Switzerland

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Environment for Agents

Terminology, Types, Prevalence, and Statutory Basis of Agencies

The term "agency" is generally used to describe a legally independent commercial intermediary (the "agent", whether a juridical or natural person), having continuing authority to negotiate or conclude a number of transactions in the name of and on account of another person, the "principal".[1] According to the legal definition under the governing Swiss Code of Obligations (CO),[2] an agent is "a person who undertakes to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf and for their account without entering into an employment relationship with them" (article 418a, paragraph 1, CO).[3]

There are different types of agencies, depending on whether the agent acts on behalf of one or more principals. A distinction also is generally made between single business agencies and multi-business agencies. Another distinction is between a "facilitating agent" and a "concluding agent". While the facilitating agent is only entitled to arrange a transaction between the principal and a third

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1 This chapter intends to provide an overview on agency law in Switzerland and to outline some aspects that may be relevant for foreign market participants. Therefore, references to details of legal provisions and to specific scholar opinions are deliberately left out to ease reading. Sources consulted in connection with this chapter include Andreas M. Dubler, *Der Kommissionsagenturvertrag*, Diss. ZH 1995 = SSHW Bd 159; Moritz Kuhn, *Der Alleinvertriebsvertrag (AVV) im Verhältnis zum agenturvertrag (AV)*, in Forstmoser/Giger/Heini/Schluep (Hrsg.), FS Max Keller, Zürich 1989, S. 187ff.; Michael Kull/Christoph Wildhaber (Hrsg.), *Schweizer Vertriebsrecht - ein Handbuch für Praktiker, unter besonderer Berücksichtigung des agentur-, Alleinvertriebs- und Franchisevertrags*, Zürich 2008; Hans Jakob Maier/Hans Joachim Meyer-Marsilius, *Der Agenturvertrag, Kommentierung mit Formulierungsvorschlägen für agenturverträge, 2. Auflage*, Zürich 1981 (hrsg. von der Handelskammer Deutschland–Schweiz); Rolf H. Weber, *Bekanntmachung über die wettbewerbsrechtliche Behandlung vertikaler Abreden*, in Oesch/Weber/Zäch, *Wettbewerbsrecht II, Kommentar*, Zürich 2011, at pp 142–184.

2 Swiss Official Records of Legislation (SR) 220.

3 Federal Supreme Court 122 III 66.

party, the concluding agent is authorized to enter into agreements with the customers or clients on behalf of the principal as a direct proxy. The facilitating agent must introduce the opportunity to the principal (who may then choose to enter into the contract with a customer or a client) like a broker.[4] In addition, he may have to assist in the negotiations or otherwise support the creation of a contractual relationship between the parties, and later attend to the customer relationship.

On the other hand, the concluding agent acts in the name and on account of the principal when entering into the contracts as a direct representative and thereby binds the principal without the requirement for further notice and/or approvals.[5] Statutory law deems an agent to be a facilitating agent (article 418e, paragraph 1, CO). The concluding agent therefore specifically must be authorized with a power of attorney (which is generally included in the agency agreement) to act on behalf of the principal.[6] Without such a power of attorney, the agent may only arrange for or broker the agreements but not complete them himself.

The agency relationship in general is governed by articles 418a *et seq.* of the Swiss Code of Obligations. To the extent that the specific statutory provisions on the agency do not govern an issue, the facilitating agent also is subject to the provisions on broker agreements[7] and the concluding agent also is subject to the provisions on commission agreements.[8]

However, both sections of the law again refer to the law of mandate agreements as a subsidiary source of law, which means that in many respects the provisions on mandate agreements[9] apply to the agency agreements. In an international context, the Swiss rules on conflicts of law refer to the law at the domicile of the agent, unless otherwise agreed by the parties.[10]

Apart from regular commercial agencies, the most common form of an agency relationship in Switzerland is the insurance agency. Being the most relevant application of the statutory provisions on agency, the insurance agency has also been specifically addressed in the insurance contract law.[11] According to these provisions, the insurance company is responsible for any action of its agent as if the insurer was acting on its own.[12] Typically, the insurance agent does not conclude the contracts himself but arranges the agreement by submitting the application forms to the insurance company for approval.

4 Code of Obligations, art 412, para 1.
5 Code of Obligations, art 32, para 1; Federal Supreme Court 108 II 120.
6 Code of Obligations, art 34, para 1.
7 Code of Obligations, arts 412 *et seq.*
8 Code of Obligations, arts 425 *et seq.*
9 Code of Obligations, arts 394 *et seq.*
10 Federal Act on Private International Law, art 117, SR 291.
11 SR 221.229.1. The Federal Act on Insurance Contracts is currently under revision in its entirety.
12 Federal Act on Insurance Contracts, art 34.

Rights and Duties of Agents and Principals

The agent has a general duty of care and loyalty towards the principal, which limits the agent's freedom to perform the services independently.[13] As a result of the agent's duty of loyalty, double representation (i.e., acting for both the principal and the client) or solicitation of the principal's employees is prohibited.[14] However, unless otherwise agreed, the agent also may act for other principals (article 418c, paragraph 2, CO).

It also is possible to agree on a covenant not to compete; however, in this case, the agent is entitled to special compensation that he cannot validly waive, and to which the agent is entitled even if the agent terminates the agency agreement (article 418d, paragraph 2, CO).[15] Furthermore, the agent is obliged by law to maintain business secrets he learned in connection with the agency relationship, even after termination of the agency agreement (article 418d, paragraph 1, CO).

An agreement that the agent shall guarantee the payment obligations of the customer or client is only valid if made in written form and the agent is entitled to specific compensation as a result of such agreement, which he again cannot validly waive (article 418c, paragraph 3, CO). If no such agreement is made, the agent shall at least check the clients' ability to pay as part of his duty of care. Indeed, he may become liable to the principal if a loss arises as a result of his failure to do so.

The agent has, first of all, a right to receive a fee, if and when a contract with a customer or client is entered into, unless otherwise agreed (article 418g, CO). In addition, depending on the circumstances, the agent may be entitled to a fee for the collection of payments from clients, the fee for guaranteeing the payments by the clients, the special compensation for a non-compete undertaking and the compensation for the enlargement of the customer base (articles 418l, paragraph 1; 418c, paragraph 3; 418d, paragraph 2; and 418u, CO). Finally, the agent has a retention right to secure his claims against the principal (article 418o, CO).

Like the agent, the principal has a duty of loyalty to the agent. The principal must do everything in his power to enable the agent to perform his activities successfully and furnish him with relevant information and documentation (article 418f, paragraph 1, CO).[16]

In particular, the principal must notify the agent immediately, if he expects that the number and/or the volume of the transactions that will be achievable is likely to be substantially smaller than was agreed to, or expected in the circumstances (article 418f, paragraph 2, CO).

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13 Code of Obligations, art 418c, para 1, and art 398, para 2; Federal Supreme Court 122 III 66.

14 Federal Supreme Court 136 III 518 and Federal Supreme Court 4C.216/2002 of 19.9.2003.

15 Federal Supreme Court 95 II 143.

16 Federal Supreme Court 122 III 66.

Unless otherwise agreed in writing, the agent enjoys exclusivity, where a particular area or clientele is allocated to him (article 418f, paragraph 3, CO).[17] Direct transactions by the principal within the specified area or with the specified clientele remain, however, possible unless otherwise agreed.

General Business Climate, Business and Trade Licensing

In General

The general business climate in Switzerland can be described as a liberal one. The constitutional freedom of trade and industry guarantees the choice and operation of a business free from governmental restrictions.[18] Accordingly, an agency in general is not subject to any business or trading licence requirement.

However, some requirements may apply from the kind of business the agent operates. For example, an insurance agent may be required to register with the Swiss Financial Markets Supervisory Authority FINMA and insurance agents are required to furnish certain information to the insured upon getting in touch with the client.[19] Or, as another example, agents who act as distributors of collective investment schemes need to register with FINMA, if they are not legally and factually included in an organization which is already subject to supervision by FINMA.[20]

Product Licensing

In Switzerland, the distribution of products does generally not require any specific permit or license. Certain products may, however, only be distributed if they have been approved or if they meet certain requirements.

Such products include pharmaceuticals, which may only be distributed if they have received regulatory approval, and medical products, which may only be distributed if they meet the general requirements on health and safety.[21]

Import Regime, Customs and Duties

Switzerland is not a member of the European Union (EU) or the European Economic Area (EEA) but is a member of the European Free Trade Association (EFTA). In contrast to the EU, EFTA is not a customs union. The Swiss border, therefore, remains one of the very few custom borders within Europe. On 1 January 2011, the agreement with the EU on the simplification of customs formalities and on customs security measures entered into force. As a result, the security regulations in accordance with the EU Customs Code (such as prior notification) are waived in direct traffic between Switzerland and the EU.

17 Federal Supreme Court 122 III 66.
18 Swiss Federal Constitution, art 27, SR 101.
19 Federal Act on Supervision on Insurance, arts 43 and 45, SR 961.01.
20 Federal Act on Collective Investment Schemes, art 19, SR 951.31.
21 Federal Act on Pharmaceuticals and Medial Products, arts 9 and 45, SR 812.21.

All goods entering or exiting Switzerland must clear customs. Imports are subject to customs duties, value added tax, and excise duty except for those exempted under law. Specific duties — low for raw materials, moderate for semi-finished goods, and high for manufactured goods — are levied by weight of import. Import duties average 3.2 per cent on industrial goods. Duties and taxes must be paid before customs will release goods for import.

In addition to the EFTA Convention and the Free Trade Agreement with the EU, Switzerland has a network of 25 free trade agreements (FTAs) with 34 partners outside the EU. Approximately 20 additional FTAs should be implemented by 2014, including those with important partners such as China and India.

Exchange Control

Switzerland does not have any sort of exchange controls. All currencies can be freely traded and no restrictions are imposed on the import and export of capital.

Tax Regime

In Switzerland, taxes are levied at three different levels— on the federal level (direct federal tax[22] federal withholding tax[23], stamp duties,[24] and value-added tax (VAT[25])); on the cantonal (state) level (on income and net wealth of individuals and on profits and equity of legal entities) and on the municipal level (mostly as a surcharge on the basic cantonal tax). Furthermore, the cantons and municipalities levy taxes on real estate gains and the transfer of real estate.

A Swiss legal entity, e.g., a stock corporation or a limited-liability company having its statutory seat in Switzerland (or, alternatively, having its place of effective management in Switzerland), is fully subject to federal and cantonal income tax, and to cantonal capital tax. The income tax is basically assessed based on the statutory accounts of the legal entity. Taxable is the net profit after tax, which means that the income tax is qualified as tax, deductible costs for the company. If the company has incurred economically not justified expenses, the taxable profit will be increased by an adjustment assessed by the tax authority. On federal level, a tax rate of 8.5 per cent on the profit after tax is applicable. On cantonal level, the taxation depends on the place of the companies' tax residency. The cantonal income tax rates vary from 10 to 24 per cent on the profit after tax. Overall, taking into account that the income taxes are tax-deductible costs, the effective federal and cantonal income tax rate of a company is approximately 15 to 25 per cent on the profit before tax.

An individual is fully subject to federal and cantonal tax liability if he has his tax domicile or his temporary residence in a canton. The criterion used to determine

22 Federal Act on Direct Federal Taxes, SR 642.11.
23 Federal Act on Withholding Tax, SR 642.21.
24 Federal Act on Stamp Duty, SR 641.10.
25 Federal Act on Value Added Tax, SR 641.20.

whether an individual is tax domiciled in a canton is the individual's intention of permanent residency in that particular canton. To determine such intention, the tax authorities look at the center of the individual's personal and business interest. Temporary residence is the case where an individual stays in the canton during at least 30 days to carry out a professional activity or stays in the canton during at least 90 days without carrying out a professional activity. Individuals with an enterprise, a permanent establishment or real property situated in a canton are subject to limited tax liability in the respective canton. Furthermore, trading in real property situated in a canton triggers limited cantonal tax liability.

Swiss VAT is applicable in case a Swiss domiciled company or an individual person runs a business that is either based on sales of goods or on the provision of services. If the company or the individual person achieves a turnover of more than CHF 100,000 from the sales of goods or the provision of services with place of delivery in Switzerland within a year, Swiss VAT liability is mandatory.

Below the mentioned threshold, the company or individual can request to be subject to VAT liability. Furthermore, apart from the sale of goods or the provision of services, any person can become liable to Swiss VAT for the mere purchase of services from suppliers domiciled abroad. From 1 January 2011, the ordinary Swiss VAT tax-rate is eight per cent. There are, however, two special VAT rates for accommodation services (3.8 per cent) and for convenience goods (2.5 per cent).

Formation of Agency Relationship

Capacity of Parties, Registration or Licensing of Agent or Principal

Both parties to an agency relationship, the agent and the principal, can be either natural persons or legal entities. The stock corporation (*Aktiengesellschaft*) is the most widespread form of business organization in Switzerland, but the limited-liability company (*Gesellschaft mit beschränkter Haftung*) has recently been used more frequently because of its less stringent regulatory structure.

Anyone trading, manufacturing or otherwise engaged in a business must be registered in the Commercial Register. Many legal entities, e.g., the stock corporation and the limited-liability company, only come into existence upon their registration in the Commercial Register.

Express or Implicit Agreements, Course of Trading

Agency agreements can be made orally or in writing, express or implicit. No specific form is required. In any event, however, the existence of an agreement requires the exchange of consistent declarations of intent between the parties, which can be express or implicit. The regular course of trading is one of the sources to be used to interpret and construe an agreement.

Formalities, Writing, Attestation, Notarization, or Registration of Agreement

The agency agreement does not have to be in any specific form but is usually done in written form. However, if the parties wish to deviate from the statutory provisions at the expense of the agent, such agreement is only valid, if made in writing.[26]

The law provides that the mandatory statutory provisions of the agency law may only be deviated from by written agreement between the parties, if the agent is only acting in a part-time capacity (article 418a, paragraph 2, CO).

In any event, however, the provisions concerning the compensation of the agent in case of a guarantee of the client's payment obligations or the covenant not to compete cannot be waived (articles 418c, paragraph 3, and 418d, paragraph 2, CO).[27] Nor can the rules concerning termination for cause be disposed of (article 418r, CO). Agency agreements do not require any attestation, notarization or registration.

Mandatory, Prohibited, or Preserved Activities or Purposes

The law requires that the agent is not in an employment relationship with the principal (article 418a, paragraph 1, CO).[28] As a result, the agent may not be subordinated to the principal or subject to his instructions.[29]

If no additional rules of conduct are agreed, the principal's right to give instructions are very limited and the agent must accept and follow the instructions of the principal only if they relate to the transactions to be entered into.[30] In particular with respect to the organization of his business, the working hours or the retention of third parties, the agent remains a completely independent business.

Furthermore, the agency is a continuous relationship in terms of time and transactions, although the law does not specify any minimum period. It results from the legal definition of an agency that the agreement must be for the facilitating or concluding of transactions for the principal (article 418a, paragraph 1, CO). Other than that, there are no mandatory, prohibited or preserved activities or purposes in an agency agreement within the general limits of the law.

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26 Code of Obligations, arts 418c, paras 2 and 3, 418f, para 3, and 418g, para 3; Federal Supreme Court 90 III 109.

27 Federal Supreme Court 95 II 143.

28 Federal Supreme Court 99 II 313.

29 Federal Supreme Court 129 III 664.

30 Federal Supreme Court 136 III 518.

Operational Aspects

Authority to Negotiate or to Conclude Sales, Accept Returns, Make Exchanges, Issue Refunds, Settle Disputes

The agent's authority largely depends on whether he is a facilitating or concluding agent. Because the law deems an agency to be a facilitating agency (article 418e, paragraph 1, CO), the agent needs a power of attorney to conclude contracts. A power of attorney can be given express or implicit and it can be withdrawn by the principal at any time.[31]

On the backdrop of the legal presumption in favor of a facilitating agency, the construction of presumed authority of the agent is difficult and a third party may not generally assume that an agent is authorized to conclude a contract on behalf of the principal.[32] If, however, authority of the agent is communicated to third parties, a third party acting in good faith may rely on such authority.

Absent any other power of attorney given to the agent, the agent is authorized only to receive notices of defects and other declarations whereby the clients exercise or reserve their rights in respect of defective performance by the principal, and to exercise the principal's right to secure evidence thereof (article 418e, paragraph 1, CO).

By contrast, the agent is not considered to be authorized to accept payments, to grant time limits for payments, or to agree on other modifications of the contract with clients (article 418e, paragraph 2, CO). Likewise, the agent is not authorized to settle disputes on behalf of the principal in the absence of a power of authority to do so. An exception to these rules is set forth in the insurance contract law, which provides that the insurance company shall be responsible for the acts of its agents like for its own.[33]

Disclosed and Undisclosed Agency

Swiss agency law does not contain any specific provisions concerning the disclosure of the agency relationship. It only governs the representation of the principal. Distribution systems with a strong brand tend to require a unified appearance in the market.

However, the principal runs the risk of becoming liable for the acts of the agent, if a third party rightfully relied on the appearance created. Some minimum requirements are established by the general obligation of legal entities to use their firm name in the complete and unaltered form as registered in the Commercial Register.[34]

31 Code of Obligations, art 34, para 1.
32 Federal Supreme Court 120 II 201.
33 Code of Obligations, art 34; Federal Act on Insurance Contracts.
34 Code of Obligations, art 954a, para 1.

Commission on Sales

The agent has a right to receive a fee, if and when the contract with the customer or client is entered into unless otherwise agreed. The most common forms of commissions are sales commissions as a percentage of the sales amount, fixed amounts per contract and collection fees if the agent is mandated to collect the payments and guarantee commissions if the agent guarantees the payment by the client.

The agent is entitled to the agreed or customary commission on all transactions that he facilitated or concluded during the agency relationship (article 418g, CO). Therefore the agent's remuneration is dependent on whether his performance causally leads to the valid conclusion of a transaction, irrespective of whether he is only facilitating or already concluding the transaction.

The facilitating agent earns his commission if he successfully arranges the transaction during the agency relationship while the conclusion of the contract may take place later,[35] and the concluding agent earns his commission on all contracts concluded during the lifetime of the agency.

Unless otherwise agreed in writing, the agent has earned his provision also if he can get the customer or client interested in doing business with the principal, even if the transaction is eventually entered into on the principal's initiative and without further support by the agent (article 418g, paragraph 1, CO).

An exclusive agent to whom a particular area or clientele has been allocated exclusively is entitled to the agreed commission (or, in the absence of such an agreement, the customary commission) on all transactions concluded during the agency relationship with clients belonging to that area or clientele (article 418g, paragraph 2, CO).[36]

Agency law deems an agent not to be entitled to collect payments by the clients (article 418e, paragraph 2, CO). If he does, based on a specific agreement, he is entitled to a collection fee.[37] Furthermore, the agent is entitled to a guarantee commission if he guarantees the payment by the client or takes over at least some of the costs associated with it (article 418c, paragraph 3, CO).[38]

Unless otherwise agreed in writing, the entitlement to the commission is established as soon as the transaction with the client or customer has been validly concluded (article 418g, paragraph 3, CO).[39] The agent's entitlement to the commission however, lapses subsequently, where the execution of a concluded transaction is prevented for reasons not attributable to the principal (article 418h, paragraph 1, CO).[40] Moreover, the entitlement is entirely forfeited

35 Federal Supreme Court 84 II 542.
36 Federal Supreme Court 121 III 414; Federal Supreme Court 122 III 66.
37 Federal Supreme Court 83 II 32.
38 Federal Supreme Court 4A 639/2009 of 17.3.2009.
39 Federal Supreme Court 90 III 109; Federal Supreme Court 121 III 414.
40 Federal Supreme Court 90 III 109; Federal Supreme Court 121 III 414.

if the principal, although performing his obligations under the contract, does not receive consideration at all or only to a minor extent as it would not be fair to require the principal to pay a commission (article 418h, paragraph 2, CO).

Unless otherwise provided by agreement or custom, the commission falls due at the end of the calendar half-year in which the transaction was concluded (article 418i, CO).[41] As for the insurance business, however, the commission is due when the first annual premium has been paid.

Reimbursement of Agent's Expenses

Unless otherwise provided by agreement or customs, the agent is not entitled to reimbursement of costs and expenses incurred in the normal course of operating his business (article 418n, paragraph 1, CO).[42] He is entitled to reimbursement of those costs and expenses, however, which he incurred as a result of special instructions of the principal (article 418n, paragraph 1, CO) or when acting as agent of necessity.[43] The duty to reimburse these costs and expenses arises even when the transaction does not occur (article 418n, paragraph 2, CO).

Agent's Accounting Duties

Apart from the general legal requirement to maintain and keep the books and records,[44] the agent is only required to account for the commission if agreed between the parties in writing. If no agreement that the agent shall draw up a statement of commission is made, the principal must provide the agent with a statement as at each due date setting out the transactions on which commission is payable (article 418k, paragraph 1, CO).

The mere furnishing of copies of the invoices by the principal is not sufficient. A statement provided by the principal to the agent is deemed accepted by the agent if the agent does not object within an appropriate period of time.[45] On request, the agent must be granted access to the relevant books and records (article 418k, paragraph 2, CO). The agent may not waive this right in advance.

Provision of Publicity Material, Preparation and Control of Advertising, Compliance with Local Standards

Swiss agency law does not expressly provide for a specific obligation of the principal concerning advertising. However, the principal generally must provide the agent with all necessary documents to enable the agent to perform his duties successfully (article 418f, paragraph 1, CO).[46] Furthermore, the understanding is

41 Federal Supreme Court 121 III 414.
42 Federal Supreme Court 83 II 32.
43 Code of Obligations, arts 419 *et seq.*
44 Code of Obligations, arts 957 *et seq.*
45 Federal Supreme Court 95 II 143.
46 Federal Supreme Court 122 III 66.

that the principal must develop an overall marketing and advertising concept, let the agent use it and undertake reasonable promotional measures at an overall level.

Details are usually defined in the agency agreements, which frequently provide that local promotional activities are performed by the agent using the overall marketing concept of the principal and the principal is responsible for the overall marketing and advertising activities.

Within a generally defined marketing concept, the principal may give instructions, e.g., layout guidelines, to the agent or require the agent to seek consent if he wants to deviate from the defined concept. Nevertheless, costs for local promotional activities usually have to be borne by the agent.

Sales Quotas

Agency agreements frequently provide for minimum sales to be achieved, failing which the granted exclusivity may be withdrawn or, in more severe cases, the agreement may be terminated altogether.

Failure to Exploit Agency

The principal generally must do every thing in his power to enable the agent to perform his duties successfully (article 418f, paragraph 1, CO). Moreover, the principal is obliged to pay the agent appropriate compensation if, in breach of his legal or contractual obligations, he wrongfully prevents the agent from earning the volume of commission that was agreed or expected in the circumstances (article 418m, paragraph 1, CO).[47] An agreement to the contrary is void.

The law implicitly provides for a best efforts obligation on the part of the agent and expressly requires him to safeguard the interests of the principal with the diligence of a prudent businessman (article 418c, paragraph 1 CO). Agency agreements sometimes provide for sanctions if the agent does not use his best efforts to exploit the agency or more often if he fails to meet certain minimum sales targets.

Indemnity

Since agents are independent from the principal, they both are responsible and liable for their own acts and omissions to third parties. In addition, it is possible that an agent subsidiarily is facing a product liability claim. That is why agency agreements often provide for indemnity and hold harmless arrangements, including undertakings to support or assume the other party's defence.

47 Federal Supreme Court 95 II 143.

Termination

Fixed or Indefinite Term, Express or Implied Relocation of Term

Upon termination of the agency contract, the agent's right and obligation to facilitate or conclude transactions in the name and for the account of the principal, as well as the principal's obligation of doing everything to enable the agent to perform his activities successfully, end, while the other rights and obligations persist until the liquidation of the agency relations has been completed.[48] The law of agency contracts provides for a termination regime of its own.

First, an agency contract may terminate by expiry of duration. Where an agency contract was concluded for a fixed term or its duration is limited by virtue of its purpose, it ends without notice on expiry of that term (article 418p, paragraph 1, CO). Where a fixed-term agency contract is tacitly extended by both parties on expiry of its duration, it is deemed to have been renewed for the same duration subject to a maximum of one year (article 418p, paragraph 2, CO). Where termination is subject to prior notice, failure by both parties to give notice is deemed tacit renewal of the contract (article 418p, paragraph 2, CO).

The agency contract also may be terminated by due notice. Where the agency contract was not concluded for a fixed term and its duration is not limited by virtue of its purpose, it may be terminated by either party during the first year of the contract by giving one month's notice, expiring at the end of the following calendar month. Any agreement of a shorter notice period must be done in writing (article 418q, paragraph 1, CO). Where the contract has lasted for at least one year, it may be terminated by giving two months' notice expiring at the end of a calendar quarter. However, the parties may agree a longer notice period or a different termination date (article 418q, paragraph 2, CO). Article 418q, paragraph 3, CO contains the mandatory statutory provision (which cannot be changed by agreement) that the notice period must be the same for both the principal and the agent. As it is the case for agency contracts as a whole, the notice does not require any particular form. For the sake of evidence, however, it is recommended to place the notice in writing.

Remediable or Non-Remediable, Fundamental or Non-Fundamental Breaches

The agency contract also may be terminated with immediate effect for good cause by both the principal and the agent (article 418r, paragraph 1, CO). In defining "good cause", the legislator declares the statutory provisions of the employment contract[49] applicable *mutatis mutandis* (article 418r, paragraph 2,

48 The obligation to maintain business secrets (art 418d, para 1) and, as the case may be, the prohibition of competition (art 418d, para 2) survive even the complete liquidation of the agency relationship.

49 Code of Obligations, arts 319 *et seq.*

CO). By analogy to the respective statutory provision concerning employment contracts,[50] good cause is any circumstance which renders the continuation of the agency relationship in good faith unconscionable for the party giving notice.

Fundamental or non-fundamental but sustainable (i.e., non-remediable) breaches of contract, but also objective reasons which make a continuation of the agency relationship unconscionable, may qualify as good cause. It is generally accepted in jurisdiction and doctrine that termination for good cause with immediate effect is only valid without prior warning in case of fundamental breaches.

It is common that parties of an agency contract define good cause in their agreement, e.g., by listing cases of good cause. As the statutory provision of article 418r, paragraph 1, CO is mandatory and the right of termination for good cause cannot be waived by agreement, the parties' definition of good cause is not binding for a judge. It may, however, at least give him an idea what the parties consider to be unconscionable to continue the agency relationship.

Supervening Impossibility, Temporary, Indefinite or Permanent

The agency contract may, at last, end by occurrence, i.e., on the death or incapacity of the agent or the bankruptcy of the principal. Where in essence the agency relationship was entered into with the principal in person, it ends on his death (article 418s, CO).

If the parties have entered into an agency agreement with regard to a special purpose and such purpose cannot be attained, the fulfilment of the agency contract becomes impossible.

In the event that such impossibility is attributable to one party, the general statutory provisions of articles 97 *et seq.*, CO on mal-performance of obligations apply.

These provisions enable the party whom the impossibility is not attributable to, among other remedies, to withdraw from the contract and to claim damages for the lapse of the contract. If, however, the impossibility to perform is not attributable to one party, the general statutory rule of article 119, CO applies.

According to that provision, the obligation that has become impossible is deemed to be extinguished and the party released is liable for the consideration already received pursuant to the provisions on unjust enrichment[51] and loses his counter-claim to the extent it has not yet been satisfied.

Termination Indemnity, When Payable, Calculation

The mere fact that the agency relationship has been terminated, does not entitle either of the parties to a claim for damages *per se*. Upon termination of the

50 Code of Obligations, art 337, para 2.
51 Code of Obligations, arts 62 *et seq*.

agency relationship, however, all the agent's claims for commission or reimbursement of expenses fall due (article 418t, paragraph 2, CO). Aside from claims for commission, these claims may contain:

- Adequate compensation for loss of income due to inability to work (article 418m, paragraph 2);
- Indemnities for breach of the principal's obligations (articles 418f and 418m, paragraph 1, CO);
- Indemnities for termination for good cause attributable to the principal (article 418r, CO);
- Reimbursement of out-of pocket expenses (article 418n, CO);
- Compensation for clientele (article 418u, CO); and
- Special remuneration for a post-termination non-compete undertaking (article 418d, paragraph 2, CO).

The statutory provision of article 418d, paragraph 2, CO is mandatory and, therefore, the entitlement to such special remuneration may not be validly waived before the end of the agency agreement, or, respectively, before said claim has come into existence. The amount of the special remuneration is calculated by deducting the earnable income[52] of the agent from his hypothetically earnable income on the competing activity.[53]

The special remuneration of article 418d, paragraph 2, CO also is due in the event that the agent has terminated the agency agreement. The question whether or not the special remuneration for a post-termination non-compete undertaking may be claimed cumulatively to the compensation for clientele of article 418u CO is controversial and has not yet been answered clearly by the Federal Supreme Court. The principal may, upon termination of the agency relationship, claim indemnities for breach of the agent's obligations, including of the latter's general duty of care and loyalty (article 418c, paragraph 1, CO in connection with article 398, paragraph 2, CO), and indemnities for termination for good cause attributable to the agent (article 418r CO).

Commission on Post-Termination Sales

In principle, the agent is only entitled to a commission for transactions the principal has concluded during the term of the agency relationship. There are, however, a few exceptions to this principle. On the one hand, the facilitating agent is entitled to a commission if he successfully arranges the transaction during the term of the agency agreement, even if the transaction is concluded

52 The earnable income needs to be anticipated, as the special remuneration is due as per termination. The agent is not obliged to accept unskilled labor.

53 The competing activity by which the income is hypothetically earnable must be realistic.

after termination, whilst the concluding agent is only entitled to a commission if the transaction is concluded before the termination of the agency agreement (article 418g, paragraph 1, CO). In this regard, the facilitating agent is entitled to a commission on post-termination sales.

On the other hand, the agent is, unless otherwise provided for by agreement or custom, entitled to commission on orders subsequently placed by a client acquired by him during the agency relationship only if such orders are placed before the end of the agency contract (article 418t, paragraph 1, CO). The legislator deliberately stated that such orders only need to be placed before the end of the agency contract, yet need not be accepted by the principal. This means that the agent may be entitled to commission on transactions that are concluded after the termination of the agency agreement. As a further exception to this principle, the agent is entitled to a commission on post-termination sales if the agency contract provides for an obligation to facilitate or conclude contracts of sale of goods held in stock after termination of the agency contract, respectively, for a commission on these post-termination sales. Regardless of this principle and aforementioned exceptions, it is, for the sake of clarity, recommended to provide for detailed rules on post-termination sales in the agency agreement.

Goodwill Interests, Payments

In General

The law of agency contracts provides, under certain preconditions, for special consideration due to the agent upon termination of the agency agreement. In the event that the agent's activities have resulted in a substantial expansion of the principal's clientele and considerable benefits accrue even after the end of the agency relationship to the principal from his business relations with clients acquired by the agent, the agent has a claim for adequate compensation, provided this is not inequitable (article 418u, paragraph 1, CO).

As this statutory provision governing the compensation of clientele is mandatory, it may not be validly waived before the end of the agency agreement, respectively, before the claim has come into existence. This payment is not considered an additional consideration for services provided, but rather a compensation of an added value generated for the principal and, therefore, a particular case of Swiss legislation. This is why the provision of article 418u has experienced rather contained appliance in the jurisdiction of the Federal Supreme Court.

Preconsition for Consideration

In General. Clientele means not just an address list, but a real customer base, allowing the agent's replacement to continue the agent's activities. The expansion is considered substantial if it is of economic importance. In the past, the expansion of a customer base from 85 up to 123 in two years and acquisition of 200 clients in 14 years has qualified as economically important.[54] Such substantial expansion of client must have its cause in the activities of the agent.[55]

Considerable Benefits. The substantial expansion of clientele must bring a considerable benefit to the principal. Only if there is high probability of the clientele remaining loyal to the principal and satisfying their needs by him, is such expansion beneficial. These benefits must, in addition, be considerable, meaning economically relevant.

Not Inequitable. Last, the compensation payment may not be inequitable. It goes without saying that the courts have been granted a wide range of discretion not only to lower its amount but also to completely exclude the agent from such compensation.

The amount of such claim may not exceed the agent's net annual earnings from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract (article 418u, paragraph 2, CO). No claim exists where the agency relationship has been dissolved for a reason attributable to the agent (article 418u, paragraph 3, CO).

Return of Stock, Publicity Material, Accounts, Books, and Other Documents

On the date of termination of the agency relationship, both the agent and the principal are obliged to restitute to the other party everything received from the other party or from a third party on account of the other party during the term of the agreement (article 418v). Unaffected thereby are the rights of retention of the contracting parties. The principal's restitution obligation contains the restitution of the agent's in-house business documents he has received. In practice, this obligation is of little relevance.

The restitution obligation of the agent contains the restitution of publicity material (manuals, brochures), trade samples, pricelists, movable property and securities, moneys received from third parties pursuant to an authority to collect, lists of customers made by the principal as well as intellectual property rights (including domain names) of the principal.

The agent's restitution obligation does, however, not contain in-house documents or lists of costumers made by the agent. Whether or not the agent is obliged to restitute his correspondence with customers is controversial, and depending on the agreement or on the commercial practice.

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54 Federal Supreme Court 84 II 164 and 103 II 277.

55 This may be the case if the agent, at the beginning of the agency relationship, brings new clientele to the principal that remain loyal to him; the agent acquires new clientele during the term of the agency relationship; or the agent had important influence on the concluding of new transactions with clientele of the principal.

As movable property, goods held in stock by the agent are also an object of the agent's restitution obligation. The return of goods held in stock will, as a rule, be in the best interest of both parties. This is why the greater part of the jurisprudential doctrine not only affirms an obligation of the agent to return goods held in stock, but also a right to do so. In that opinion the return of stock may be refused by the principal in the event that the agent has caused the termination of the agency relationship. The agent's right to return stock is uncontested in case of branded goods distributed in exclusive channels. It is to be modified, however, if merchantable goods are concerned and if the agency agreement had not provided for an obligation to keep goods in stock. Subject to agreement, the value of the goods in stock is measured according to the current market value.

In any case, the parties to an agency agreement are strongly recommended to stipulate in detail what is to be restituted upon termination of the agreement and how the value of the returned goods held in stock is to be measured. Whereas the agent may exercise and may not even in advance waive his right of retention on movable property and securities as well as moneys received from third parties (article 418o, paragraph 1, CO), the right of retention cannot be exercised on price lists or on lists of customers (article 418o, paragraph 2, CO) or on intellectual property rights given to the agent in trust.

Agent's Rights in Principal's Bankruptcy

As stated above, the agency contract terminates with the principal's bankruptcy (article 418s, paragraph 1, CO). The Federal Act on Debt Enforcement and Bankruptcy (DEBA)[56] does not provide for any privilege of the agent's claims in the principal's bankruptcy. The bankruptcy administrator may enter into and fulfil the agency contract instead of the principal.[57]

Principal's Property Held by Agent and Agent's Bankruptcy

The bankruptcy of the agent does not automatically terminate the agency contract, but entitles the principal to terminate the contract with immediate effect for good cause (article 418r, paragraph 1, CO). Given the agent only facilitates or concludes commercial contracts in the name of the principal, his bankruptcy does not necessarily prevent him from continuing his business activity. Such continuation, however, needs the bankruptcy administrator's consent.[58]

The question arises how the principal's goods held by the agent are to be treated in the latter's bankruptcy. It lies within the nature of an agency relationship that goods of the principal held by the agent, e.g., in stock, do not become property of the agent, but remain property of the principal until they are commissioned

56 SR 281.1.
57 Federal Act on Debt Enforcement and Bankruptcy, art 211, para 2.
58 Federal Act on Debt Enforcement and Bankruptcy, art 237, para 3, lit. 2.

and alienated to the costumer. This proprietorship of the principal is in no way affected by the agent's bankruptcy, as the agent's bankrupt estate is established only by assets belonging to the agent in the moment of the opening of bankruptcy.[59] As proprietor of goods held by agent, the principal is entitled to claim restitution of his property.[60]

Intellectual Property

Use: Implicit or Express

The principal, as owner of intellectual property, may expressly or implicitly grant the use of such rights to the agent. These rights include patent, trade mark, design and authorship rights, as well as, in a wider sense, any sort of technical or operational know-how. It is common that the parties to an agency agreement define object and extent of such right of use in the agreement.

As know-how is, unlike the other intellectual property rights, not directly protected by special legislation, but only indirectly by the Federal Act against Unfair Competition (UCA),[61] e.g., against the unfair prying into manufacturing and trading secrets,[62] it is highly recommended to stipulate in detail object and use of know-how in the agreement.

Intellectual property rights are of less relevance in agency relationships than they are in franchise systems, as here the constituent of license takes a back seat. Nevertheless, intellectual property rights are essential to the legal safeguarding of the distribution system against the agent and third parties. In connection with agency relationships, trade mark rights come to the fore. If the principal has consigned fiducially intellectual property rights to the agent or granted to him the right of use of intellectual property rights, the latter is obliged to restitute such rights on the date of termination of the agency relationship (article 418v, CO).

Duty to Protect, Confidentiality, Prosecute Infringements

The general duty of care and loyalty of the agent (article 418c, paragraph 1, CO in connection with article 398, paragraph 2, CO) contains the duty to provide the principal with all the necessary information about the contractual territory on a regular basis, as well as the duty to safeguard the interests of the principal within the contractual territory. Due to the aforementioned duties, the agent is obliged to periodically supervise the market with regard to (potential) infringements of the principal's intellectual property rights and to immediately inform the principal of such infringements.

59 Federal Act on Debt Enforcement and Bankruptcy, art 197, para 1.
60 Federal Act on Debt Enforcement and Bankruptcy, art 242, paras 1 and 2.
61 SR 241.
62 Federal Act against Unfair Competition, art 4, lit. c.

Within the scope of the Federal Act on Protection of Trademarks and Indications of Origin (PTIO),[63] the periodical supervision of the market and the immediate information by the agent may be indispensable in order to allow the principal to intervene against the registration of a new trade mark in time, as it is only the owner of the priority right who is entitled to intervene against the unlawful use of a trade mark.

The agent has no right to intervene in this regard. The periodical supervision of the market also is of great importance, as the courts make high demands on the timely intervention against infringements of trade mark rights and as they attribute the agent's knowledge of such infringements to the principal.[64]

The agent is obliged by law to maintain business secrets he learned in connection with the agency relationship, and to neither exploit nor inform others of them, even after termination of the agency agreement (article 418d, paragraph 2, CO).

Business secrets are defined as facts of economic privacy of the principal the secrecy of which is recognizable to the agent as being in the principal's will and interest. On the other hand, the law of agency does, aside from the general duty of loyalty to the agent, not provide for a legal obligation of the principal to maintain business secrets of the agent. From the agent's prospective, it is therefore recommended to stipulate such obligation in the agency agreement.

In supervising the market with regard to infringements of intellectual property rights and immediately informing the principal of such infringements, the agent thoroughly fulfils his legal duty to intervene. Such duty, however, does not contain the obligation to actually prosecute infringements on behalf of the principal unless expressly stated in the agency agreement. From a principal's point of view, it is therefore highly recommended to stipulate in detail a more extensive duty of the agent to intervene in the agency agreement.

Liability for Infringements, Indemnity

The agent may generally be held liable for the non- or mal-performance of his general duty of care and loyalty (article 418c, paragraph 1, CO) as well as of his other legal duties, such as the duty to maintain business secrets of the principal (article 418d, paragraph 2, CO).

The agent may therefore also be held liable for any non- or mal-performance of his duties in connection with the intellectual property rights of the principal. The indemnity to be paid by an agent based upon that liability will amount to the so-called negative interest, meaning that the principal should be brought in a financial position of the (hypothetical) *status quo ante*, as if the agency agreement were never entered into.

63 SR 232.1.
64 Federal Supreme Court, 4.C.371/2005 of 2 March 2006 (*Pain Paillasse*).

Interests in New Intellectual Property Generated

As defined by Swiss intellectual property law, a creator is a person who has created either an aesthetic immaterial value or a sign capable of distinguishing goods or services, or a new technology. Such creatorship bestows, within the limits set by the law, absolute power over the created intellectual property upon its creator (rule of creatorship).

The rule of creatorship is broken by a provision of the CO as it refers to employment contracts. Article 332, paragraph 1, CO states that "[i]nventions the employee has made and designs he has created, or in the elaboration in which he has participated, while performing his employment activity and contractual duties, belong to the employer regardless of whether or not they may be protected". As there is no such provision in the law of agency contracts, the question arises whether the rule of creatorship will apply in agency relationships or, by analogy of article 332, paragraph 1, CO, the rule should be broken.

With regard to the fact that an agency relationship is lacking the elements typically constituting an employment relationship, e.g., the subordination, there is no reason for breaking the rule of creatorship in connection with agency relationships. Therefore, if the agent generates new intellectual property during the term of the agreement, all these rights remain with the agent. Thus, it would, from a principal's point of view, be recommended to expressly stipulate in the agency agreement the assignment of such intellectual property rights of the agent to the principal.

Finally, it must be mentioned that, according to article 4 PTIO, trade marks registered in the name of agents, representatives or other authorized users without the consent of the owner, or trade marks that remain on the Register (of trade marks) after consent has ceased to be effective, shall also not enjoy protection. The agent's duty of loyalty and of safeguarding the principal's interest would be opposed to such registration.

National Competition Law

Legal Basis

Agency (and distribution) contracts are "vertical" legal relationships in a competition law perspective, i.e., seller and buyer of products (or eventually services) belong to different levels in the supply chain of goods. Such kind of vertical relationships can exist between a producer and a wholesaler, between a wholesaler and a retailer, or between a retailer and an end-customer.

Vertical agreements restraining competition are governed by article 5, paragraph 4, of the Swiss Cartel Act (CA).[65] The CA of 1995, being in force since July 1996, has not foreseen a provision on vertical agreements in its original form;

65 SR 251.

only in the course of the revision of the CA in 2003 has the parliament included the aforementioned rule in the CA, being in force since April 2004.

Contrary to EU and United States antitrust laws, the Swiss Constitution (article 96, paragraph 1) only allows the legislator to introduce provisions combating the misuse of the economic liberty by competition restraints, i.e., the Swiss CA does not contain any *per se* rules. Nevertheless, in order to come as close as possible to per serules within an extended notion of the misuseprinciple in Swiss law, the legislator is stating that specific vertical competition restraints are considered to be illegal if the concerned private business entities are not able to prove that the respective restraints do not substantially affect competition in the relevant market. This change of the burden of proof leads to a result which comes very close to a *per se* rule. According to article 5, paragraph 4, CA, vertical agreements are considered to substantially affect the economic liberty of the market participants if the privately agreed rules contain a direct or indirect price fixing provision or if they lead to a separation of markets in respect of geographical areas or business partners (thereby establishing exclusive positions).

From a competition law perspective, agency agreements are mainly discussed in view of the mentioned problem that vertical agreements have competition-restraining effects. However, aspects of market dominance also can play a role if the supplier of the goods is market dominant leading to the result that substitutable goods are not available (irrespective of the actual position of the agent), or the agent is vested with an exclusive position in a specific market by the supplier thereby excluding the competition exposure. Nevertheless, the situation of market dominance can only cause a control of the behavior and not a structural control. Therefore, in practice, the application of article 7 CA regulating the misuse of a market dominant position is less likely to occur than the application of article 5, paragraph 4, CA.

If the agent only has the function of a "facilitating agent", the critical issue of price fixing is not relevant since the agent does not enter into a contract with a third person in his own name. Otherwise, the key problem consists in the question whether the agent has been granted by the principal an exclusive position in a specific market. In practice, such provisions do exist in agency agreements; however, the inclusion of exclusive markets or territories provisions in contractual relationships takes place more often in (sole) distributorship agreements than in agency agreements.

Regulation on the Treatment of Vertical Competition Restraints

Article 6, paragraph 1, lit. c, CA entitles the Competition Authority (*Wettbewerbskommission*) to release ordinances and regulations having the objective to concretize the provisions of the CA. The Competition Authority released a first Regulation on the Treatment of Vertical Agreements in 2002 having been replaced by a new Regulation in 2007. This Regulation 2007 has been revised with decision of the Competition Authority of 28 June 2010, being in force since 1 August 2010 (VertBek).[66]

The Swiss Regulation on the Treatment of Vertical Agreements very much relies on EU Commission Regulation 330/2010 on Vertical Agreements of 20 April 2010,[67] as well as on its Guidelines of Vertical Restraints of 19 May 2010.[68] In addition, Swiss practice by the Competition Authority and by the courts attempts to rely on the EU practice in the decision-making processes; thus, Swiss law is envisaging meeting a so-called compatibility test with EU competition law.

Critical Legal Issues in Vertical Relations

Direct and Indirect Price Fixing

Direct or indirect price fixing (in the form of minimum prices or fixed prices) is considered to substantially restrain competition (article 10, paragraph 1, lit. a, VertBek); these measures may be justified only if the concerned enterprises prove that enough competition is existing outside of the scope of the contractual restriction. The Competition Authority is looking at intrabrand competition and at interbrand competition (article 11, VertBek). However, practical experience shows that such kind of justification can hardly be sufficiently brought.

Since the 2003 implementation of article 5, paragraph 4, in the CA, the Competition Authority has only decided three cases in the field of vertical restraints: The first case was insofar untypical as the concerned enterprises have agreed to the conclusion of the Competition Authority that competition was illegally restrained and have accepted a (small) fine.[69] The two other decisions of the Competition Authority, namely on the supply chain in a toothpaste market[70] and in the pharmaceutical medication market (so-called price recommendations of second hand),[71] are still pending in court due to an appeal by the sanctioned enterprises. In its previous practice, the Competition Authority has usually applied a restrictive notion of the relevant market, i.e., that goods protected by different trade marks are principally not substitutable.

Separation of Geographical Markets and Business Partners

According to article 5, paragraph 4, CA and article 10, paragraph 1, lit. b, VertBek, the separation of geographical areas and business partners by exclusive arrangements substantially restrains competition. Again, the concerned enterprises do have the privilege of justifying the competition-restraining arrangement by giving evidence that intrabrand or interbrand competition remains available. In this respect, article 12, paragraph 2, lit. b, VertBek lists

66 *Federal Gazette*, BBl 2010, 5078.
67 OJ 2010 L 102/1 of 23 April, 2010.
68 OJ 2010 C 130/1 of 19 May, 2010.
69 *RPW* 2009, at p 143.
70 *RPW* 2010, at p 65 (*Gaba/Elmex*).
71 *RPW* 2010, at p 649.

four cases that are not to be considered as situations of a substantial competition restraint.

Similar to EU law, the Swiss Regulation on Vertical Agreements distinguishes between active and passive sales (articles 2 and 3 VertBek). Contractual restrictions in respect of passive sales are not justifiable. In the aforementioned 2010 revision of the Regulation, a sentence has been added in article 3 VertBek explicitly stating that Internet sales are considered to be passive sales. For the first time in practice, the Competition Authority has rendered a respective decision on 11 July 2011, which clearly lays down that a purchaser of goods cannot be restrained in selling them by means of the Internet.[72]

Competition Clauses

Provisions in an agency agreement which forbid the agent to directly or indirectly distribute or sell products of a competitor of the principal in the same market are restraining competition (article 6 and article 12, paragraph 2, lit. f, VertBek); the Regulation on Vertical Agreements considers the duration element as irrelevant if the goods are sold from the premises of the supplier.

Misuse of a Dominant Market Position

In General

If the principal or the agent has a dominant market position as such or if exclusivity for a certain market or territory is granted to the agent by the principal, such position may not be misused (article 7 CA). This legal provision contains a general rule (paragraph 1) and a list of potential cases of illegal behavior (paragraph 2). The list is enumerative, meaning that additional "cases" are possible; furthermore, the general rule and the list of specific cases can be applied in parallel, i.e., are not alternatives.

Refusal to Enter into Contractual Relationships

A market dominant agent may not refuse to enter into a legal relationship (contract) with a potential buyer of the goods at stake (article 7, paragraph 2, lit. a, CA); the scope of a delivery contract obviously depends on the capacity of the supplier (agent or producer of the goods) and the delivery situation; even a phase-out is possible if the potential buyer is given enough time to look for an alternative supplier.

Discriminatory Practices

All types of discriminatory practices applied by a market dominant enterprise are illegal, in particular in respect of price and business conditions (article 7, paragraph 2, lit. b, CA).

72 Order of the Competition Commission of 11 July 2011 in the matter 22-0391.

Tying Arrangements

In principle, tying arrangements restrain competition (article 7, paragraph 2, lit. f, CA), except if the two tied products necessarily belong together, which can be the case if highly developed technological goods interlinked with each other are offered in the market.

Post-Termination Restrictions

The Regulation on the Treatment of Vertical Agreements limits the possibility of the contractual parties to include post-termination restrictions in the agency agreement.

Clauses excluding the agent from competing with the supplier after the termination of the contractual relationship are considered as provisions illegally restraining competition, with the exception of four specific situations which are clearly listed in the Regulation (article 12, paragraph 2, lit. g, VertBek), such as goods and services competing with the contractual products or protecting contractual know-how or not exceeding five years.

Unfair Trade Practices

The Federal Act Against Unfair Competition encompasses a general clause combating unfair competition based on the good faith principle (article 2 UCA) and (UCA) several provisions dealing with specific situations (articles 3–8 UCA). The most important specific legal norm is article 3 UCA, listing 14 practically relevant cases of unfair competitive behavior.

In general, it contradicts fair competition if the agent is using wrong personal titles (article 3, lit. c, UCA) or wrong or misleading descriptions of its enterprise or its own goods or services (article 3, lit. b, UCA). Furthermore, the agent may not make public information about competitors by pronouncing wrong or misleading statements (article 3, lit. a, UCA). Comparative advertising must be correct (article 3, lit. d, UCA).

The general clause on unfair competition is very broadly worded; it encompasses all aspects of behavior that are not to be considered as fair and compliant with good faith under the given circumstances (article 2 UCA). This norm mainly applies if the appreciation of the behavior in a given situation is not possible in accordance with specific provisions.

The disadvantage of the general clause consists in the fact that the offended party can "only" start legal action against the offending party in civil courts; criminal actions that could more easily lead to the disclosure of evidence are only possible in case of violation of a specific provision contained in articles 3–8 UCA.

Taxation

Exposure to Local Income or Corporation Taxes

A corporation or an individual acting as agent and being domiciled in Switzerland or having a permanent establishment in Switzerland will become liable to income and capital taxes at federal, cantonal and municipal level. The overall effective income tax rates can vary — based on the tax relevant domicile — between 15 to 25 per cent on profit before tax of a company or up to 45 per cent (based on canton of residency of the individual or the location of the business) of the net income of an individual doing business in Switzerland.

If the agent transacts in real estate, the transaction could, under certain circumstances, become subject to the cantonal real estate gain and real estate transfer tax. Both types of real estate taxes are levied only on cantonal and/or on municipal level but not on federal level. The real estate gain tax can, depending on the holding period of the real estate and the involved canton/municipality, amount to 50 per cent of the real estate gain, defined as the difference between the sales price and the initial costs of the real estate. The level of the real estate transfer tax also depends on the location of the real estate and can amount to three per cent of the market value of the real estate.

Business Taxes

Apart from the taxes mentioned above and the Swiss VAT, there are no further business taxes that could become relevant for an agent doing business in Switzerland.

Taxes Related to the Agent's Business Premises

Switzerland does not know any specific taxes related to the agent's business premises, but it must be mentioned that the existence of business premises may qualify as a permanent establishment and therefore create a limited direct tax liability at the place where the permanent establishment is located.

Use Taxes

Switzerland does not have any use taxes. Any turnover resulting from the activity of an agent having a Swiss VAT liability will be covered by Swiss VAT if the place of delivery or service is in Switzerland.

Collection and Refund of Value-Added Taxes

If an agent is liable to Swiss VAT, there is a duty to file a quarterly VAT declaration. Due to the fact that the Swiss VAT is a self-declaration tax, the company or the individual person having a Swiss VAT liability is responsible for the correct filing of the VAT declaration.

The due date for the filing of the quarterly VAT declaration is 60 days after the end of each quarter of the year. If justified, there is a possibility to request an extension of the due date.

The VAT declaration must contain the total of the invoiced VAT to the clients of the agent (= output VAT) minus the total input VAT which vendors have invoiced to the agent for deliveries of goods or services.

The refund of Swiss VAT for an agent being domiciled in Switzerland is only possible in case of a Swiss VAT liability. Furthermore, the entitlement for a refund of Swiss VAT will be reduced or fully denied in case the agent realizes Swiss VAT-exempted turnover without right for input VAT, which can be the case, for instance, in the area of real estate transfers or with turnover in the financial industry.

Litigation Issues

General Principles and Codifications

By its nature, the legal environment of an agency agreement involves three parties: The agent, the principal and the third party (the client). The principal enters into an agency agreement with the agent who then negotiates or concludes with the client an agreement in the name and on account of the principal.

Accordingly, the principal enters into contractual relationships with both the agent and the client. In the respective agreements, both the applicable law and the place of jurisdiction are typically agreed.

On the other hand, there is typically no agreement between the agent and the client and, as a result, there is no choice of applicable law or place of jurisdiction in case of any conflict between these parties.

In cases where the parties did not agree on the applicable law, such law will be determined in accordance with the Swiss Federal Act on International Private Law (IPLA),[73] while the court of competent jurisdiction is to be determined according to the rules of the Lugano Convention[74] (in case the defendant is domiciled in a member state) or the IPLA (in case the defendant is not domiciled in a member state of the Lugano Convention).

73 SR 291.

74 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters dated 30 October 2007, in force in Switzerland as of 1 January 2011 and replacing its earlier version of 1988. SR 0.275.12. The Lugano Convention basically extends the rules applicable among the EU member states under the "Brussels I" Regulation (Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) to Switzerland, Norway and Iceland.

Principal's Exposure to Local Jurisdiction

If the disputing parties did agree on a place of jurisdiction (in or outside of Switzerland) and/or the applicable law, such choice is valid and binding between the parties.[75] If a foreign court has been agreed to be competent on a non-exclusive basis, a Swiss-based principal may nevertheless be sued at its legal seat.

In the absence of a jurisdiction clause in the agency agreement or in the agreement between the principal and the client, the place of jurisdiction is determined by the Lugano Convention or the IPLA.

According to article 5, paragraph 1, of the Lugano Convention, a person domiciled in a member state may, in matters relating to a contract, be sued in another member state, in the courts for the place of performance of the obligation in question. For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question will be:

- In the sale of goods, the place in a member state where, under the contract, the goods were delivered or should have been delivered; and
- In the provision of services, the place in a member state where, under the contract, the services were provided or should have been provided.

Under article 113 IPLA, a foreign party may be sued in Switzerland if the obligation in question is to be performed in Switzerland. Based on the above rules, in a dispute between a Swiss-based agent (assumingly performing its services in Switzerland) and a foreign principal, the principal may be sued at the seat of the agent, either according to the Lugano Convention[76] (in the case of a principal domiciled in a member state) or according to the IPLA[77] (in case the principal is not domiciled in a member state of the Lugano Convention). A competent Swiss court would, in the absence of an explicit differing choice, apply Swiss law given that the Swiss-based agent would be the party rendering the characteristic service.[78]

In a dispute between the principal and the client and in the absence of a differing agreement, the principal also may, based on the above rules, be subject to Swiss jurisdiction if he is obliged to deliver goods to Switzerland or to perform services in Switzerland. Moreover, if the foreign principal is held liable by the client under the Swiss Product Liability Act, he may be sued before Swiss courts if the relevant damage occurs in Switzerland.[79]

75 Federal Act on International Private Law, arts 5 and 116.
76 Lugano Convention, art 5, para 1.b).
77 Federal Act on International Private Law, art 113.
78 Federal Act on International Private Law, art 117.
79 Federal Act on International Private Law, art 129; Lugano Convention, art 5,para 3.

Agent Able to Receive Process for Principal

In Switzerland, a claimant files its writ with the competent court that is then responsible for the service of process to the defendant. If the defendant is not domiciled or represented in Switzerland, service will be made through the consulate of the country in which the defendant has its domicile/corporate seat. Any person (including the agent) may be authorized to receive process based on a respective mandate agreement. According to a mandatory provision of Swiss law, a mandate may, however, in principle be revoked by any party to it at any time.[80]

Since a foreign principal has no interest in facilitating to any client the service of process against the principal, it is neither common nor does it seem advisable for the foreign principal to grant to any Swiss-based person in advance proxy to receive process. In practice, a foreign principal sued before a Swiss court will typically entrust a Swiss law firm with the defence against the respective claim. Service of process will then be made to the respective law firm.

Agent's Authority to Initiate Suits on Behalf of Principal

Under Swiss law, a party may authorize any person to initiate or pursue litigation on behalf of the respective party. The underlying mandate agreement, again, may be revoked at any time. Any such authorization will not replace the principal as claimant in the proceeding. Rather, the agent would conduct the proceedings in the name and on behalf of the principal.

Issues Submissible to Arbitration

According to article 177 IPLA, any proprietary claim may be agreed by the parties to be subject to arbitration. In connection with an agency agreement, the parties involved are, therefore, free to submit all issues to arbitration.

Foreign Arbitration

The parties are free to agree that a dispute relating to an agency agreement shall be resolved by foreign arbitration. A foreign arbitral award will be recognized and enforced in Switzerland based on the New York Convention of 1958.[81]

Foreign Jurisdiction (Prorogated or Not)

As stated above, the parties are free to choose the applicable law as well as the place of competent jurisdiction (or arbitration) in the agency agreement or in the agreement between the principal and the client. A foreign judgment will be recognized in Switzerland in accordance with articles 32 *et seq.* of the Lugano Convention (where the judgment was rendered in a member state), or articles 25

80 Code of Obligations, art 404.
81 SR 0.277.12.

et seq. IPLA (where the judgment was rendered in a non-member state). Recognition of a judgment rendered in a Lugano Convention member state will only be refused under very limited conditions, such as IF:

- Recognition is manifestly contrary to Swiss public policy;
- The judgment was given in default of appearance if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- The judgment is irreconcilable with a judgment given in a dispute between the same parties in Switzerland; and
- The judgment is irreconcilable with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in Switzerland.

For judgments rendered outside of a Lugano Convention member state, article 26 IPLA provides that foreign judgments are recognized and enforceable if the respective court was competent based on a respective agreement.

In cases where the parties did not agree on a competent jurisdiction, article 149 IPLA states that foreign judgments on contractual disputes are recognized in Switzerland if they have been rendered:

- In the country in which the defendant is domiciled; or
- In connection with a dispute relating to a contractual obligation that was or should have been performed in the country in which the foreign judgment was rendered.

Similar to the rules set forth in the Lugano Convention, recognition of a foreign judgment may be refused under the IPLA only if it is contrary to Swiss public policy or if some defined fundamental procedural rights of the defendant have not been respected in the respective foreign proceedings.

Applicability of Foreign Law

The law applicable on the dispute between the parties has no effect on the enforceability of any judgment or arbitral award in Switzerland. Recognition may only be refused as set forth above.

Product Liability

General Principles and Basis of Liability

Liability of the principal or the agent towards the client may be based on:

- Contract — The principal enters into contractual obligations towards the client under the agreement negotiated or concluded by the agent. The respective obligations and compensation in case of any breach of contract may be stated either in the agreement or in the CO. While some provisions of the CO are mandatory in nature and will, therefore, apply regardless of the wording of the agreement, other clauses of the CO may be overruled or supplemented by the provisions of the agreement.
- Product Liability Act — The Swiss Product Liability Act (PLA)[82] is in general equivalent to the EU Product Liability Directive.[83] Under the PLA, a producer will be liable if a defective product results in the death or injury of a person or a physical damage of an object of private use. In connection with the PLA, a producer means any person producing the product or parts of the products or importing the products into Switzerland.
- Tort — According to articles 41 *et seq.* CO, any person illegally and intentionally or negligently causing any damage to another person will be liable for such damage. Given its rather strict conditions, tort liability is of subsidiary relevance only in connection with agency agreements. The focus of this chapter is therefore limited to contractual liability and product liability under the PLA.

Agent's Liability for Principal's Defective Products

As stated above, the agent negotiates or concludes an agreement on behalf of the principal. Accordingly, there is no contractual liability of the agent towards the client.

Liability towards the client for any defective products or other kind of contractual breach remains with the principal only. Similarly, unless the agent imports goods to be sold to the client on behalf of the principal (which does not typically lie within the scope of an agency agreement), the agent also will not be liable to the client under the PLA.

Agent's and Principal's Liability for Agent's Negligence and Deficiency

The CO provides for a legal assumption that the agent is only authorized by the principal to impart business to the principal, to accept, on behalf of the principal, notices of breach from the client and to assert the principal's rights to secure evidence. The agent is not authorized to accept payment on behalf of the

82 SR 221.112.944.

83 Council Directive 85/374/EEC of 25 July 1985.

principal, to grant grace periods or to agree on any other amendments of the contract with the client.[84]

Of course, this legal assumption does not prevent the principal and the agent from agreeing on a wider or narrower scope of the agent's authority in the agency agreement. However, in the absence of receipt of specific information to the contrary, the client may rely on the agent to be authorized to take all actions and only those actions on behalf of the principal that are set forth in the CO.

If the agent wilfully or negligently acts outside the scope of its authority as assumed by the CO, the principal will not be liable to the client for any such actions of the agent, unless it has explicitly extended the agent's authority accordingly. An exemption to this principle, however, applies to insurance contracts where the principal is liable by mandatory law for all acts of its agent.[85]

The principal will, however, be bound by all actions of the agent taken within the scope of its authority as assumed by the law, even if the parties agreed on a narrower authorization in the agency agreement. If any such actions constitute a breach of the agency agreement, the agent will become liable to the principal for all losses suffered as a result therefrom.

Environment for Distributors

Terminology, Types, Prevalence, and Legal Environment of Distributorships

"Distributor" means an independent trader, dealing in his own name and for his own account in goods or services produced by a third party, the "supplier". The term includes authorized dealers in a selective distribution system, but it does not embrace franchisees, which do not use their own names.[86] In a

84 Code of Obligations, art 418e.

85 Federal Act on Insurance Contracts, art 34.

86 Chapter intends to provide an overview on distribution law in Switzerland and to outline some aspects that may be relevant for foreign market participants. Therefore, references to details of legal provisions and to specific scholar opinions are deliberately left out to ease reading. Sources consulted in connection with this chapter include Andreas Furrer/Oliver Arter (Hrsg.), *Vertriebsverträge II*, Bern 2010; Andreas Glanzmann, *Der Alleinvertriebsvertrag im schweizerischen Kartellrecht unter vergleichender Heranziehung des EG-Rechts*, Diss. SG 1991; Jürg E. Hartmann, *Vertriebsverträge im internationalen Kontext: Alleinvertriebsvertrag und verwandte Verträge (Selektiver Vertrieb, Franchise-Vertrag) unter Berücksichtigung des schweizerischen und des EU-Wettbewerbsrechts*, Zürich 2007; Jürg E. Hartmann/Felix W. Egli/Bernhard F. Meyer-Hauser, *Der Alleinvertriebsvertrag, 2. Auflage*, St. Gallen 1995; Moritz Kuhn, *Der Alleinvertriebsvertrag (AVV) im Verhältnis zum agenturvertrag (AV)*, in Forstmoser/Giger/Heini/Schluep (Hrsg.), FS Max Keller, Zürich 1989, S. 187ff.; *Michael Kull/Christoph Wildhaber* (Hrsg.), *Schweizer Vertriebsrecht - ein Handbuch für Praktiker, unter besonderer*

distributorship agreement, the supplier undertakes to supply the distributor with certain goods or services. In return, the distributor commits to purchase the respective goods or services from the supplier and to promote the sale of the goods or services in a certain territory.

Distributorships are sometimes referred to as specialized trade (*Fachhandel*). In an "exclusive" or "sole" distributorship agreement, the supplier grants the distributor an exclusive right to act as sole distributor in a certain territory. Alternatively or in addition, the exclusivity also may be defined in terms of certain goods or services or in terms of time. A "selective" distribution system calls for certain criteria for a distributor to meet in order to be admitted to the selective distribution system as an authorized distributor.

Distributorship agreements are not treated as a specific separate type of agreement under Swiss law. It is a contract *sui generis*, which combines elements of agency, partnership, purchase and mandate agreements.[87] A typical element of a distributorship agreement is the distributor's obligation to promote or facilitate the sale of the goods or services, similar to the obligations of an agent.[88] The crucial distinction to an agency, however, is that the distributor acts in his own name and for his own account and not as a representative or proxy.[89]

Because the distributorship agreement is not laid down in statutory law, it is recommended that the parties of a distribution agreement define their obligations and the consequences of the performance in detail. A distributorship agreement is usually set up as a framework agreement under which the supply of goods or services is provided for. Such supply is then, however, an individual purchase or service agreement, while the distributorship agreement constitutes a continuing obligation. As a result, title of the goods purchased passes on to the distributor and the distributor bears the commercial risk. In an international distributorship arrangement, Swiss conflict of law provisions refer to the law in effect at the place of the distributor's domicile unless otherwise agreed by the parties.[90]

Switzerland generally takes a liberal view on distributorship relationships and distributorship agreements are a common and important form for Swiss firms to organize the distribution of their goods and services. In Switzerland,

Berücksichtigung des agentur-, Alleinvertriebs- und Franchisevertrags, Zürich 2008; Oliver Arter (Hrsg.), *Vertriebsverträge*, Bern 2007; Christian Alexander Meyer, *Der Alleinvertrieb, 2. Auflage*, 1992; Johannes Vetsch/Hans Caspar von der Crone, *Die Kundschaftsentschädigung in Vertriebssystemen: Besprechung des Entscheides 4A_61/2008 vom 22. Mai 2008 des Schweizerischen Bundesgerichtes (BGE 134 III 497), SZW 2009, S. 79ff.; Rolf H. Weber, Bekanntmachung über die wettbewerbsrechtliche Behandlung vertikaler Abreden*, in Oesch/Weber/Zäch, *Wettbewerbsrecht II, Kommentar*, Zürich 2011, 142-184.

87 Federal Supreme Court 4A_61/2008 of 22 May 2008.

88 Code of Obligations, arts 418c, para 1, and 418f, para 1; Federal Supreme Court 107 II 223.

89 Federal Supreme Court 4C.130/2004 of 18 June 2004.

90 Federal Act on International Private Law, art 117.

distributorship agreements are mostly found in the automotive industry, for the distribution of services, in the cosmetics sector and in the engineering and machine industry. In particular, distribution agreements are most common in sectors that require intensive marketing or maintenance. The supplier's chance to penetrate the market with little investments and with little risk is considered one of the key advantages of a distributorship, while the distributor benefits from the supplier's brand and, depending on the type of the distributorship, from a certain exclusivity.

Rights and Duties of Distributors and Suppliers

In a distributorship, the distributor's key obligation is to purchase the goods or services (the "Products) only from the supplier and to promote the sale of the Products. On the other hand, the supplier grants the distributor the right to purchase the Products from the supplier and, in case of an exclusive or sole distributorship, exclusivity in a certain territory. In return for exclusivity, the distributor is frequently contractually obliged to purchase a minimum quantity of Products. Furthermore, the supplier is often required to support the distributor in the promotion and distribution of the Products. And, in many instances, the supplier also allows or requires the use of its brand and trade marks for the promotion and sale of the Products by the distributor.

Whether and to what extent the distributorship relationship also includes a duty of loyalty and care and also a non-compete obligation during the term of the agreement depends on the circumstances and is subject to legal debate in Switzerland. The prevailing view is that if the distributor is largely independent, there is no specific duty of loyalty and care and consequently no non-compete obligation. A non-compete obligation following termination of the distributorship in analogy to an agency is, however, mostly accepted.[91] Similar to an agency, the distributor may in certain circumstances be entitled to be compensated for the enlargement of the clientele under certain circumstances, if he significantly enlarged the clientele during the lifetime of the distributorship.[92]

General Business Climate, Business and Trade Licensing

The general business climate in Switzerland can be described as a liberal one. The constitutional freedom of trade and industry guarantees the choice and operation of a business free from governmental restrictions.[93] Accordingly, distributorship agreements in general are not subject to any business or trading licence requirement.

However, some requirements may apply from the kind of business the distributor operates. For example, a distributor who distributes collective

91 Code of Obligations, art 418d.
92 Code of Obligations, art 418u; Federal Supreme Court 134 III 497, 4A 61/2008 of 22 May 2008 and 4A 86/210 of 5 July 2010.
93 Swiss Federal Constitution, art 27.

investment schemes needs to register with FINMA if he is not legally and factually included in the organization of an undertaking which is already subject to supervision by FINMA.[94]

Product Licensing

In Switzerland, the distribution of products does generally not require any specific permit or license. Certain products may, however, only be distributed, if they have been approved or if they meet certain requirements.

Such products include pharmaceuticals, which may only be distributed if they have received regulatory approval, and medical products, which may only be distributed if they meet the general requirements on health and safety.[95]

Import Regime, Customs and Duties; Exchange Control; Tax Regime

With respect to import of goods, customs and duties, exchange control and the general tax regime, there are no relevant differences to what applies to an agent. Reference is made to the section concerning agency, above.

Formation of Distributor Relationship

Capacity of Parties, Registration or Licensing of Distributor or Supplier

Both parties to a distributorship agreement, the distributor and the supplier, can be a natural person or a legal entity. The stock corporation (*Aktiengesellschaft*) is the most widespread form of business organization, but the limited-liability company (*Gesellschaft mit beschränkter Haftung*) has recently been used more frequently because of its less stringent regulatory structure.

Anyone trading, manufacturing, or otherwise engaged in a business must be registered in the Commercial Register. Many legal entities, e.g., the stock corporation and the limited-liability company, only come into existence upon their registration in the Commercial Register.

Express or Implicit Agreements, Course of Trading

Distributorship agreements can be made orally or in writing, express or implicit. No specific form is required.

In any event, however, the existence of an agreement requires the exchange of consistent declarations of intent between the parties, which can be express or implicit.[96] The regular course of trading is one of the sources to be used to interpret and construe an agreement.

94 Federal Act on Collective Investment Schemes, art 19; SR 951.31.
95 Federal Act on Pharmaceuticals and Medial Products, arts 9 and 45; SR 812.21.
96 Code of Obligations, art 1.

Formalities, Writing, Attestation, Notarization, or Registration of Agreement

The distributorship agreement does not have to be in any specific form but is usually done in written form. Due to the complexity of the relationship between the supplier and the distributor and since Swiss law does not provide statutory rules on distribution agreements, written contracts are the standard and highly recommended. Distributorship agreements do not require any attestation, notarization or registration.

Mandatory, Prohibited, or Preserved Activities or Purposes

The distributor is independent from the supplier and not in an employment relationship with the supplier. As a result, the distributor may not be a subordinate to the principal and the supplier's right to give instructions is limited to the elements of the distribution system.

Other than that, there are no mandatory, prohibited or preserved activities or purposes in a distributorship agreement within the general limits of the law.

Operational Aspects

Price Lists, Discounts, Volume Rebates

As set out above, the distributorship agreement is usually structured as a framework agreement to govern individual purchase agreements. As such, it is very common for the distributorship agreements to include rules that specify or at least allow to determine the prices that apply for the sale of the Products from the supplier to the distributor. Price lists setting out the prices for the products and provisions granting discounts or volume rebates are a common form to set out these rules.

The supplier and the distributor are free to set the prices or define price mechanisms with discounts and rebates between the two of them. With respect to an agreement that effectively directly or indirectly determines the resale prices, the competition laws apply.

Credit Protection, Retention of Title, and Other Security Devices

Swiss civil law provides for a number of instruments to secure the obligations of a contracting party. Retention of title is one of these instruments, although one that is not frequently used in Switzerland. The main reason is that the agreement to retain title is only valid if it is registered in a public register at the domicile of the purchaser, i.e., the distributor.[97]

97 Civil Code, arts 715 and 716; SR 210; Ordinance of the Federal Supreme Court on the Registration of Agreements to Retain Title, SR 211.413.1.

The requirement to register the retention of title has proven too cumbersome in practical terms, which is why the retention of title is rarely used. If validly agreed, title to the purchased goods passes to the purchaser subject to the condition that the full purchase price is paid.

For similar reasons, it is difficult to pledge the goods purchased as collateral. Swiss law provides that the pledge cannot be validly constituted if the purchaser is in possession of the respective goods.[98] More common forms of security are, therefore, assignments[99] or personal securities. Where the distributor is a legal entity, the supplier sometimes requires some personal securities by the beneficial owner or key management of the distributor. Such personal security may be given in the form of a surety,[100] a (collective) assumption of the obligations[101] or a guarantee.[102]

On the other hand, as a security for claims resulting from the distribution relationship, general contract law grants distributors a right to retain movable property of the supplier that is in the distributor's possession pursuant to the distribution agreement.[103] However, unlike the agent's right of retention,[104] the distributor's right of retention may be waived by agreement in advance.

Ordering, Delivery Timetables, and Assurances

The parties to the distributorship agreements are free to agree on the practicalities and operational aspects of the individual sales and purchases, such as the ordering process, delivery times and conditions, and timetables. Apart from minimum purchase volumes, distributorship agreements often provide for regular review and planning of the quantities and for minimum inventory levels.

In terms of assurances, the supplier often provides what is called a "supplier's warranty". What is legally an assurance often in effect does not strengthen the purchaser's position but eventually limits the statutory rights a purchaser would otherwise have. For example, conversion or reduction of purchase price[105] is frequently excluded in favor of remediation.

However, the exclusion of claims must be specifically provided for[106] and product liability claims may not be excluded at all. The supplier often extends the statutory warranty period of one year and waives the restrictive examination and notice requirements.[107] If the supplier provides such a warranty period to the

98 Civil Code, arts 717 and 884.
99 Code of Obligations, arts 164 *et seq.*
100 Code of Obligations, art 492.
101 Federal Supreme Court 129 III 704.
102 Code of Obligations, art 111; Federal Supreme Court 125 III 305 and 101 II 327.
103 Civil Code, art 895.
104 Code of Obligations, art 418o, para 1.
105 Code of Obligations, arts 205 *et seq.*
106 Federal Supreme Court 91 II 348.
107 Code of Obligations, arts 201 and 210.

customer, the supplier does not only assure that the Product is free from defects at the time of purchase but for the entire warranty period.

Reimbursement of Distributor's Expenses

Since the distributor, by definition, is an independent business entity, buying and selling for his own account, the distributor is normally not entitled to claim compensation for general business costs and expenses.

Unless explicitly agreed, the distributor also may not claim compensation for specific costs triggered by individual obligations under the distributorship agreement, such as the obligation to maintain an inventory, and to engage in market analysis and research.

Distributor's Accounting Duties

Distributors who will in almost all cases be operating a business that needs to be registered in the Commercial Register are required by statutory law to keep the books and records of their business, including the business correspondence, to allow the ascertain ment of their claims and liabilities and results.[108] Such books and records have to be kept for a minimum of 10 years from the end of the fiscal year to which they relate.

In addition, the parties to the distributorship agreement may agree on specific accounting duties of the distributor. In many instances such provisions are combined with a right of the supplier to audit the relevant books and records at the premises of the distributor.

Provision of Publicity Material, Preparation and Control of Advertising, Compliance with Local Standards

In distribution systems with a strong brand, a consistent appearance in marketing and sales is of high importance. Even though the distributor is independent, it is, therefore, accepted that the supplier issues detailed instructions to the distributor concerning the appearance in public.

The general understanding is that the supplier must develop an overall marketing and advertising concept, let the distributor use it and undertake reasonable promotional measures on an overall level.

Details are often defined in the distributorship agreements, which frequently provide that local promotional activities are to be performed by the distributor using the overall marketing concept of the supplier and the supplier is responsible for the overall marketing and advertising activities. Within a generally defined marketing concept, the supplier may give instructions, e.g., layout guidelines, to the distributor or require the distributor to seek consent, if

108 Code of Obligations, arts 957 *et seq*.

he wants to deviate from the defined concept. Nevertheless, costs for local promotional activities usually have to be borne by the distributor.

Termination

Fixed or Indefinite Term, Express or Implied Relocation of Term

The distributorship being a contractual relationship for which the law does not provide special statutory provisions, but which includes and gears towards activities of service, would lead to the conclusion that the statutory provisions concerning the ordinary mandate[109] would apply in a subsidiary manner. Therefore, regarding the termination of a distributorship, the question would arise as to whether or not the mandatory provision of article 404 CO on the revocation/termination of the ordinary mandate would apply. This provision states that a mandate may be terminated at any time by either party revoking or giving notice. Both jurisdiction and legal doctrine deny such applicability, but rather hold the provisions of the law of agency contracts regarding termination applicable *mutatis mutandis* in cases of ordinary termination or termination for good cause.

They hold that article 418q, paragraph 1, CO will apply *mutatis mutandis* to distributorships with a term of less than a year, meaning that it may be terminated by either party by giving one month's notice expiring at the end of the following calendar month, subject to a shorter notice period which must be done in writing. Where the contract has lasted for at least one year, however, jurisdiction and legal doctrine do not apply the two months' notice (expiring at the end of a calendar quarter) provided for in article 418q, paragraph 2 CO, but rather a six months' notice, provided for in the law of the simple partnership.[110]

Remediable or Non-Remediable, Fundamental or Non-Fundamental Breaches

The Federal Supreme Court long ago decided that the provision of the law of agency contracts regarding termination with immediate effect for good cause (article 418r, paragraph 1, CO) also applies in a distributorship.[111] One may therefore be referred to the remarks made under agency, above.

Supervening Impossibility, Temporary, Indefinite or Permanent

The legal doctrine agrees on the applicability *mutatis mutandis* of the provision of article 418s CO on the termination by occurrence in a distributorship.

109 Code of Obligations, arts 394 *et seq.*

110 Code of Obligations, art 546 para 1: "Where the partnership was established for an indefinite duration or for the lifetime of one of the partners, each partner may terminate the partnership by giving six months' notice."

111 Federal Supreme Court 89 II 33.

Therefore, the distributorship ends on the death or incapacity of the distributor or the bankruptcy of the supplier. Where, in essence, the distributorship was entered into with the supplier in person, it ends upon his death.

If the parties have entered into a distributorship agreement with regard to a special purpose and such purpose cannot be attained, the fulfilment of the distributorship agreement becomes impossible. In the event that such impossibility is attributable to one party, the general statutory provisions of articles 97 *et seq*. CO on mal-performance of obligations apply.

These provisions enable the party whom the impossibility is not attributable to, among other remedies, to withdraw from the contract and to claim damages for the lapse of the contract. If, however, the impossibility to perform is not attributable to one party, the general statutory of article 119 CO applies. According to that provision, the obligation that has become impossible is deemed to be extinguished and the party released is liable for the consideration already received pursuant to the provisions on unjust enrichment[112] and loses his counter-claim to the extent it has not yet been satisfied.

Termination Indemnity, When Payable, Calculation

The mere fact that the distributorship has been terminated does not entitle either of the parties to an indemnity claim. Upon termination of the distributorship, the distributor may claim indemnities for breach of the supplier's obligations, indemnities for termination for good cause attributable to the supplier, compensation for clientele, and the special remuneration for a post-termination non-compete undertaking, as the major part of the jurisprudential doctrine affirms the appliance of *mutatis mutandis* of article 418d, paragraph 2, CO. In this regard, one may be referred to the remarks made under agency, above.

Compensation for Lost Profits

Upon termination of a distributorship, a party may only be entitled to a compensation for lost profits in the event of mal-performance of obligations of the other party. According to the general statutory provision of article 97 CO an obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault.

Goodwill Interests, Payments

The answer to the question of whether or not a distributor may claim a compensation for clientele after the distributorship had been terminated has been controversial until a landmark decision of the Federal Supreme Court in the year 2008.[113] In this remarkable decision, which has been both acclaimed and

112 Code of Obligations, arts 62 *et seq*.
113 Federal Supreme Court 134 III 497.

criticized, the Federal Supreme Court applied article 418u, paragraph 1, CO *mutatis mutandis* in a distributorship and defined the preconditions for such appliance. In addition to the three preconditions of article 418u, paragraph 1, CO being the substantial expansion of the principal's clientele resulted of the agent's activities, the considerable benefits accrued to the principal, and the lack of inequity (article 418u, paragraph 1), the Federal Supreme Court defines as a forth precondition the integration of the distributor in the supplier's distribution system.

In the opinion of the court, such integration limits the economic freedom of the distributor and makes the distributor's position similar to that of an agent. When affirming such integration in the supplier's distribution system, the court has put a lot of emphasis on the distributor's obligation to periodically disclose to the supplier the names and addresses of the customers.

Return of Stock (Sale or Return), Publicity Material, Accounts, Books, and Other Documents

As the restitution obligations of the distributor and the supplier are similar to the ones of the agent and the principal, one may in general be referred to the remarks made under agency, above. Subject to agreement, there is no obligation of the supplier to re-purchase and take back stock of merchandise that he has sold to the distributor during the term of the distributorship agreement. In addition, article 418o CO, granting a retention right to the agent that he may not waive in advance, does not apply to distributorships. The distributor may exercise the general retention right of the Swiss Civil Code (CC)[114] provided for by article 895 CC.[115] This retention right, however, may be excluded by agreement.

As is the case with agency agreements, the parties to a distributorship agreement are strongly recommended to stipulate in detail what is to be restituted upon termination of the agreement and whether or not goods held in stock have to be returned and, if that is the case, how these goods are to be measured.

Intellectual Property

Use: Implicit or Express

The granting of use of intellectual property of the supplier to the distributor, respectively, the extent of the capacity of the latter to use such intellectual

114 SR 210.

115 Civil Code, art 895, para 1: "A creditor has the right to retain chattels and securities which have come into his or her possession with the debtor's consent until his or her claim has been satisfied, providing such claim is due and intrinsically connected with the retained objects." Civil Code, art 895, para 2: "Between persons engaged in commerce, an intrinsic connection exists where both the claim and the retained objects relate to their commercial dealings."

property, is identical with that of principal and agent. It also is accepted that the provision of article 418v CO, i.e., the agent's duty to restitute everything he has received during the contractual period, also applies *mutatis mutandis* to the distributorship. One may, therefore, be referred to the remarks made under agency, above.

Duty to Protect, Confidentiality, Prosecute Infringements

The relationship between a supplier and a distributor has already been qualified as "agency-like" by the Federal Supreme Court, before the provisions of the law of agency contracts of articles 418a *et seq*. CO entered into force.[116] In addition, the economic purpose of both the agency and the distributorship are identical, as the obligation to promote sales takes a center stage in both types of relationships.[117]

It is therefore accepted that the provision of the law of agency contracts stating the agent's duty to safeguard the principal's interest with the care of an ordinary merchant (article 418c, paragraph 1, CO) applies *mutatis mutandis* to the distributorship. One may, therefore, in this regard be referred to the remarks made under agency, above.

As far as the distributor's confidentiality obligation is concerned, however, it needs to be pointed out that such obligation is of considerably smaller extent than the respective duty of the agent towards the principal. As the distributor purchases and resells in his own name and for his own account, buyers are his and not the supplier's customers. He is therefore the owner of secrecy rights concerning these customers. The distributor is, however, obliged to keep confidential all facts the secrecy of which the supplier has an interest in.

Liability for Infringements, Indemnity

As the duty of care and loyalty of the distributor is identical with the one of the agent, one may be referred to the remarks made under agency, above.

Interests in New Intellectual Property Generated

As the rule of creatorship is applicable to distributorships, all the intellectual property rights generated during the term of such distributorship remain with the distributor. Thus, it would, from a supplier's point of view, be recommended to expressly stipulate in the distribution agreement the assignment of such intellectual property rights of the distributor to the supplier.

As the provision of article 4 PTIO applies not only to trade marks registered in the name of agents, but also to those registered in the name of distributors, one may be referred to the remarks made under agency, above.

116 Federal Supreme Court 60 II 336 and 54 II 378.
117 Federal Supreme Court 78 II 33.

National Competition Law

Legal Basis

The legal relationship between a supplier and a distributor constitutes a "vertical" relationship in a competition law perspective; therefore, the same rules apply as in case of an agency agreement. Vertical agreements restraining competition are governed by article 5, paragraph 4, of the Swiss Cartel Act (CA) since its amendment in 2003.

According to article 5, paragraph 4, CA, vertical agreements are considered to substantially affect the economic liberty of the market participants if the privately agreed rules contain a direct or indirect price-fixing provision or if they lead to a separation of markets in respect of geographical areas or business partners (thereby establishing exclusive positions). Furthermore, if the supplier of the goods is market dominant, the misuse of such dominant position can cause a control of the behavior (not a structural control) according to article 7 CA.

As far as vertical arrangements are concerned, the Competition Authority (*Wettbewerbskommission*) released a Regulation on the Treatment of Vertical Agreements in a revised version of 28 June 2010, being in force since 1 August 2010 (VertBek).

Exclusive Markets, Territories

Many distributorship agreements contain an exclusivity provision. Such kind of provision leads to a separation of markets in respect of geographical areas and/or business partners. A respective contractual provision is not in line with article 5, paragraph 4, CA even if the distributorship agreement does not contain any price-fixing clauses. When interpreting the basic legal rule more precisely, article 10, paragraph 1, lit. b, VertBek states that the separation of geographical areas and business partners by exclusive arrangements substantially restrains competition.

As mentioned with respect to agency, the concerned enterprises do have the privilege of justifying the competition- restraining arrangement by giving evidence that intrabrand or interbrand competition remains available. In this respect, article 12, paragraph 2, lit. b, VertBek lists four cases that are not to be considered as situations of substantial competition restraints, namely:

- Restrictions of active sales into geographical areas or to business partners having been reserved to be treated by the supplier or by another sole distributor (as long as passive sales are not restricted at all);
- Restrictions in respect of direct sales by wholesalers to end-customers;
- Restrictions of the sale to not-admitted distributors in the context of a selective distributorship scheme of the supplier within the geographical area designed by the supplier; and

- Restrictions of the possibility of a purchaser of goods to sell those parts being supplied for further use to customers enabling them to produce therewith corresponding goods as produced by the supplier.

As already mentioned with respect to agency, the competition authority has so far only decided three cases in the field of vertical restraints; with the exception of the *Gaba/Elmex* case, the competition authority had to deal with price fixing. Consequently, a clear and reliable practice, in particular since the *Gaba/Elmex* case is still pending in court, is not yet available.

Misuse of a Dominant Market Position

In a case of a dominant market position of the supplier or the distributor, the behavior must be in line with general fairness standards, i.e., the respective position may not be misused (article 7 CA). In particular, the subsequent forms of behavior would not be considered to be compliant with the CA:

- Refusal to enter into contractual relationships;
- Discriminatory practices; and
- Tying arrangements.

Post-Termination Restrictions

The Regulation on the Treatment of Vertical Agreements limits the possibility of the contractual parties to include post-termination restrictions in a distributorship agreement.

Clauses excluding the distributor from competing with the supplier after the termination of the contractual relationship are considered as provisions illegally restraining competition, with the exception of four specific situations which are clearly listed in the Regulation (article 12, paragraph 2, lit. g, VertBek), such as sale of goods and services directly competing with the contractual products, protection of contractual know-how or restrictions not exceeding five years.

Unfair Trade Practices

The Federal Act Against Unfair Competition encompasses a general clause combating unfair competition based on the good faith principle (article 2 UCA) and several provisions dealing with specific situations (articles 3–8 UCA). The most important specific legal norm is article 3 UCA, listing 20 (since April 2012) practically relevant cases of unfair competitive behavior. The rules already described for the agency are identically applicable on the distributor.

Taxation

Exposure to Local Income or Corporation Taxes

With respect to the local income or corporation taxes, there are no aspects of taxation law that are specific to the activities of a distributor. Therefore, reference is made to the section explaining local income or corporation taxes for agents.

Business Taxes

Apart from the taxes mentioned above and the Swiss VAT, there are no further business taxes that could become relevant for a distributor doing business in Switzerland.

Taxes Related to the Distributor's Business Premises

Switzerland does not know any of specific taxes related to the distributor's business premises, but it must be mentioned that the existence of business premises may qualify as a permanent establishment and therefore create a limited direct tax liability at the place where the permanent establishment is located.

Use Taxes

Switzerland does not impose any use taxes. Any resulting turnover from the activity of a distributor having a Swiss VAT liability will be covered with Swiss VAT if the place of delivery or service is in Switzerland.

Collection and Refund of Value-Added Taxes

With respect to the collection and refund of Swiss VAT, there are no specific aspects to the activities of a distributor. Therefore, reference is made to the Section setting out the collection and refund of VAT for agents.

Litigation Issues

Supplier's Exposure to Local Jurisdiction

There are two potential ways by which a foreign supplier may become exposed to Swiss jurisdiction. First, the distribution agreement may be governed by Swiss law and/or be subject to the jurisdiction of Swiss courts. As in agency agreements, the parties' choice of the applicable law and/or the competent courts is valid in Switzerland.[118]

118 Federal Act on International Private Law, arts 5 and 116.

In the absence of a jurisdiction clause in the distribution agreement, the place of jurisdiction is determined by the Lugano Convention (if the defendant is domiciled in a member state) or the IPLA (if the defendant is domiciled in a non-member state). According to article 5, paragraph 1, of the Lugano Convention, a person domiciled in a member state may, in matters relating to a contract, be sued in another member state, in the courts for the place of performance of the obligation in question. For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question will be, in the case of the sale of goods, the place in a member state where, under the contract, the goods were delivered or should have been delivered.

Similarly, under article 113 IPLA, a foreign party may be sued in Switzerland if the obligation in question is to be performed in Switzerland. If a foreign supplier undertakes in the distribution agreement to deliver goods to Switzerland, the supplier may, therefore, be sued in Switzerland, subject always to a differing jurisdiction clause in the distribution agreement. A competent Swiss court would, in the absence of an explicit differing choice, apply Swiss law given that the Swiss-based agent would be the party rendering the characteristic service.[119] Second, if the supplier is held liable by a private end customer under the IPLA, he may be sued before Swiss courts if the relevant damage occurred in Switzerland.[120]

Distributor Able to Receive Process for Supplier

Different from a principal under an agency agreement, a supplier under a distribution agreement has no contractual relationship with the customer to which the respective goods are sold by the distributor. Unless the supplier as producer of the goods in question provides for an explicit product guarantee to any end customer, a foreign supplier may only be held liable by a Swiss end-customer under the very narrow conditions provided by the IPLA.

It is, therefore, much more likely in practice that the distributor as the seller and contractual party to the Swiss customer will be held liable for any breach of contract. While it is possible in principle to authorize any person to receive process based on a respective mandate agreement, such authorization is neither common nor necessary nor advisable in Switzerland.

Distributor's Authority to Initiate Suits on Behalf of Supplier

Under Swiss law, a party may authorize any person to initiate or pursue litigation on behalf of the respective party. It is not uncommon for the distributor to undertake in a distribution agreement to initiate suits on behalf and on the account of the supplier, in particular in case of any violation of the supplier's intellectual property rights in Switzerland by any third party. If the distributor has been granted an exclusive license for the use of the respective intellectual

119 Federal Act on International Private Law, art 117.
120 Federal Act on International Private Law, art 129; Lugano Convention, art 5, para 3.

property right in Switzerland, it may be even entitled to take in its own name legal action against a violating party.

Issues Submissible to Arbitration

According to article 177 IPLA, any proprietary claim may be agreed by the parties to be subject to arbitration. In connection with a distribution agreement, the parties involved are, therefore, free to submit all issues to arbitration.

Foreign Arbitration

The parties are free to agree that a dispute relating to a distribution agreement shall be resolved by foreign arbitration. A foreign arbitral award will be recognized and enforced in Switzerland based on the New York Convention of 1958.

Foreign Jurisdiction (Prorogated or Not)

As stated above, the parties are free to choose the applicable law as well as the place of competent jurisdiction (or arbitration) in the distribution agreement. A foreign judgment will be recognized and enforceable in Switzerland in accordance with the Lugano Convention[121] (where the judgment was rendered in a member state), or the IPLA[122] (where the judgment was rendered in a non-member state).

Applicability of Foreign Law

The law applicable on the dispute between the parties has no effect on the enforceability of any judgment or arbitral award in Switzerland. Recognition may only be refused as set forth above.

Product Liability

Distributor's Liability for Supplier's Defective Products, etc.

In a distribution law environment, the distributor acquires full title in the goods delivered and distributes them to customers in its own name and on its own account based on independent sales agreements. A Swiss distributor will typically sell the goods to (Swiss or foreign) customers based on a Swiss law governed sales contract.

As a result, the distributor will, as seller under the respective contract with the customer, be liable for damages suffered by the customer resulting from a defective product or any other breach of contract, subject to the terms of the sales contract. If the sales contract does not provide otherwise, the distributor is

121 Lugano Convention, arts 32 *et seq.*
122 Federal Act on International Private Law, arts 25 *et seq.*

liable to the customer for direct damages (including legal costs) suffered as a result of the distributor's breach of contract, regardless of whether or not the respective breach was attributable to the distributor's fault or not.[123]

Moreover, the distributor also may be liable for further damages unless it can provide evidence that such damage is not attributable to its fault.[124] Based on a mandatory provision of Swiss law, an exclusion of liability for damages caused by the distributor's gross negligence or wilful misconduct is void.[125]

Moreover, if any defective product results in the death or injury of a person or a physical damage of an object of private use, the distributor may, notwithstanding anything to the contrary contained in the contract with the customer, become liable for that damage if it qualifies as a producer under the PLA.[126] This is likely to be the case since the distributor typically acts as importer of the respective goods.

Depending on the terms of the distribution agreement, the distributor may have a right of recourse against the supplier for any losses suffered due to a customer claim that was based on facts resulting from a breach by the supplier of the distribution agreement. Typically, a distribution agreement contains a specific clause relating to "third party claims" that allows the supplier to take over the defence against the customer's claim against the distributor if the supplier would in the end be held liable by the distributor for any losses suffered as a result of such claim.

Supplier's and Distributor's Liability for Distributor's Failure to Warn, Instruct, Store, Install, or Label Properly

As stated above, the distributor is primarily liable to the customer for any damage suffered by it as a result of the distributor's breach of the sales contract. This is even more the case if the breach was caused by the distributor's fault whereby the distributor also will be liable for indirect damages[127] and the distributor will obviously not have a right of recourse against the supplier.

Moreover, if the supplier is held liable as producer of the goods under the IPLA or if the supplier otherwise suffers any loss as a result of the distributor's breach of its obligations under the distribution agreement, the distributor will be liable to the supplier for any such loss subject to the terms of the distribution agreement.

123 Code of Obligations, art 195, para 1.
124 Code of Obligations, art 195, para 2.
125 Code of Obligations, art 100, para 1.
126 See agency, Section IX.1.
127 Code of Obligations, art 195, para 2.