



Distribution and Agent contracts in Spain and Spanish Supreme Court Sentence from October 15th, 2008

Distribution or agent contract?

It is a frequent case that foreign investors are interested in introducing their products on the Spanish market, and come to face the problem, whether to choose collaboration with a local agent or distributor with regional knowledge or whether to set up a branch under control of their own management.

Without going into further details about commercial and general business strategies (concession of rights to use products and rights to business name and image, customer policies, high tech standards, re-sales etc.), we would like to give you some general guideline as to the legal consequences between the two choices; contract for distribution or contract with an agent.

Jurisprudence about applicable law

The first experience a foreign investor will probably have in Spain is that Spanish legal advisers are not going to refer to any specific body of laws that explicitly regulates the contract for distribution (although this is the case regarding the agent contract).

There is no explicit, coordinating and systematic law in Spain, regulating what we would call collaboration contracts (distribution, commission...) very much contrary to legal traditions in European countries that follow *Continental European law*.

In Spain close attention should be paid to Jurisprudence in the first place and the vanishing differences between the distribution contract and the agent contract, defined in sentences.

The difference between these two types of contracts does matter, as we need to analyze what kind of contract we are dealing with (supply, agent, distribution, commission contract etc.) in order to know about the economic consequences, arising from the contract and other legal effects.

In the absence of a written Spanish law with explicit, precise and covering distribution contracts regulations (there is an insistent use and abuse of analogies referring to the agent contract), we feel it is necessary to draw up the main differences, at least as far as the contract resolution is concerned (compensation to customers).

Sentence from the Spanish Supreme Court, October 15th 2008

For this purpose a recent sentence from the Spanish Supreme Court, October 15th, 2008 needs to be analyzed. This sentence deals with compensation in case of contract resolution and offers protection to the distributor who can prove the existence of a principal-agent relationship and acquired customers by his own means.

The case we study makes special reference to contracts with vague definitions, verbal contracts or contracts that are not clear as far as established rights and obligations are concerned.

It is not unusual in praxis that the conditions for this kind of relationships are based on a mere verbal consent or on mere product lists, where the marketing and the sales of the products should take place for prices estimated approximately.

In some business fields this praxis is widely spread standard procedure and the problem in lawsuits is how to prove that a verbal contract ever existed, that changes and alterations have taken place all along the way during the period of the so called "contract". And in the end the rights and obligations arisen from the contract are completely diffuse.

How can we classify an activity as purely "commercial" and on behalf of the "producer or principal"?

The sentence establishes a principle that might surprise a foreign investor, offering a kind of protection to the "Spanish" distributor that we may consider excessive out of our view point, as in Spain the distributor is considered the weaker party to the contract.

According to the principle established, whenever the contract does not hold any stipulations or explicit agreements, the Court will adopt protective rules taken from the Spanish Agent Law, "Ley de Agencias" (an analogy used almost automatically).

The Court does not apply this principle of protection with immediate and automatic effects, but if the contract is not clear enough, the principle applies with effects that are close to immediate and automatic. When analyzing an Agricultural Company's Distribution Contract the Sentence holds that the Principle of Protection is not used by direct and automatic analogy according to article 28 in the Spanish Agent Law, but evidence of four things needs to be provided:

- a) An existing relationship to the manufacturer (similar to the agent contract).
- b) Customers have been acquired for the manufacturer.

- c) The customers have been customers of the manufacturer.
- d) Branch praxis in the region where the activities are carried out.

As we can see these four circumstances and required evidence are subject to subjective interpretation and differ a lot depending on what fields of activities we are talking about.

Clarifying aspects and recommendations

So we should make a point of clarifying some basic aspects for the possible future case of compensation claims from customers.

Depending on the existing contract / relationship a customer list should be drawn up covering the customers that are passed on to the manufacturer instead of just a list with the customers that belong to the manufacturer.

Besides, the function to be carried out within a certain field, established by the existing relationship / contract should be made clear (for example; passing on clients to an agent, who are potential tractor buyers is different from passing on clients to him buying machinery, payable in short term instalments).

Out of our view point it is rather necessary to avoid legal insecurity for both parties; manufacturer and distributor / agent. By taking the following measures we recommend below you can avoid being surprised by future customer compensations claims:

- a) Adjust the contract that is to be signed to the circumstances within the actual field where the activities are taking place. There is no general rule for how to benefit from clients that goes for all the fields. Within different working fields the way how to obtain benefits from your clients can differ a lot.
- b) Establish in a clear and obvious way (as clear as you can) how you want the contract to be carried out. Unless you do this, the judge is going to use analogy, referring to the Spanish Agent Law. Establish systems for resale, percentage, functions, and reports etc. enabling the judge to understand which kind of relationship existed between the parties.
- c) In the first place, establish conditions that make a difference between the agent and the distributor (freely set prices, organisation, resale, exclusivity, information to customers...). As you can see according to Jurisprudence (above), the main difference between the agent and



the distributor is (or used to be) the matter of resale; that is to say whether or not the merchandise or product was bought by the distributor and then re-sold to the end customer in the region.

- d) Define the termination of contract. That is to say be very clear and specific about the reasons for contract termination and whether the possibility does or does not exist to pass on clients based on the parties' obligations during the period the contract is being carried out (as are for example targets and percentage of profit).

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Zafo Law will take no responsibility of any dispositions based on this article. We always recommend having legal advice before entering into any given contract or other disposition regarding the subject described in this article.

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