

COMMERCIAL AGENCY, FRANCHISE AND DISTRIBUTION (8TH DRAFT)

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TEXT OF ARTICLES

Chapter 1: General Provisions

Section 1: Scope of Chapter 1

Article 1:101: Scope

This Chapter applies to commercial agency, franchise and distribution contracts and to other contracts where one party, engaged in business independently uses its skills and efforts to bring another party's products on to the market.

Section 2: Obligations

Article 1:201: Pre-Contractual Information

- (1) A reasonable time before the contract is concluded each party must provide the other with adequate information.*
- (2) Adequate information means information which is sufficient to enable the other party to decide on a reasonably informed basis whether or not to enter into a contract of the type and on the terms under consideration.*
- (3) If a party's non-compliance with paragraph 1 leads the other party to conclude a contract when the first party knew or could reasonable expected to have know that the other party, had it been provided with adequate and timely information, would not have entered the contract, or would have entered the contract only on fundamentally different terms, the other party may avoid the contract for mistake (Article 4:103 PECL).*
- (4) Parties may not derogate from this provision.*

Article 1:202: Co-Operation

(1) In commercial agency, franchise and distribution contracts and in other long-term commercial contracts the obligation to co-operate (art. 1:202 PECL) is fundamental and particularly intense. It requires the parties in particular to collaborate actively and loyally and to co-ordinate their respective efforts in order to achieve the objectives of the contract.

(2) Parties may not derogate from this provision.

Article 1:203: Information during the Performance

(1) During the contract each party must provide the other in due time with all the information which the first party has and the second party needs in order to achieve the objectives of the contract.

(2) Parties may not derogate from this provision.

Article 1:204: Confidentiality

(1) A party who receives confidential information from the other, must keep such information confidential and must not disclose the information to third parties either during or after the end of the contract period.

(2) Any information which a party already had in its possession or which has been disclosed to the general public, and any information which must necessarily be disclosed to customers as a result of the operation of the business is not be regarded as confidential information for this purpose.

Section 3: Ending and Termination

Article 1:301: Contract for a Definite Period

(1) A contract for a definite period ends upon the expiry of the period determined by the contract. Unless the parties agreed otherwise, such a contract cannot be ended unilaterally beforehand, except in the case of ending for an urgent and important reason (art. 1:304).

(2) A party is free not to renew a contract for a definite period. However, if the other party has given notice in due time that it wishes to renew the contract, the party who wishes not to renew the contract must give the other party notice of its decision not to renew within a reasonable time before the expiry of the contract period.

(3) A contract for a definite period which continues to be performed by both parties after the contract period has expired becomes a contract for an indefinite period.

Article 1:302: Unilateral Ending Contract for Indefinite Period

(1) Either party to a contract for an indefinite period may end the contract by giving notice of reasonable length (art. 6:109 PECL).

(2) Whether a notice is of reasonable length depends, among other factors, on

(a) the time the contract has lasted,

(b) reasonable investments made,

(c) the time it will take to find a reasonable alternative, and

(d) usages.

(3) A notice period of one month for each year during which the contract has lasted, with a maximum of 36 months, is presumed to be reasonable.

(4) The notice period for the principal, the franchisor or the supplier is to be no shorter than one month for the first year, two months for the second, three months for the third, four months for the fourth, five months for the fifth and six months for the sixth and subsequent years during which the contract has lasted. Parties may not derogate from this provision.

(5) Agreements on longer notice periods than those laid down in Paragraphs 2 and 3 are valid provided that the agreed period to be observed by the principal, franchisor or supplier is no shorter than that to be observed by the commercial agent, the franchisee or the distributor.

[(6) The aggrieved party is not entitled to specific performance of the contract during the notice period. However, the court may order specific performance of contractual and post-contractual obligations which do not depend on co-operation.]

Article 1:303: Damages for Non-Observance Notice Period

(1) In the case of the non-observance of the notice periods mentioned in art. 1:301 (2) and 1:302 (1), the aggrieved party is entitled to damages.

(2) The general measure of damages is such sum which corresponds to the benefit which the aggrieved party would have obtained during the non-observed period of notice.

(3) The yearly benefit is presumed to be equal to the average benefit which the aggrieved party has obtained from the contract during the previous 3 years or, if the contract has lasted for a shorter period, during that period.

(4) The general rules on damages for non-performance (art. 9:501 ff PECL) apply accordingly.

Article 1:304: Unilateral Ending for Urgent and Important Reasons

(1) A party may end the contract unilaterally and without observing a notice period of reasonable length for an urgent and important reason.

(2) An urgent and important reason for ending is a circumstance of such a nature that, taking into account the interests of both parties, the party which ends the contract cannot reasonably be expected to continue the contract, even temporarily.

(3) A party's right to end the contract for an urgent and important reason does not exclude that party's right to damages for non-performance.

(4) Any stipulation leaving the decision as to whether there is an urgent and important reason to one of the parties remains without effect.

Article 1:305: Termination for Non-Performance

(1) A party may terminate the contract for non-performance only if the other party's non-performance is fundamental within the meaning of Article 8:103 (b) and Article 8:103 (c) PECL (art. 9:301 PECL).

(2) Parties may not derogate from this provision.

Article 1:306: Indemnity for Goodwill

(1) When the contract comes to an end for any reason (including termination by either party for non-performance), a party is entitled to an indemnity from the other party for goodwill if and to the extent that

(a) the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business, and

(b) the payment of the indemnity is reasonable having regard to all the circumstances.

(2) The grant of an indemnity does not prevent a party from seeking damages under Article 1:303.

Article 1:307: Stock, Spare Parts and Materials

If the contract is ended, terminated or avoided by either party, the principal, franchisor or supplier must repurchase the commercial agent's, franchisee's or distributor's remaining stock, spare parts and materials at a reasonable price, unless the commercial agent, franchisee or distributor can reasonably resell them.

Section 4: Other General Provisions

Article 1:401: Right of Retention

In order to secure its rights to remuneration, compensation, damages and indemnity the commercial agent, franchisee or distributor has a right of retention over the movables of the principal, franchisor or supplier which are in its possession as a result of the contract, until the (former) principal, franchisor or supplier has fulfilled its obligations.

Article 1:402: Signed Written Document

Each party is entitled to receive from the other, on request, a signed written document setting out the terms of the contract.

Chapter 2: Commercial Agency

Section 1: General

Article 2:101: Scope

This Chapter applies to contracts under which one party (the commercial agent) agrees to act on a continuing basis as a self-employed intermediary to negotiate or to conclude contracts on behalf of another party (the principal) and the principal agrees to remunerate the commercial agent for the commercial agent's activities.

Section 2: Obligations of the Commercial Agent

Article 2:201: Negotiate and Conclude Contracts

The commercial agent must make reasonable efforts to negotiate contracts on behalf of the principal and to conclude the contracts which the commercial agent was instructed to conclude.

Article 2:202: Instructions

The commercial agent must follow the principal's reasonable instructions, provided they do not substantially affect the commercial agent's independence.

Article 2:203: Information during the Performance

The obligation to inform (Article 1:203) requires the commercial agent in particular to provide the principal with information concerning:

- (a) contracts negotiated or concluded,*
- (b) market conditions,*
- (c) the solvency of and other characteristics relating to clients.*

Article 2:204: Accounting

(1) The commercial agent must maintain proper accounts relating to the contracts negotiated or concluded on behalf of the principal.

(2) If the commercial agent represents more than one principal, the commercial agent must, in particular, maintain independent accounts for each principal the commercial agent represents.

(3) If the principal has important reasons to doubt that the commercial agent maintains proper accounts, the commercial agent must allow an independent accountant to have reasonable access to the commercial agent's books upon the principal's request. The principal must pay for the services of the independent accountant.

Section 3: Obligations of the Principal

Article 2:301: Entitlement to Commission During the Contract

- (1) The commercial agent is entitled to commission on contracts concluded with clients during the period covered by the agency contract, if*
- (a) (i) the contract with the client has been concluded as a result of the commercial agent's efforts; or*
(ii) the contract has been concluded with a third party whom the commercial agent has previously acquired as a client for contracts of the same kind; or
(iii) the commercial agent is entrusted with a certain geographical area or group of clients, and the contract has been concluded with a client belonging to that area or group, and
- (b) (i) the principal has or should have performed the principal's obligations under the contract; or*
(ii) the client has performed the client's obligations under the contract or justifiably withholds the client's performance (art. 9:201 PECL).
- (2) The parties may not derogate from Paragraph 1 sub b) sub ii) to the detriment of the commercial agent*

Article 2:302: Entitlement to Commission After the Contract

- (1) The commercial agent is entitled to commission on contracts concluded with clients after the agency contract has ended, if*
- (a) (i) the contract with the client is mainly the result of the commercial agent's efforts during the period covered by the agency contract, and the contract with the client was concluded within a reasonable period after the agency contract ended; or*
(ii) the conditions of Article 2:301 Paragraph 1 would have been satisfied except that the contract with the client was not concluded during the period of the agency, and the client's offer reached the principal or the commercial agent before the agency contract ended, and
- (b) (i) the principal has or should have performed the principal's obligations under the contract; or*
(ii) the client has performed the client's obligations under the contract or justifiably withholds the client's performance (art. 9:201 PECL).
- (2) The parties may not derogate from Paragraph 1 sub b) sub ii) to the detriment of the commercial agent.*

Article 2:303: Prevailing Entitlement to Commission

The commercial agent is not entitled to the commission referred to in Article 2:301, if the previous commercial agent is entitled to that commission pursuant to Article 2:302, unless it is reasonable that the commission is shared between the two commercial agents.

Article 2:304: Moment when Commission is to be Paid

(1) The principal must not pay the commercial agent's commission later than on the last day of the month following the quarter in which the commercial agent became entitled to it.

(2) The parties may not derogate from this provision to the detriment of the commercial agent.

Article 2:305: Entitlement to Commission Extinguished

(1) The commercial agent's entitlement to commission in accordance with Articles 2:301 and 2:302 can be extinguished only if and to the extent that it is established that the contract with the client will not be performed and that fact is due to a reason for which the principal is not accountable.

(2) Upon the extinguishing of the commercial agent's entitlement to commission, the commercial agent must refund any commission which the commercial agent has already received (Part. @).

(3) The parties may not derogate from Paragraph 1 to the detriment of the commercial agent.

Article 2:306: Remuneration

Any remuneration which (partially) depends upon the number or value of contracts is presumed to be commission within the meaning of this Chapter.

Article 2:307: Information during the Performance

The obligation to inform (Article 1:203) requires the principal in particular to provide the commercial agent with information concerning:

- (a) characteristics of the goods or services,*
- (b) prices and conditions of sale or purchase.*

Article 2:308: Information on Acceptance, Rejection and Non-Performance

(1) The principal must inform the commercial agent, within a reasonable period, of

(a) the principal's acceptance or rejection of a contract which the commercial agent has negotiated on the principal's behalf; and

(b) any non-performance of a contract which the commercial agent has negotiated or concluded on the principal's behalf.

(2) The parties may not derogate from this provision to the detriment of the commercial agent.

Article 2:309: Warning of Decreased Volume of Contracts

(1) The principal must warn the commercial agent within a reasonable time when the principal foresees or ought to foresee that the volume of contracts that the principal will be able to conclude or perform will be significantly lower than the commercial agent could normally have expected.

(2) The parties may not derogate from this provision to the detriment of the commercial agent.

Article 2:310: Information on Commission by means of Statement and Extract from Books

(1) The principal must supply the commercial agent in reasonable time with a statement of the commission to which the commercial agent is entitled. This statement must set out how the amount of the commission has been calculated.

(2) For the purpose of calculating commission, the principal must provide the commercial agent upon request with an extract from the principal's books.

(3) The parties may not derogate from this provision to the detriment of the commercial agent.

Article 2:311: Accounting

(1) The principal must maintain proper accounts relating to the contracts negotiated or concluded by the commercial agent.

(2) If the principal has more than one commercial agent, the principal must, in particular, maintain independent accounts for each commercial agent.

(3) The principal must allow an independent accountant to have reasonable access to the principal's books upon the commercial agent's request, if

(a) the principal does not comply with the principal's obligations under Article 2:310 Paragraphs 1 and 2, or

(b) the commercial agent has important reasons to doubt that the principal maintains proper accounts.

The commercial agent must pay the independent accountant.

Article 2:312: Amount of Indemnity

(1) The commercial agent is entitled to an indemnity for goodwill on the basis of art. 1:306 which must amount to:

(a) the average commission on contracts with new clients and on the increased volume of business with existing clients calculated for the last 12 months, multiplied by:

(b) the number of years the principal is likely to continue to derive benefits from these contracts in the future.

(2) The resulting indemnity must be amended in accordance with:

*(a) the average rate of migration in the commercial agent's territory;
and*

(b) the average interest rates.

(3) In any case, the indemnity must not exceed one year's remuneration, calculated from the commercial agent's average annual remuneration over the preceding five years or, if the contract has been in existence for less than five years, from the average during the period in question.

(4) The parties may not derogate from this provision to the detriment of the commercial agent.

Article 2:313: Del Credere Clause

(1) An agreement whereby the commercial agent guarantees that a client will pay the price of the goods or services forming the subject-matter of the contract(s) which the commercial agent has negotiated or concluded (del credere clause) is only valid if and to the extent that:

(a) the clause is concluded in writing, and

(b) the clause covers particular contracts which were negotiated or concluded by the commercial agent or such contracts with particular clients who are specified in the agreement, and

(c) the clause is reasonable with regard to the interests of the parties.

(2) The commercial agent is entitled to be paid a commission of a reasonable amount on contracts to which the del credere guarantee applies (del credere commission).

Chapter 3: Franchise

Section 1: General

Article 3:101: Scope

This Chapter applies to contracts whereby one party (the franchisor) grants the other party (the franchisee), in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor's network for the purposes of selling certain goods or services on the franchisee's behalf and in the franchisee's name, and whereby the franchisee has the right and the obligation to use the franchisor's tradename or trademark, the know-how and the business method.

Article 3:102: Pre-Contractual Information

(1) The obligation to disclose pre-contractual information (Article 1:201) requires the franchisor in particular to provide the franchisee with adequate and timely information concerning:

- (a) the franchisor's company and experience,*
- (b) the relevant intellectual property rights,*
- (c) the characteristics of the relevant know-how,*
- (d) the commercial sector and the market conditions,*
- (e) the particular franchise method and its operation,*
- (f) the structure and extent of the franchise network,*
- (g) the fees, royalties or any other periodical payments,*
- (h) the terms of the contract.*

(2) If the franchisor's non-compliance with paragraph 1 does not give rise to a fundamental mistake under Article 4:103 PECL, the franchisee may recover damages in accordance with Article 4:117(2) and (3) PECL, unless the franchisor had reason to believe that the information was adequate or had been given in reasonable time.

(3) The parties may not derogate from this provision.

Section 2: Obligations of the Franchisor

Article 3:201: Intellectual Property Rights

- (1) The franchisor must grant the franchisee a right to use the intellectual property rights to the extent necessary to operate the franchise business.*
- (2) The franchisor must make reasonable efforts to ensure the undisturbed and continuous use of the intellectual property rights.*
- (3) The parties may not derogate from this provision.*

Article 3:202: Know-How

- (1) Throughout the duration of the contract, the franchisor must provide the franchisee with the know-how which is necessary to operate the franchise business.*
- (2) The parties may not derogate from this provision.*

Article 3:203: Assistance

- (1) The franchisor must provide the franchisee with assistance in the form of training courses, guidance and advice, in so far as necessary for the operation of the franchise business, without additional charge for the franchisee.*
- (2) The franchisor must provide further assistance, in so far as reasonably requested by the franchisee, at a reasonable cost.*

Article 3:204: Supply

- (1) When the franchisee is obliged to purchase goods or services from the franchisor, or from a supplier designated by the franchisor, the franchisor must ensure that the goods or services ordered by the franchisee are supplied within a reasonable time, insofar as practicable and provided that the order is reasonable.*
- (2) Paragraph 1 also applies to cases where the franchisee, although not legally obliged to purchase from the franchisor or from a supplier designated by the franchisor, is in fact required to do so.*

(3)[The parties may not derogate from this provision.]

Article 3:205: Information during the Performance

The obligation to inform (Article 1:203) requires the franchisor in particular to provide the franchisee with information concerning:

- (a) market conditions,*
- (b) commercial results of the franchise network,*
- (c) characteristics of the goods and services,*
- (d) prices and terms for the sale of goods or services,*
- (e) any recommended prices and terms for the resale of goods or services,*
- (f) relevant communication between the franchisor and customers in the territory,*
- (g) advertising campaigns.*

Article 3:206: Warning of Decreased Supply Capacity

(1) When the franchisee is obliged to purchase goods or services from the franchisor, or from a supplier designated by the franchisor, the franchisor must warn the franchisee within a reasonable time when the franchisor foresees or ought to foresee, that the franchisor's supply capacity or the supply capacity of the designated suppliers will be significantly less than the franchisee had reason to expect.

(2) Paragraph 1 also applies to cases where the franchisee, although not legally obliged to purchase from the franchisor or from a supplier designated by the franchisor, is in fact required to do so.

(3) The parties may not derogate from this provision to the detriment of the franchisee.

Article 3:207: Reputation of Network and Advertising

(1) The franchisor must make reasonable efforts to promote and maintain the reputation of the franchise network.

(2) In particular, the franchisor must design and co-ordinate the appropriate advertising campaigns aiming at the promotion of the franchise network.

(3) The activities of promotion and maintenance of the reputation of the franchise network are to be carried out without additional charge to the franchisee.

Section 3: Obligations of the Franchisee

Article 3:301: Fees, Royalties and Other Periodical Payments

(1) The franchisee must pay to the franchisor fees, royalties or other periodical payments agreed upon in the contract.

(2) If fees, royalties or any other periodical payments are to be determined unilaterally by the franchisor, Article 6:105 PECL applies.

Article 3:302: Information during the Performance

The obligation to inform (Article 1:203) requires the franchisee in particular to provide the franchisor with information concerning:

a) claims brought or threatened by third parties in relation to the franchisor's intellectual property rights.

b) infringements by third parties of the franchisor's intellectual property rights.

[c) claims brought or threatened by third parties in relation to matters of general interest to the network.]

Article 3:303: Business Method and Instructions

(1) The franchisee must make reasonable efforts to operate the franchise business according to the business method of the franchisor.

(2) The franchisee must follow the franchisor's reasonable instructions in relation with the business method and the maintenance of the reputation of the network.

(3) The franchisee must take reasonable care not to harm the franchise network.

(4) The parties may not derogate from this provision

Article 3:304: Inspection

(1) The franchisee must grant the franchisor reasonable access to the franchisee's premises to enable the franchisor to check that the franchisee is complying with the franchisor's business method and instructions.

(2) The franchisee must grant the franchisor reasonable access to the accounting books of the franchisee.

CHAPTER 4: DISTRIBUTION

Section 1: General

Article 4:101: Scope and Definitions

(1) This Chapter applies to exclusive, selective distribution contracts and exclusive purchasing contracts.

(2) A distribution contract is a contract whereby one party (the supplier) agrees to supply the other party (the distributor) with goods or services on a continuing basis and the distributor agrees to purchase them and to sell them in the distributor's name and on the distributor's behalf (distribution contract).

(2) An exclusive distribution contract is a distribution contract whereby the supplier agrees to supply goods or services to only one distributor within a certain territory or to a certain group of customers.

(4) A selective distribution contract is a distribution contract whereby the supplier agrees to supply goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria.

(5) An exclusive purchasing contract is a distribution contract whereby the distributor agrees to purchase goods or services only from the supplier or from a party designated by the supplier.

Section 2: Obligations of the Supplier

Article 4:201: Obligation to Supply

The supplier must supply the goods or services ordered by the distributor, insofar as it is practicable and provided that the order is reasonable.

Article 4:202: Information During the Performance

The obligation to inform (Article 1:203) requires the supplier to provide the distributor with information concerning:

- (a) characteristics of the goods or services,*
- (b) prices and terms for the sale of goods or services,*
- (c) any recommended prices and terms for the resale of goods or services,*
- (d) relevant communication between the supplier and the customers,*
- (e) advertising campaigns relevant to the operation of the contract.*

Article 4:203: Warning of Decreased Supply Capacity

(1) The supplier must warn the distributor within a reasonable time when the supplier foresees or ought to foresee that the supplier's supply capacity will be significantly less than the distributor had reason to expect.

(2) In exclusive purchasing contracts, parties may not derogate from this provision.

Article 4:204: Advertising Materials

The supplier must provide the distributor at a reasonable price with all the advertising materials the supplier has which are needed for the proper distribution and promotion of goods or services.

[Article 4:205: The Reputation of Goods or Services

The supplier must make reasonable efforts not to seriously damage, by act or omission, the reputation of the goods or services.]

Section 3: Obligations of the Distributor

Article 4:301: Obligation to Distribute

In exclusive and selective distribution contracts, insofar as it is practicable, the distributor must make reasonable efforts to promote the sales of the goods or services.

Article 4:302: Information During the Performance

In exclusive and selective distribution contracts, the obligation to inform (Article 1:203) requires the distributor to provide the supplier with information concerning:

- (a) claims brought or threatened by third parties in relation to the supplier's intellectual property rights,*
- (b) infringements by third parties of the supplier's intellectual property rights.*

Article 4:303: Warning

In exclusive and selective distribution contracts, the distributor must warn the supplier within a reasonable time when the distributor foresees or ought to foresee that the distributor's requirement will be significantly less than the supplier had reason to expect.

Article 4:304: Instructions

In exclusive and selective distribution contracts, the distributor must follow reasonable instructions from the supplier which are designed to secure the proper distribution of goods or services or to maintain the reputation or the distinctiveness of the goods or services.

Article 4:305: Inspection

In exclusive and selective distribution contracts, the distributor must provide the supplier with reasonable access to the distributor's premises to enable the supplier to inspect the distributor's compliance with the standards agreed upon in the contract and with reasonable instructions given.

[Article 4:306: The Reputation of Goods or Services

The distributor must make reasonable efforts not to seriously damage, by act or omission, the reputation of the goods or services.]