguishes in fact a franchise from a distributorship.[17] The fee can be in the form of a flat fee, a royalty, or required purchases from the franchisor. The performance of the franchisor is more complex and abundant than the franchisee's performance which might be limited only to the fee payment. That's why, unlike distribution, the reciprocity

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[11] For details review *E. Rott-Pietrzyk*, Agent Handlowy – regulacje polskie i europejskie, Warsaw 2006, p. 325 et seq.

[12] See *Schmidt*, see fn. 2, p. 1051, 1053.

[13] Compare *U. Promińska*, in: System Prawa Prywatnego (ed. *Z. Radwański*), vol. 9 (*W. J. Katner* ed.), Warsaw 2010, § 32, paras 5, 8; *S. Włodyka*, see fn. 4, p. 302 et seq.; *Włodyka/Spyra*, see fn. 2, para 105, p. 639, paras 111-119, p. 642 et seq.

[14] *A. Koch*, Umowa franchisingowa, RPEiS 1980, no 3, p. 56. See also § 3(6) of Polish Council of Ministers Regulation of 30 March 2011 [Official Journal of Poland (Dz.U.) No 81, pos. 441 of 18 of April 2011];

[15] See *K. Bagan-Kurluta*, Franchising a podobne instytucje prawne, pub.: Rejent 1999, No 1, p. 70.

[16] See *E. Wojtaszek-Mik*, Umowa franchisingu w świetle prawa konkurencji wspólnoty europejskiej i polskiego prawa antymonopolowego, Toruń (Thorn) 2001, p. 66.

[17] *Th. F. Clasen*, International Agency and Distribution Agreements, North America, Europe, Analysis and Forms, Charlottesville 2002, § 1.1, p. US-6-US-7.

of a franchise agreement is discussed occasionally by some academics and the Supreme Court.[18]

As a result, a distribution contract differs to a relevant extent from sale, commercial agency, commissioned sales representation or franchise agreements, but at the same time includes many characteristics from all above relationships. Therefore it ought to be structured on its own grounds in order to identify its emblematic features.

From the Polish perspective there is an interesting problem regarding the question which party sets up the network. In general, in international trade there are three models of distribution: one favoring the supplier, a further one – favoring the distributor, and a third one in which the mutual rights and obligations of the parties are aptly balanced.[19] But such division of distribution schemes does not mean that the favored party is always responsible for the formation of the net. To make selling under the web more attractive, its initiator may give many benefits and concessions to potential participants. It is so e.g. in the case of franchise. In a standard model net distribution relationship it is the manufacturer who selects and manages the group of his dealers, responsible for the distribution of supplied products (often on exclusivity grounds) and efficiently cares for the manufacturer's standards of achievement. The manufacturer was widely regarded by legal authors as an entity with the highest economic and legal gain in establishment of the net. But the contractual practice in Poland shows the original and opposed trend. The vast majority of producers are small and medium-sized companies or cooperatives with singly irrelevant commercial clout. So, the economic pattern often turns out the distributor to be a party involved in the creation of the network with the adequate bargaining or monopsony power to make the first move to start cooperation with local suppliers and producers, being at the same time responsible for its formation and maintenance. For example, the big food merchants have monopsony power when purchasing supplies from farmers or victuals processors. This results in the creative contents of distribution contracts.

Mainly the distributors are influential enough to persuade their counterparts to build the agreement in a way guaranteeing the best possible protection of the distributor's business under their conditions. In fact, the distribution of products is not coordinated by producers, what means, among others, that they cannot prevent the distributor from the purchase and resale of the competitive products through his network. They are not involved directly in the decision-making process concerning among others the quantity of lots of the supplied goods, the supply time-table, and the preparation of advertising materials. The distributors' revenue depends much on the quantity of goods resold and not on a famous brand or quality. The price of a particular unit within the net is relatively low but the margin is profitable usually in the case of high sales (the economies of scale). When the product is not being purchased by customers they at once bring to an end its distribution. They are not asked by the distributor to warn of decreased supply capacity. In case of such decline, regardless of whether it has been predicted or not, one supplier is substituted right away by the other. The exclusivity clauses, if any, are hardly stipulated. As a result, there are a lot of manufacturers and providers of the same or replaceable products, taking part in exhaustive price competition within the same network. The quantity and price of supplied products are often agreed just prior to each instalment delivery. Sometimes the prices offered in the net for consumers (German: Endverkäufers) are

[18] For further reference, see *Promińska*, see fn. 13, § 32, paras 57, 58; the Supreme Court dec. of the 7th March 2007, No. I CSK 348/06, pub.: Monitor Prawniczy 2007, No. 7, p. 340.

[19] See for instance draft distribution contracts proposed by the International Distribution Institute (IDI) www.idiproject.com, and the International Chamber of Commerce (ICC) in Paris, Guide to Drafting International Distribution Agreements, ICC Pub. No. 441 (E) (1998).

lower than the wholesale prices accessible on local markets for equivalent products. Nonetheless, the suppliers keep being still sincerely interested in such cooperation, because the costs of distribution through such network are considerably lower in comparison with their potential individual expenses. The distributor is responsible for logistics, maintenance of the fleet of delivery vans, carriage and allocation of products among his widespread net of shops, warehouses or commercial centers. Although the suppliers participate in the costs of distribution, it is still much more convenient than the maintenance expenditures on individual means of transportation, department stores, shop assistances or storekeepers, the invention and completion of an efficient logistic system. The unit price would then be relatively higher, but a considerably larger quantity of the goods sold through the net shall balance these costs perceptibly.

II. The meaning and sufficient structure of "distribution"

The notion "distribution" refers to a whole range of horizontal contracts or vertical agreements between parties who are situated at different levels of economic transactions. Both a customary distribution and a net distributorship agreement (exclusive or selective) are not standardized under Polish statutory law. All distribution agreements are qualified as both mixed and unnamed contracts, depending on the amount of characteristics of other contracts regulated by statutory law. This is the case, for example, in which a distributor also has the right to sell products as a commissioned sales representative or commercial agent, acting for the limited purpose of soliciting orders and on supplier's behalf. If the intermediation is accessory, such activity ought to be considered to be consistent with the distribution agreement. Otherwise the courts may consider the existence of two separate contracts and apply the rules governing the respective contract to each part. It is highly likely, however, that the judges do their best to recognize such agreement as a one of the named contracts, regarding all atypical elements as accessory ones. If the distributor takes part in the process of manufacturing of products that are to be resold on later stages of distribution, it is combined with the elements of contract of specific work. If these elements constitute the preponderant part of the obligations of the parties, then the rules on contract of commercial agency or specific work shall apply to the relationship at stake, instead of the rules on distribution.

Though Polish civil law, like all other European continental and common law systems,[20] does not contain any specific statutory provisions concerning distribution, the principle of contract freedom (art. 353^1 PCC) generally allows the autonomous parties to conclude unreservedly any kind of reciprocal agreement. So the parties may arrange their relationship as it is deemed proper on the condition that the contents or the purpose of distribution are not contrary to the nature of the obligation, with the mandatory provisions of law (ius cogens), and with the principles of good faith and fair dealing.[21]

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[20] See for further details, *Ch. v. Bar/E. Clive/H. Schulte-Nölke* (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Munich 2009, Note I to art. IV.E.-5:101 DCFR, p. 2439. In Belgium there is statutory law on distribution (the Act as of the 27th of July 1961), but it regulates only the one-sided termination of the exclusive distribution contracts.

[21] In Austrian, Belgian, German or Portuguese doctrine a distribution contract is regarded as a contract of sale of goods rather than the sale of goods and services. In common law systems the term „dealer" is reserved mainly for salesmen who buy and sell securities or commodities speculating in the items. Due to the German jurisprudence, there is an additional requirement in order to define a distribution contract: the distributor's integration into the supplier's sale system. See, *M. W. Hesselink/J. W. Rutgers/O. B. Diaz/M. Scotton/M. Veldman*, Principles of European Law. Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC), Sellier 2005, p. 263; *Clasen*, see fn. 17, § 3.2.2.a.

The distribution contract may occur in a form of framework agreement (French: contrat-cadre, contrat-matrice; German: Rahmenvertrag, Polish: umowa ramowa). The juridical qualification of essential elements is in question, because of its complex and heterogeneous character.[22] Within the framework contract, the parties make a firm promise but only in outline. The framework is an agreement to establish terms and conditions governing future accomplishment contracts – orders for making specific purchases of goods or running service – that may be awarded during the life of that agreement (call-offs, French: contrats d'application; German: Ausführungsverträge). The parties to the framework are not obliged to place orders, but if they do so, the terms nothing less than agreed in the framework shall apply to each order. The frame terms and conditions (the general conditions of delivery, the quality of goods that are to be ordered, the quantity of instalments, the time, method and currency of payments, the discount accounting formula, the preferable or maximum sale or resale prices, detailed method of placing, accepting or rejecting orders, the remedies for breach of contract, penalties, arbitration clause, etc.) cannot be subject to any further modifications in placed orders, except for some commonly agreed supplementary or refining provisions. The framework agreement should specify that its terms control over any conflicting terms found in subsequent call-offs.[23] In the case of selective or exclusive distribution, the supplier, under the pain of contractual liability, is obliged to perform against the orders made by the distributor unless they are in disagreement with the framework.

As an unnamed contract, the distribution arrangement is a self-regulatory instrument, so it is highly recommendable that the parties stipulate in their agreement as much reasonable terms as appropriate to avoid the requirement to refer to statutory law in the future. In the absence of precise and exhaustive contractual regulation, the relationship shall be governed by the general provisions of the PCC (German: Allgemeiner Teil) regarding the legal acts and declarations of intent (German: Rechtsgeschäfte; Willenserklärungen) (art. 1-125); obligations (art. 385-385[3], 450-486) and synallagmatic agreements (German: gegenseitige Verträge) (art. 487-497). With the reference to certain aspects of the distribution relationship one can apply the particular PCC provisions regarding the relevant named contracts by reasonable analogy, including the provisions on the contract of mandate (art. 750 PCC).[24] "The respective application of the provisions of mandate" provided for in art. 750 opens to a certain extent the possibility of interpretation of the terms of distribution contract in the course of some PCC terms referring to specific types of contracts on service (e.g. commercial agency), only in the case of convergence of parties' interest, purpose, economic and social functions of distribution contract with the purposes of the indicated named contracts.[25]

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[22] See e.g., *Ferrier*, see fn. 1, para 534; *A. Koch*, Umowy w obrocie gospodarczym (*A. Koch*/*J. Napierała* eds.), Krakow 2006, p. 129; *Kocot*, see fn. 1, para 152, p. 190-191; *Martinek/Semler/Habermeier*, see fn. 1, § 4, para 1, § 18 paras 1 and 7; *Włodyka/Spyra*, see fn. 2, paras 91-95, p. 50-51.

[23] See for further reference, *L. DiMatteo*, Law of International Contracting, 2nd edn., Kluwer Law International 2009, p. 305.

[24] See *L. Ogiegło* (in:) Kodeks Cywilny. Komentarz (*K. Pietrzykowski* ed.), vol. II, 7th edn., Warsaw 2013, the commentary to art. 750, p. 513-514; *M. Safjan*, Umowy związane z obrotem gospodarczym jako najważniejsza kategoria czynności handlowych, pub.: Przegląd Prawa Handlowego 1998, No 2, p. 4; *M. Sośniak*, Umowy o świadczenie usług z art. 750 kodeksu cywilnego, pub.: Państwo i Prawo 1981, No 5, p. 70. Due to art. 750 the provisions of mandate shall apply respectively to contracts on performance of services not regulated by other PCC provisions. It is also worth of notice that both contract of commercial representation (umowa pośrednictwa) and on general performance of service are excluded from the scope of the PCC provisions regulating particular types of contractual obligations (art. 535-921[16]).

[25] See, *P. Machnikowski*, in: Kodeks cywilny. Komentarz. (*E. Gniewek*, *P. Machnikowski* eds.), Warsaw 2013, commentary to art. 750, paras 3 and 6, p. 1281; *Z. Radwański*, Teoria umów, Warsaw 1977,

Some characteristics of the named contracts on the provision of service reflect much closer similarity to the distribution agreement than a contract of mandate (art. 734 – 751 PCC). The Supreme Court is of the opinion that one should rather apply the PCC provisions on commercial agency (art. 758-764[9]), if the contract at stake is a variety of commercial agreement concluded with a middleman.[26] The codified norms regulating the commercial agency concerning, for instance, competitive restrictions (art. 764[6] – 764[8]), commission (art. 761 § 2, if the distribution is based on the exclusivity model), or the provisions referred to the termination of contract procedure (art. 764[1] – 764[2]), the loyalty duty (art. 760), the obligation to inform the other party (art. 760[1] § 1 – 760[2] § 1) and the compensatory payment, the indemnity for goodwill (art. 764[3] – 764[4]) could be applied by the way of analogy to a distribution contract insofar as appropriate.[27]

Certainly, the application of the above norms does not mean its direct and unequivocal adoption to the distributorship cooperation. In my opinion, it is advisable to understand the terms of the distribution contract in the analogous manner as the equivalent provisions of the commercial agency contract got used to be interpreted in comparable circumstances. The Supreme Court is right, pointing out that per analogiam application of statutory and mandatory provisions referred to named contracts to unnamed ones may take place but only exceptionally, insofar the scope of rights and obligations would coincide, qualifying the contract rather as a mixed one (e.g. with elements of commercial agency service). The analogous inference shall be carried on cautiously, considering that, even in the case of a standardized contract such as the commercial agency contract, there are codified norms that might be adopted only if the parties wished them to be applied (see e.g. the PCC's dispositive provisions reg. competitive restrictions imposed on agent mentioned above).[28] As a result, the interpretation should be employed with due thoroughness, taking into account the "differentia specifica" of each distribution relationship, its strategic significance in commercial cooperation founded commonly on the true formal and commercial independence of a professional distributor. The stronger the link between distributor and supplier (e.g. based on the selective distributorship) is, the more apparent and justified would be the analogous use of the provisions on commercial agency by the way of analogy.[29] In case of doubts the PCC provisions on commercial agency shall not be applicable to the international distribution contracts.[30]

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p. 244; *Rott-Pietrzyk*, see fn. 10, § 77, p. 628. See also the Supreme Court decision of 28th of October 1999, No. II CKN 530/98, pub.: Orzecznictwo Sądów Polskich 2000, No 7-8, p. 393 et seq.

[26] See the Supreme Court's decisions of: the 14th of May 2004, No. IV CK 291/03, not pub.; the 14th of July 2004, No. IV CK 366/03 not pub.; the 15th of Nov. 2004, No. IV CK 199/04, pub.: the Wolters Kluwer's digital legal information system – Lex no 197659.

[27] Correspondingly in case of contract of sales representation, see, *W.J. Kocot*, the commentary to the Supreme Court decision of the 19th of Dec. 1990, III CZP 67/90, pub. Orzecznictwo Sądu Najwyższego 1991, No. 5-6, pos. 65), Państwo i Prawo 1993, No 7, p. 113. For additional details, see *M. Sośniak*, Umowy o świadczenie usług, op. cit., p. 72-73. Otherwise: *M. Nesterowicz*, the commentary to the Supreme Court decision of the 19th Dec. 1990, III CZP 67/90, pub.: Orzecznictwo Sądów Polskich 1991, No 10, pos. 230; *S. Wójcik*, Umowa zlecenia – uwagi de lege ferenda, pub. in: Private Law in the Transitory Time. The Essays in Honour of Professor Stanisław Sołtysiński (A. Nowicka ed.), Poznań (Posen) 2005, p. 305.

[28] The Supreme Court's dec. of the 5th of Dec. 2013, No. V CSK 30/13, pub.: the Wolters Kluwer's digital legal information system – Lex no 1422123.

[29] In Austria, Germany, Finland and Portugal the rules on commercial agency are applied by the way of analogy to distributorships insofar as appropriate. Under Swedish law such rules may be applied to sole distributorships but such interpretation is uncertain. In Spain only same agency provisions may be applicable by way of analogy, especially those concerning indemnity for goodwill. See *v. Bar/Clive/Schulte-Nölke*, see fn. 20, Note VI to art. IV.E.-1:101 DCFR, p. 2298-2299.

[30] See also fn. 5 above.

There are also controversies regarding the after-sale liability and the warranty of quality of the resold products. By purchase of goods from the supplier the distributor becomes their owner. So, in principle, the latter shall bear the responsibility for non-conformity and take the risk of their poor quality against his customers (due to art. 558 § 1 PCC in fine, the consumers are protected on separate mandatory grounds provided for in the Directive 1999/44/EC as of the 25th of May 1999 and the Directive 2011/83/EU as of the 25th of Oct. 2011). Nevertheless, accordingly with art. 473 § 1 and art. 558 § 1 of the PCC, the parties may inter partes extend, limit or exclude the liability for warranty set out in the Civil Code and split in the after sale service duties between, unless the supplier insidiously or dishonestly concealed the defect. The supplier may release his dealers from the responsibility, doing warranty service instead or, what is more frequent in network selective or exclusive distributorships, refund them all or a part of incurred expenses resulting from running such service. As far as the liability for defective products is concerned,[31] the product liability claim can be made against producer, supplier of product's components, importer or against any person putting its trademark, business name or other distinctive designation who are then liable jointly and severally. The liability for defective products may not be excluded or limited.

It is advisable to set up choice of law (lex contractus) and forum selection clause (lex fori) in the distribution agreement (in particular in international contracting). It is then recommendable to choose any law the parties wish to govern their contract. The parties are permitted to choose expressly or demonstrably a law having no other connection to the facts of the contract. They may choose the different laws governing different parts of the distribution contract and may alter their choice at any time they wish. Although it seems to be a point of controversies among academics, it could be the choice of both the law of a country, CISG and also the lex mercatoria or model (soft) law like DCFR.[32] However, it is rightly noted by foreign authors, that a choice of law or forum selection clause will not be honored in most European courts if it results in the avoidance of mandatory European or national laws pertaining to some types of distribution agreements.[33] Exclusive or selective distribution contracts may be regarded prohibited and then void pursuant to the application of EC and Polish competition law challenging territorial restrictions and restrictive trade practices. In this respect particularly relevant are: the Commission Regulation (UE) No. 330/2010 of 20 April 2010 on the application of Art. 101(3) of the TFUE to categories of vertical agreements and concerted practices[34] and the various exceptions for specific branches of trade [e.g. the Commission Regulation (UE) No. 461/2010 of 27 May 2010 on the application of Art. 101 (3) of the TFUE to categories of vertical agreements and concerted practices in the motor vehicle sector[35]] and the Regulation of Polish Council of Ministers of 30 of March 2011 on the exclusion of some types of vertical agreements from the ban on restricting competition agreements.[36]

The definition of distribution provided for in art. IV.E.-5:101 DCFR seems to be well fitted to the economic reality in Poland. The main characteristics of the customary distri-

[31] See art. 449^1 – 449^{10} of the PCC, implementing the Directive 1985/374/EWG as of the 25th of July 1985 amended in the Directive 1999/34/EC as of the 4th of June 1999.

[32] *Kruczalak/Rott-Pietrzyk*, see fn. 4, para 222.

[33] See *DiMatteo*, see fn. 23, p. 309.

[34] Official Journal of EU, L 102 of the 23rd of April 2010, in force till the 31st of May 2022.

[35] Official Journal of EU, L 129 of the 28th of May 201, in force till the 31st of May 2023.

[36] Official Journal of Poland (Dz.U.) No 81, pos. 441 of the 18th of April 2011, in force till the 31st of May 2023. This regulation was issued on the basis of art. 8(3) of the Protection of Competition and Consumers Act of the 16th of February 2007 (Dz.U. No 50, pos. 331 with later amendments).

bution contract are the supply with products on a continuing basis by a professional supplier and the purchase at a discount, or take and pay for them by a professional distributor for the resale to others for his own account and not for the account of the supplier. Generally, the discount is a difference between the purchase price and the resale price. The discount range depends not only on successful bargaining with the distributor's customers but also on the system of price concession agreed with the supplier (turnover discount, partial reimbursement of logistics or marketing costs, etc.). The supplier should reserve the right to specify and modify its prices at his sole discretion. The right of the distributor to set resale pricing should also be pointed out in the contract. The supplier might be obliged to pay excess transportation and storage charges for failure to comply with shipping instructions it has accepted. However, he may want to restrict any consequential damages.[37]

The distribution contract is a synallagmatic accord, because the preponderant part of the contract is a sale that is always mutual. Both parties oblige themselves in such a manner that the performance by one of them is to be the equivalent to that by the other (art. 487 § 2 PCC). The provision of the distributor's performance is dependent upon the provision of performance by the supplier ("I perform because you perform in return"). The relationship is based on the loyalty and reliance between the parties due to the fact that the distributor represents and accomplishes economic interests of the supplier and then he is chosen (selected) cautiously by the latter. As a result the parties are mutually obliged to provide each other with due information before or after the contract conclusion about important aspects of their cooperation.

The exclusivity is not a necessary element of a distribution agreement. Then the formal and business independence of a distributor, the definitiveness of purchase of products by him with the purpose to supply to others (customers) often situated at different (vertical) levels of economic transactions and the solidity of cooperation which shall not be reduced only to the acquisition of delivered products are the distinguishing features of this contractual, mutual and due relationship. The distributor himself commits not only to purchasing and distributing, but also to promoting such products in his own name and on his behalf. In this case, the distributor is an exceptional type of commercial intermediary whose frequent purchases from the supplier (manufacturer) and whose assumption of various marketing and related activities on behalf of the supplier distinguish it from standard buyers in general.

In the main, the supplier cannot supervise the distributor in his day-to-day activity and does not have direct influence on the distributor's management decision making process. To avoid any uncertainties, the parties shall specify expressis verbis in the contract that their relationship is one of the independent contracting in which neither party has a right to bind the other. The more efficient control shall be guaranteed only within the network distribution (mainly selective one). But even then the supplier's persuasive power might be executed only indirectly, while obliging the distributor to show him the books, contracts, balance sheet data or other financial documents occasionally or on demand for inspection and audit. The supplier has a right to be in command of the distributor's accountancy but he is not obliged to do so. The denial to disclose information, the possible negative outcome or contract infringement would not deprive the distributor of his independence but instead such facts could bring about the cooperation restrictions (e.g. the supplies' cutback, discount rebuff) or, in the extreme case, its termination without notice. Nevertheless the supplier is still free to impose such restrictions and all the more he is not obliged to terminate contract.

[37] Compare *DiMatteo*, see fn. 23, p. 305.

He is self-directed in both specification of the delivery conditions or dates and in determination of contract terms (especially as to the prices) negotiated with his customers. The unambiguous consequence of the distributor's self-sufficiency is the risk borne by him in case of non-performance of resale contracts. In turn, the distributor's customers are not entitled to seek protection against the supplier in case of improper performance of contract by his dealer, unless the parties agreed otherwise. They are also denied of their right to take legal action against the supplier in case of tort committed by the distributor. What is more important, the contractual liability between distributor and his customer cannot be replaced by the supplier's liability in tort. Unfortunately, the position taken by the Polish Supreme Court seems to be utterly incompatible with the juridical, commonly accepted character of distribution. Accordingly to the eminent Court's ruling,[38] the undertaking (in that case – the automotive manufacturer of international standing) that supplies products (vehicles) to the authorized dealers in Poland involved in the net on the exclusivity basis shall be obliged to supervise their business and to examine the distributors' reliability.

By application of art. 430 of the PCC,[39] The Supreme Court refused to consider the exclusive dealer an independent merchant, but an entity being under the supplier's subordination similar to an employee that has to work under the employer's guidance. The supplier neither entrusts his distributor the performance of contracts concluded with the clients of the latter, nor is the dealer ever supervised by the supplier in carrying out his duties under these contracts. The Court did not recognize the contract as a distributorship agreement, although it did represent all indispensable attributes of exclusive distribution arrangement, typical for the international automotive market in Europe. The parties also indicated that their relationship is one of independent contracting. There were other inaccuracies made by the Court. It was then unacceptable, for instance, to replace, in spite of parties' intent, the contractual liability by the liability in tort towards a third party (the dealer's customer) in case of a valid contract between the supplier and the distributor. The Court determined the obligations of the supplier as resulting from the contract with the dealer but at the same time it deduced the supplier's liability in tort in favor of the dealer's customer who brought a claim against the supplier for the breach of contract by the dealer. The breach of contractual obligation may be the equivalent to the causing damage in tort only when at the same time the violation of public interest, universal and generally applicable statutory or equity norms has occurred.[40] The inexorable requirement from the supplier to supervise the dealer's business and the duty to provide him with binding instructions how to perform his resale contracts goes against the contract freedom and fair dealing.[41] For the producer's liability in tort, it cannot be decisive that the dealer's customers identify him with the producer through its trade or service mark, logo type or brand, even if acting in reliance. Under the PCC (art. 7) the good faith might be under the protection of law only, if the statute makes legal effects dependent upon good or bad faith.

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[38] The Supreme Court decision of the 17th of July 2003, No. III CKN 29/01, pub.: Orzecznictwo Sądów Polskich 2005, no. 5, pos. 59 with the approbated note of *M. Nesterowicz*, p. 246. See also the earlier decision of the Court of Appeal in Cracow of the 17th of Oct. 2001, No. I ACa 782/01, not pub.

[39] Due to art. 430 (which is a tort), whoever on his own account entrusts the performance of an act to a person who is carrying out that act is supervised by him and has a duty to follow his instructions, shall be liable for the damage caused by that person in the performance of the act entrusted to him.

[40] See *M. Safjan* (in:) Kodeks Cywilny. Komentarz (*K. Pietrzykowski* ed.), vol. I, 7th edn., Warsaw 2013, the commentary to art. 443 of PCC, para 3, p. 1287.

[41] For further details see *Kocot*, see fn. 1, para 145.

Even after the passage of a decade, the awareness of a widespread existence of such strategic cooperation net agreements in the trade along with the Law & Economics rules are constantly insufficient among Polish state courts.[42] The models of complex commercial relations do not receive much attention from our judicature.[43] The right examples are the distribution contracts, accustomed to be concluded by the chains of large food stores and home improvement or DIY hypermarkets. In the majority of cases, these contracts have been recognized as simple purchase or delivery[44] agreements, despite the adoption by the parties of all indispensable elements of distribution transaction (e.g. marketing and promotion, distributor's EDI payment system access, audit of products service, or the discount accounting recipes, all of which ought to be regarded as integrated in one complex contract, have been usually considered instead as a package of additional, independent and mutual agreements only accompanying a contract of purchase).[45] The judges seem to pay no attention to the obvious fact that from the legal point of view a distributor operates at his own risk, but economically he represents the commercial interest of a supplier as well.[46] The advantages of this relationship are twofold. On the one hand, the brand or product which the distributor resells might be the element that attracts customers, much more than his proficiency or reputation. On the other, the revenue expected by the supplier much depends on the successful organization and know-how of the distributor. The increase of the distributor's turnover usually means higher purchases from the supplier and also reasonable expectations that the difference between the buying price of the products and their resale price will be more advantageous for the distributor. So in any legal estimations or interpretation of this type of strategic cooperation one should take into consideration the supplier's partial contribution in the costs (e.g. marketing, promotion, logistics, transportation) and the margin (e.g. bonuses, discounts, preferences in delivery) of the distributor. The above mechanism of limited involvement is the main idea that had made the distribution cooperation so successful in Poland and worldwide.

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[42] Although, see a single dec. of the Court of Appeals in Krakow as of the 10th of Sept. 2012, No. I ACz 1279/12, pub.: the Wolters Kluwer's digital legal information system – Lex no 1220503 in which the judges formulated a right definition of the contract of distribution.

[43] The fixed arbitrary tribunals in Poland are more experienced in contractual practice and therefore better prepared as far as the recognition of distribution contracts is concerned.

[44] Under art. 605-611 of the PCC, a contract of delivery is a separate agreement, unlike e.g. art 30 and 31 of the CISG accordingly to which the delivery of goods is one of the essential obligations of the seller.

[45] See e.g.: the Supreme Court's dec. of the 26th January 2006, No. II CK 378/05, pub.: Wokanda 2006, no. 6, pos. 8, with the note of *K. Szczepanowska-Kozłowska*, pub.: Glosa 2007, no. 2, p. 105-118; The Court's of Appeals in Warsaw dec. of the 28th Oct. 2011, No. VI ACa 392/11, pub.: the Wolters Kluwer's digital legal information system – Lex no 1102649; The Court's of Appeals in Warsaw dec. of the 2nd Oct. 2012, No. I Aca 359/12, pub.: Lex no. 1238217; The Court's of Appeal in Poznań dec. of the 7th Feb. 2013, No. I ACa 1199/12, pub.: Lex no. 1283019; The Court's of Appeals in Warsaw dec. of the 12th March 2013, No. I ACa 1119/12, pub.: Lex no. 1298988; The Court's of Appeals in Warsaw dec. of the 4th Sept. 2013, No. I ACa 321/13, pub.: Lex no. 1378899; The Court's of Appeals in Warsaw dec. of the 27th Sept. 2013, No. I ACa 347/13, pub.: Lex no. 1378900; The Court's of Appeals in Warsaw dec. of the 24th Oct. 2013, No. I ACa 748/13, pub.: Lex no. 1392102.

[46] This inevitable attribute present in each distribution agreement has been appreciated lately by the Court of Appeals in Krakow in its dec. of the 10th of Sept. 2012, quoted above. The judges then declared that the distributor acted on his own behalf and not only on his account but also in the interest of the manufacturer.

III. The classification of network undertakings

When the supplier agrees to supply products only to one distributor within a certain territory or to a certain group of customers, the distribution takes on the characteristics of an exclusive distribution. The contract may provide for bilateral exclusivity. There is an exclusive purchasing contract, if the distributor agrees to purchase products only from a certain supplier (manufacturer) or from a party designated by him. The net distribution is used to be a selective distribution contract under which the supplier agrees to supply products only to distributors appointed on the basis of objective, strict and often demanding criteria that in exchange for the selected distributor obliges himself not to sell products to any unauthorized retailers or distributors (not recognized by the supplier) within the territory which the supplier's system of distribution is or is supposed to be operational. Due to Polish competition law, the selective distribution must be a vertical type of contractual arrangement, if it is to be subject to the competition protection regulations.[47] The level of economic transaction on which the distributor is going to run its business ought to be specified in contract. Wholesalers usually operate among themselves horizontally, unlike retailers who run their business on the level other than their vertically positioned counterparts. Unfortunately, both exclusive and selected contracts have been represented in Polish literature[48] mainly from the perspective of competition law and the Commission Regulation (UE) No. 330/2010 (former Regulation No. 2790/99) – the approach that might decrease much its role and significance as a strategic cooperation arrangement. May be, that is why our judges are so indifferent as far as distribution contracts are concerned, having difficulties to recognize aptly their ratio legis.

The selective distribution is the most popular subcategory of the distributor's network agreement (often called "dealership agreement"; Polish: umowa dealerska).[49] The selective dealership is settled principally within the closed network, arranged and guided by the supplier. The system may be based on both quantitative (with the limited number of contenders) or qualitative (based on the maintenance of strict conditions and the producer's approval as to the first-rate quality of resale and after-sale service patterns) se-

[47] See e.g. § 3(5) of Polish Council of Ministers Regulation of 30 of March 2011. Due to art. 1(1) (a) of Reg. 330/2010 and of Reg. 461/2010 "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

[48] See e.g. *C. Banasiński/E. Piontek* (eds.), Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warsaw 2009; *M. Bauer/F. Hoffman*, Porozumienia dystrybucyjne we wspólnotowym prawie konkurencji, Przegląd Prawa Handlowego 2003, no. 12; *T. Skoczny*, Zakaz porozumień ograniczających konkurencję a selektywna dystrybucja, Warsaw 1995; *T. Skoczny* (ed.), Ustawa o ochronie konkurencji i konsumentów, Komentarz, Warsaw 2009; *Włodyka/Spyra*, see fn. 2, paras 87, 90-91, 104, p. 629 et seq.

[49] Compare *Kocot*, see fn. 1, para 153, p. 191; *Włodyka/Spyra*, see fn. 2, para 85 et seq., p. 629. The "system of selective distribution" is defined in art. 1(1) (e) of Commission Regulation (UE) No. 330/2010 and art. 1(1) (i) of Commission Regulation (UE) No. 461/2010 accordingly to which „selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system. The selective distribution is also recognized by German, Dutch, French and Spanish doctrine & jurisprudence. See *v. Bar/Clive/Schulte-Nölke*, see fn. 20, Note III to art. IV.E.-5:101 DCFR, p. 2440; *W. Küstner/K. H. Thume*, Handbuch des gesamten Außendienstrechts, vol. 3, Vertriebsrecht, 2 edn., Heidelberg 1998, para 1261 et seq.; *Martinek/Semler/Habermeier*, Handbuch, see fn. 1, § 14, para 1.

lection procedures. The terms and conditions of selective distribution for making specific purchases and after sale consumer assistance are usually set out in the framework contract and they are uniform for all authorized dealers taking part in the net. If, for example, the dealer provides in the resale contract the warranty of products, its scope shall be consistent with this of the supplier. The dealership agreements are offered predominantly by manufacturers of compound and competitive goods (less services) of high quality or famous brands, which must be distributed, guaranteed and serviced by well-prepared, competent commercial intermediaries. The parties may interdict the resale by the network distributor of all kinds of competitive products or restrict distribution only to final customers (consumers). In return, the supplier may refrain from making direct sales. The supplier has exclusive rights to select his dealers, control their accounts, the resale price strategy, the dealer's personnel training and recruitment or inspect their premises to check the accomplishment with the contracted or reasonably instructed standards (see art. IV.E.-5:305 DCFR).

Such right of control and inspection reflects the enjoyment of the prestige of the brand and the prevention any damage to the supplier's reputation. The manufacturer may focus on production and innovation activity, leaving the sale dilemmas to his dealers. Having the developed net of commercial representatives, the supplier is able to advance production and expansion strategies, satisfying the requirement to use best endeavors to achieve maximum sales. The most important dealers' advantage is the safety of ongoing deliveries of goods, stock and spare parts, the backing in the logistics and financing, the partition of marketing and advertising costs, the constant access to the supplier's goodwill, the possibility to make use of the supplier's logo type or trademarks and the solid financial standing, letters of comfort, etc. (the greater chance to be credited by banks). The distributor along with the supplier must, as far as realistic, make reasonable efforts to promote the product and not to damage its reputation (compare: arts. IV.E.-5:301 and IV.E.-5:306 DCFR). The distributor's obligation to provide information concerning local market situation, the perspectives of development, the present situation and the scenario for future sales or about the claims brought or threatened by third parties in relation to the supplier's intellectual property rights or infringements of these rights can be derived from the mutual obligations of loyalty, good faith and fair dealing (compare: arts. IV.E.-2:202 and IV.E.-5:302 DCFR).

The same rules ought to be applied to the distributor's obligation to warn of decreased requirements and to the non-disclosure or confidentiality obligation (compare: art. 760 PCC, arts. IV.E.-5:303 and IV.E.-2:203 DCFR).[50] The loyalty duty excludes the possibility to assign the distributor's rights onto the third parties. So the agreement should explicitly prohibit the dealer to assign his contractual rights in whole or in part (art. 509 § 1 PCC – pactum de non cedendo). For the same reasons the contract should also state whether the distributor is entitled to appoint sub-distributors. The dealers oblige themselves to place minimum resale capacity orders (the minimum sales quota) or to reach contracted level of purchase orders from the supplier (the minimum quantity clause). The selective dealers usually do not perform on exclusivity grounds, contesting one with another on the same territory.

The exclusive distribution is based on a concession granted by a supplier (manufacturer, concedent) to a distributor (concessionaire) for the sale of certain goods or rendering of specific service. The supplier obliges himself to sell the goods only to his concessionaire or to forbear at all from the engagement of any jobbers, middlemen, agents or

[50] The solution under Polish legal practice is similar to the Spanish approach noted by *v. Bar/Clive/Schulte-Nölke*, see fn. 20, p. 2458 and p. 2460.

distributors on said territory.[51] On the other hand, the distributor may reciprocally agree to purchase products only from a certain supplier or from a party designated by him. In all cases the supplier cannot, within the scope in which exclusiveness has been reserved, conclude contracts, either directly or indirectly, which might infringe the exclusiveness of the distributor (see art. 550 in fine PCC). In practice, the exclusivity may consist of granting of exceptional resale and/or purchase rights to the distributor carrying on his business inside the designated (licensed, accredited) geographical territory (restricted distributorship based on territorial exclusivity) or addressing his offers to the selected group of customers (sole distributorship which is based on the exclusive customer allocation of supplier's products).[52]

The mixed variant of the above types of exclusivity arrangements is also popular. The contract might contain the non-competition clause prohibiting the distributor to sell products manufactured by the supplier's rivals (intra-brand competition), unless these competitors offer them on more profitable terms or for a favourable price. The supplier can hold the right to sell his products directly to his special customers. In such a case the distributor shall be rewarded adequately. The passive resale outside the contractual territory is generally allowable (appl. of art. 761 § 2 PCC by analogy). If the concessionaire is unable to reach the contracted level of purchases, the supplier may allow his other dealers to commence resale on the licensed territory. The supplier would also retain the right to stop making available a product that has been discontinued. The breach of the exclusiveness shall be redressed in accordance with general principles of the ex contractu liability (art. 493, 471 et seq. PCC). There are contractual provisions, facilitating the injured party to be compensated [e.g. contractual penalties (art. 483 PCC), the release of benefit, the cessation of the exclusivity misuse or the right of avoidance (art. 395 PCC)]. Moreover, a detailed limitation on special or consequential damages ought to be set. Apart from above, the rights and obligations of selected and exclusive distributors are indistinguishable.[53]

The vertical models of exclusive or selective commercial cooperation that have been accustomed in Poland especially seem to be on hand, and an effective frame regulatory method of sale of goods and provision of services of exceptional features or qualities by internationally eminent, brand manufacturers (suppliers) through the nets of very experienced Polish or local entrepreneurs (dealers). In turn, customary distribution contracts are a popular form of regular supply of goods to huge, worldwide commercial networks, centers of commerce or supermarkets which resale them mainly indirectly to retailers and entrepreneurs or directly to consumers. There are also highly expanded chains of wholesalers (brokers, merchants) in each type of trade who dedicate themselves to a particular and well examined assortment (stock) of products handing them out between producers and commercial networks of distribution. In spite of the vivid expansion of distribution forms of commercial involvements in our country, it seems to be untimely to recommend de lege ferenda to set forth specific statutory provisions and legal definition of the distribution contract. For the entrepreneurs the major attractiveness of this type of vertical commercial cooperation is its diversity and that it is not, unlike agency e.g., statutorily regulated by imperative norms protecting one party opposite to the other, leaving them instead more room for self-regulatory invention. Besides, the terms and

[51] See *A. Koch*, Umowa wyłącznej koncesji handlowej w eksporcie, Poznań 1982, p. 124; *Martinek/Semler/Habermeier*, see fn. 1, § 18, para 49; *Włodyka*, see fn. 4, p. 290.

[52] In case of the territorial exclusivity, the distributor who offers the supplied products on his Internet website is obliged to inform customers seated or domiciled outside his territory about their authorized distributor. Otherwise he would violate the exclusivity restrictions.

[53] Compare *Włodyka/Spyra*, see fn. 2, para 103, p. 638.

conditions of this type of commercial contract, especially selective distribution, are still far from being settled in trade and risky from the competition law's point of view, so we are supposed to take time and let the practice to consolidate and standardize contractual terms and the distributors to become more experienced.

IV. The formation and formal requirements

The parties intending to enter into any distribution contract are recommended to follow the general rules of the PCC regarding the conclusion of contracts (art. 66-72[1]). The PCC provides the essential provisions regulating the most common methods of contract's formation by: offer & acceptance, negotiations, auction and tender. Taking into consideration that the distribution is a complex and heterogeneous contractual arrangement, often executed by international counterparts, it is advisable to use the general conditions or standard forms of contracts and rules set up by one of the parties.[54] It is very common practice to negotiate distribution contracts, especially in case of exclusive network agreements. A party engaged in negotiations shall have a duty to provide the other party within reasonable time before contract conclusion with such information as is sufficient to enable the other party to decide on a reasonably informed basis whether to enter into a distribution contract on the terms under consideration (compare art. IV.E.-2:101 DCFR).

On the other hand, the uniform standard forms are in frequent use by the suppliers, who are going to found their own net of selected dealers, when the separate negotiations and the formation of contractual provisions agreed individually are highly unlikely due to the need of consistent treatment of all distributors in the net. The distribution contract might also be concluded by electronic means through the Internet, on web pages where general conditions of the distribution contract are permanently available. If one of the parties applies an electronic model form of contract it should render it accessible to the other party prior to conclusion of the contract in a manner which would enable the other party to store and reproduce it in the normal course of business (art. 484 § 4 PCC).

There are no formal requirements as far as a distribution contract is concerned.[55] Because of the fact that distribution is an unnamed contract, the parties have very substantial autonomy to choose a form in which they wish their contract to be concluded or modified (annexed). The parties may stipulate that their contract become effective only with the observance of the form reserved (art. 76 PCC). So, it might be concluded in the regular written form (with the traditional handwritten signature or electronic signature verified by virtue of a valid qualified certificate – art. 78 PCC), in the form with the authenticated signature or authenticated date or in the form of notarial deed. The ordinary written form is the most common form of exclusive distribution contracts. If the parties reserved the conclusion or any modification of contract to be in the written form without specifying the effects of the non-observance of that form, it shall be assumed, in case of doubt, that it has been stipulated solely for evidentiary purposes (ad probationem – art. 76 PCC in fine). As in the case of agency contract (art. 758[2] PCC), each of the parties may demand that the other party confirm, in written form or in textual form on a durable medium, the terms of the implicit contract executed orally or per facta concludentia and the provisions that amend or complement it (compare also art. IV.E.-2:402 DCFR, art. 77[1] PCC, § 85 BGB). It is possible under Polish law that, in the absence of a contract in writing, a retailer or wholesaler who has been supplying for a long period of

[54] See *Koch*, see fn. 22, p. 128; *Kocot*, see fn. 2, para 180, p. 205; *Włodyka*, see fn. 4, p. 278.

[55] This rule is applicable also to the notice of termination or prolongation, see chapter 5 below.

time (in particular on the exclusivity grounds) may be qualified as a distributor on the basis of factual relationship. Nevertheless, accordingly with the jurisprudence quoted above it is highly likely that he would rather be qualified as a usual buyer.

V. The termination of contractual relationship

The distributor and the supplier oblige themselves to cooperate on a continuing basis that means their relationship shall have, in principle, firm character. For both parties the long-standing collaboration has a value in itself and is the most appreciated type of collaboration from the economic point of view. As a result, the constancy of this relationship shall be under special contractual protection. The establishment of a fine financial and organizational structure of network distribution requires much investment that returns in the long term.[56] The advantages of such stable alliance are particularly for network distributors who then may better arrange and manage their business.[57] The longer the cooperation the better, especially in the case of the exclusive purchasing contract in which being in the net is often "to be or not to be" for distributor's business. The stronger and inter-reliant the relationship between the parties is, the more unwavering the contract is appreciated. Because of its significance and the lack of any statutory regulation in Polish civil law, the manner, terms and waiver conditions shall be stipulated in each contract with sufficient accuracy. If the parties wish to renounce the contract in return for the payment of consolation fee (art. 396 PCC), they have to stipulate it efficiently.

There ought to be a very precise and unequivocal arrangement of the earlier termination and the effects of an unlawful or unjust waiver of contractual obligations, because neither Polish law nor the courts provide the minimum period of notice for distribution contracts. To determine the early termination as an unlawful act, the parties must first attribute the meaning of what is lawful. The parties should provide reasonable notice in order to terminate the agreement or to prevent its repeated renewal and the types of breach (in particular so-called "repudiatory" breaches) that may result in earlier or immediate termination. In case of termination without just cause, the parties are suggested to set forth pretermination notice extended adequately. If the parties haven't afforded in their contract any such notice or the notice period is considered too short, the court may find out whether there is a customary or reasonable period applicable (art. 365^1 PCC).

In general, there are three types of terms on which the distribution contracts are concluded in Poland, having in mind that some part of them is arranged in the form of framework agreement: (1) for a fixed (definite) period with automatic renewal clause or (2) negotiable prolongation and (3) for indefinite time. Additionally, when both parties have just started their cooperation, some suppliers prefer to execute the first contract for an initial trial period before committing to a continuing relationship. It is usually concluded for the period of one year or two years at most, but might be subject to replenishment or renewal. Any party is free not to renew a contract for a fixed period. If the parties stipulated that the renewal is automatic, each of them is entitled by the reasonable notice to prevent its prolongation. In other definite contracts any party is supposed to declare the contract renewed, giving a notice within the specified or reasonable time before the expiry of the contract period. Any attempted waiver of the above rights shall be void (art. 58 § 2 PCC). The renewals can be repeatable and the exact period for which it is prolonged should be specified in the contract (the longer collaboration, usually the

[56] Compare *Martinek*/*Semler*/*Habermeier*, see fn. 1, § 1, paras 18, 26-28.

[57] See *Włodyka*/*Spyra*, see fn. 2, para 101, p. 638.

longer the consecutive renewed periods). The prolongation for an indefinite period is uncommon, but may take place after few renewals (at least three) or by continued performance (compare art. 764 PCC reg. agency). In cases where the distributor has the adequate bargaining or monopsony power to attract competitive suppliers into his net, the conclusion of subsequent contracts (which are always for a fixed – usually one-year period) is offered on a separate basis or negotiated within the frame of the distributor's uniform general conditions.

The network distribution contracts executed on exclusivity or selective grounds are most often signed for longer periods or for an indefinite time. If it is a framework contract, it does not have to be terminated by notice but ceases to exist by the cessation of placing orders or the renunciation of application contracts' conclusion. A distribution contract concluded for an indefinite or long-term period (for five or more years) should be terminated by giving a pretermination notice within reasonable time. The reasonability test is based on the factors similar to those provided for in art. IV.E.-2:302(3) (4) DCFR: the usages, the length of cooperation and the time needed to find an alternative, the scale of investments. There is a common practice that the longer cooperation the longer periods of notice, wherein these periods are stretched in case of the termination of the network contract by the supplier, above all in the case of mixed exclusive distribution and purchase agreements.

The practice of designation of the period of notice of one month for each year during which the contractual relationship has lasted might be followed particularly in selective distributorship contracts which are based on a stronger correlation between distributor and supplier – on the agency's pattern (see e.g. art. 15.2 of the Directive 86/653/EEC, art. 764^1 PCC). But in my opinion, the PCC provisions on the termination of commercial agency cannot be applied directly to distribution agreements, unless their parties provided for otherwise.[58] Regular and most often periods of notice in Polish contractual practice are between three and six months. The termination of contract without or with inadequate period of notice may amount to damages that should be distinguished from the compensation payment which is due regardless of the violation of the termination's course of action. In such circumstances, it is more frequent practice to set out a contractual penalty (art. 483-484 PCC). The general measure of damages calculation may correspond with the one provided for in art. IV.E.-2:303(2) (3) DCFR. In the case of unlawful termination, the suffering party may enforce the performance that the party in breach is bound to render referring to the genuine performance of obligations principle (art. 354 § 1 PCC).

The contract of distribution might be terminated without notice for non-performance. The parties usually specify the detailed grounds for immediate termination by the supplier and distributor separately. There is also the possibility to avoid contract ex nunc due to the delay in performance of a party, accordingly to the statutory provisions of the PCC regarding all synallagmatic agreements (art. 491 § 1 and § 2, 493 § 1, art. 552). The careful review of these contractual provisions leads to the conclusion that such non-performance must be material and fundamental (compare art. IV.E.-2:304 DCFR). It is admissible to end a contract for a definite period immediately in the case of non-performance of the duties in full or in significant part (e.g. the default of price payment for supplied products, the decreased supply capacity and the lack of warning, the failure to

[58] For contrary doctrine opinions in Germany and France see *Martinek/Semler/Habermeier*, see fn. 1, § 19-20; *A. H. Puelinckx/H. A. Tielemans*, The Termination of Agency and Distributorship Agreements: A Comparative Survey, pub. Northwestern Journal of Int'l Law & Business, vol. 3, 1981, p. 462-464, p. 469-470; *Carbonneau*, see fn. 3, p. 92, 110; *Guyénot*, see fn. 3, p. 237. See also *v. Bar/Clive/Schulte-Nölke*, see fn. 20, Note VI, p. 2298-2299.

perform the minimum quantity orders, the assignment of rights, the infringement of the exclusiveness, logo type, trademarks) as well as an urgent and important reason (the general discontinuance of debt's payment, insolvency, the distributor's seizure of payments made by customers, etc.). The analogous rule has been adopted in the PCC on agency (art. 764^2) and could be applied by the parties in the dealership agreements. It is not necessary but rather advisable to notify the termination for breach as within shortest period as possible. If the aggrieved party had tolerated the breach of contract in the past without complaining, it would have not deprived her of the right to terminate but rather would make claiming damages harder.

In case of termination of network distribution for any reason (it is rather exceptional practice reg. any customary distribution), the parties may set out the specific rules reg. termination payment being either a compensatory performance or an indemnity payment for goodwill. The reimbursement under each option ought to be estimated in a different way. Unlike commercial agency, the compensation payment is not mandatory concerning distribution agreements, so the parties have to agree on whether they are willing to give each other both options or only one of them. The compensation is usually provided in favor of the distributor and the indemnity in favor of both parties. The distributor is to be compensated for any loss (including expectation and reliance interest) suffered as a result of the end of contract. It could be paid in the form of a lump sum. The parties may also provide a maximum cap.

It seems reasonable to accept the practice that the amount of compensation generally reflects the value or goodwill of the distributor's business at the date when the contract comes to an end. The contract should provide for the price to be paid by the supplier if he is required to buy back stock or spare parts. On the other hand, the indemnity for goodwill is not an award for loss or unjustified enrichment. It is a separate claim and in addition to any damages the aggrieved party would be entitled to. It ought to be calculated based on the business that the party built up, e.g. obtaining new customers, leading to the significant increase in turnover or the volume of business with existing clients, while the beneficiary party is still gaining considerable profit from the contracts with those clients (compare art. 764^3 PCC, § 89b HGB, art. IV.E.-2:305 DCFR). The burden of proof relating to the above facts rests on the creditor. The indemnity payment shall be capped at a maximum of one year (sometimes longer, depending on the length of previous cooperation) – in case of contracts concluded for indefinite time or – in case of contracts for fixed period – of the total time that left to the moment of agreed contract expiration.

VI. The limitation of claims and the reservation of title

The claims resulting from distribution economic activity just as all property claims shall be subject to the general provisions on limitation (art. 117-125 PCC). The limitation periods cannot be contractually modified. In all B2B transactions the period of limitation shall be three years. The claims arising from a sale made within the scope of the activity of the seller's enterprise shall be barred by limitation after a lapse of two years (art. 554 PCC). Two-year limitation period should also apply to the claims for remuneration for the acts performed and for the reimbursement of expenses or the advance payments (compare art. 751 in conn. with art. 750 PCC). As far as the international distribution contracts regulated in part by the CISG are concerned (see the footnote 5 above), the provisions of the 1974 New York Convention on the Limitation Period in the International Sale of Goods shall apply.[59] To protect their claims the parties may establish any

[59] The 1974 New York Convention came into force in Poland on the 1st of June 1996.

personal security or collateral that they wish to set up. In distribution contracts the most common clause is the stipulation of ownership of the movable goods sold by their manufacturer until the payment of the price (the reservation of title clause). The transfer of ownership from the supplier to the distributor takes place subject to the suspensive condition (art. 589-591 PCC). To be effective towards third parties (e.g. creditors of the distributor) the reservation of title clause shall be executed in the form with the authenticated date.