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Q&A on Distribution Agreements

Part I: Legislative framework

Q1. Please specify the legislative framework generally applicable to the conclusion and execution of distribution agreements (a)? Please include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and, if available, to the English translation of the legislative framework (c).

a. Legislative framework:

It should be noted at the outset that, with the exception of brokers and commercial agents, there is no specific legislation for distribution agreements. Thus, the general provisions of civil law and competition law as well as (partly by way of analogy) individual provisions from special acts apply to distribution agreements. The following statutes constitute the primary legal framework of distribution law:

- Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)
- Austrian Commercial Code (*Unternehmensgesetzbuch*)
- Austrian Cartel Act (*Kartellgesetz*)
- Austrian Act on Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*)
- Austrian Fair Competition Act (F*aire-Wettbewerbsbedingungen-Gesetz*)
- Austrian Commercial Agents Act (*Handelsvertretergesetz*)
- Austrian Brokers Act (*Maklergesetz*)
- Motor Vehicle Sector Protection Act (*Kraftfahrzeugsektor-Schutzgesetz*)

b. Link(s) to official publication:

- Austrian General Civil Code is accessible via this link
- Austrian Commercial Code is accessible via this link
- Austrian Cartel Act is accessible via this link
- Austrian Act on Unfair Competition is accessible via this link
- Austrian Fair Competition Act is accessible via this link
- Austrian Commercial Agents Act is accessible via this link
- Austrian Brokers Act is accessible via this link

- Motor Vehicle Sector Protection Act is accessible via this link

c. Link(s) to English translation:

Only selected statutes are provided with an official English translation:

- Austrian Commercial Agents Act is accessible via this link
- Austrian Act on Unfair Competition is accessible via this link

Q2. Other than for agency agreements pursuant to Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents, are there specific rules depending on the distribution format (e.g. franchising, exclusive distribution)?

No.

Q3. Other than general contract law and competition law, are there other rules which may generally restrict the parties when drafting and concluding distribution agreements (e.g., rules in relation to unfair contract terms in B2B contracts, specific requirements in the context of a prohibition of abuse of economic dependence)?

Yes.

If yes, which general rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and to the English translation of the regulatory framework (c).

a. General rules

1. Contractual provisions infringing good morals in a B2B-environment (Art. 879 Austrian General Civil Code)

Imposing contractual provisions that are contradicting general good morals is considered unlawful in Austrian law. Thus, such terms are by law considered null and void and remain without any legal effect (see, Art. 879 para 1 Austrian General Civil Code).

Austrian law develops this legal principle further and takes into account the typical imbalance that arises when one party submits to the General Terms and Conditions (GTC) of the other. For such situations, Austrian law provides for a strict balancing test and prohibits GTC that grossly disadvantage the other party; such provisions are otherwise null and void by law and remain without any legal effect as well (see Art. 879 para 3 Austrian General Civil Code).

Both these provisions aim at nullifying contractual obligations clearly overstepping the boundaries of the Austrian legal system and, in that capacity, serve as "catch-all"-provisions supplementing more specific prohibitions that can be found in e.g. cartel law.

2. Unfair B2B market practices (Austrian Act on Unfair Competition)

The Austrian Act on Unfair Competition prohibits business practices that (i) are capable to negatively affect

competition to a sufficiently significant degree, or that (ii) are against requirements of professional diligence and – with regard to the specific product – are capable of misleading the average consumer (see Art. 1 para 1 Austrian Act on Unfair Competition).

This general prohibition is supplemented by more specific prohibitions of misleading (Art. 2 Austrian Act on Unfair Competition) and aggressive business practices (see Art. 1a Austrian Act on Unfair Competition).

A misleading business practice is a practice involving false information or information that, albeit factually correct, deceives or is likely to deceive another market participant and, as a consequence, leads this market participant to make a business decision that it would not have taken otherwise.

This includes possible deception with regard to the existence or nature of the product, the main characteristics of the product, the scope of the company's obligations, the price or the way in which the price is calculated, etc.

According to Art. 2 para 4 Austrian Act on Unfair Competition, a business practice is also misleading if essential information is omitted which the other market participant requires to take an informed decision, and which causes or may cause it to take a business decision that it would not otherwise have taken.

An aggressive market practice is a market practice which, in its factual context, taking account all of its characteristics and circumstances, by means of harassment, coercion, including the use of physical force, or inappropriate influence, significantly limits or may significantly limit a market participant's freedom of choice or conduct with regard to a product and thereby causes or may cause it to take a business decision that it would not have taken otherwise.

The Austrian Act on Unfair Competition contains a list of business practices qualifying as misleading or aggressive that are prohibited in any circumstances. This list includes e.g. the false statement of a company to be subject to a special code of conduct (misleading) and implying that the market participant may not leave the room without entering into a contract.

3. Abuse of economic dependence – relative market power (Art. 4a Austrian Cartel Act)

In contrast to EU competition law, the Austrian Cartel Act contains a special provision for determining the existence of a dominant position in vertical relationships. Pursuant to Art. 4a Austrian Cartel Act, an undertaking shall also be deemed dominant if it has a paramount market position in relation to its customers or suppliers (so-called "relative market power"). According to the aforementioned provision, such position exists in particular if customers or suppliers are dependent on maintaining their business relationship with their contractual partner in order to avoid serious economic disadvantages. According to case law, such dependence exists when a termination of the contractual relationship would lead to a massive loss of sales or the loss of a significant portion of the customer base. This concept of dominance therefore merely focuses on the vertical relationship between the supplier and the customer and not on their respective market position vis-à-vis competitors at a horizontal

level.

If a distributor only or mainly sells and provides products from one supplier, one will thus have to assume a corresponding dependence of the distributor. This opens the wide array of measures of the Austrian Cartel Act aiming at the prevention of abuse of market power even to companies which have only modest market shares compared to competitors when looking at a horizontal level.

According to the Austrian Supreme Court, conditions imposed by the dominant undertaking are abusive (Art 102 (2) (a) TFEU and sec 5 (1) (1) KartG) if they are clearly unfair or clearly disproportionate to the costs of providing the service. The court must weigh the interests of the parties under the principle of proportionality.

4. Breach of commercial good conduct (Austrian Fair Competition Act)

The Austrian Fair Competition Act prohibits certain types of misconduct and as such has some similarities with the prohibition of abuse of market power under cartel law. What is unique about the Austrian Fair Competition Act is that it does not require any sort of market power to be applicable.

Its scope of application is much broader, as all types of commercial conduct capable of endangering fair competition can, in principle, be prohibited. The law provides some illustrative examples of such conduct, in particular the offering or demanding, granting or accepting of money or other benefits, including discounts, special conditions, special equipment, obligations to take back goods or the assumption of liability, between suppliers and distributors which are not objectively justified, especially if additional benefits are not matched by corresponding counter-performance (see, Art. 1 Austrian Fair Competition Act).

Further, the Austrian Fair Competition Act imposes an equal treatment obligation on all suppliers vis-à-vis authorised distributors and vice versa, unless factual circumstances justify a different treatment (see, Art. 2 Austrian Fair Competition Act).

The Austrian Fair Competition Act also considers the situation of local supply. In particular, companies providing their goods and services to final (re)sellers (who in turn offer them to final consumers) may be obliged by law to conclude contracts with the final (re)sellers (on reasonable terms), if otherwise (i) local supply or (ii) the competitiveness of the final (re)sellers is endangered (see, Art. 4 Austrian Fair Competition Act). Since this is a major interference in the principle of a free market economy, this measure only serves as ultima ratio.

b. Link(s) to official publication:

- Austrian General Civil Code is accessible via this link
- Austrian Cartel Act is accessible via this link
- Austrian Act on Unfair Competition is accessible via this link
- Austrian Fair Competition Act is accessible via this link

c. Link(s) to English translation:

The Austrian Act on Unfair Competition is accessible via this link.

Part 2: Pre-contractual phase

Q4. Are there mandatory provisions in relation to the disclosure of pre-contractual information prior to concluding and/or executing distribution agreements?

Yes.

If yes, which mandatory provisions apply (a) and which information must be disclosed (b)? Where available, please also include a link to the official publication of the applicable rules (c) and, if available, to the English translation of the regulatory framework (d).

a. Mandatory provisions:

The following general legal principles of Austrian law are derived from numerous statutory provisions of the Austrian General Civil Code and cannot be precisely attributed to specific provisions.

b. Information to be disclosed:

Art. 874, 878 and 1293 et seq Austrian General Civil Code set out the general principles of extra-contractual liability and duty of care. Case law confirms that damage claims resulting from a violation in the conclusion of an agreement are based on the extra-contractual legal regime.

Moreover, all agreements must be executed in good faith according to Austrian Law. This principle also applies to the pre-contractual phase and requires each party to inform the other party of the elements that should allow the future partner to make an assessment that is as objectively as possible, of the commercial risk that the commercial cooperation entails. Austrian case law shows that such duty to inform exists e.g. with regard to

- imminent maturity for insolvency leading to the frustration of the purpose of the contract;
- the own identity;
- industry-known susceptibility of an engine to malfunction;
- the intended placement of a competing product; and
- the nature of the subjects of performance and obstacles to a valid conclusion of the contract.

Furthermore, there are non-statutory codes of conduct prescribing certain pre-contractual duties of care, such as the Code of Conduct for Franchising.

c. Link(s) to official publication:

The Austrian General Civil Code is accessible via this link.

d. Link(s) to English translation:

Not available.

Q5. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

No.

Q6. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

No.

Q7. Can a party be held liable if it terminates the pre-contractual negotiations?

Yes.

If yes, on what grounds (a); under what conditions (b); and what consequences are generally linked to such liability (c)?

a. Grounds for pre-contractual liability:

The Austrian General Civil Code is accessible via this link.

b. Conditions for pre-contractual liability:

Any party is in principle free to terminate pre-contractual negotiations, but it is required to negotiate in good faith. According to Austrian case law, terminating pre-contractual negotiations in itself is not unlawful, unless the party terminating the pre-contractual negotiations is acting in bad faith and terminates the negotiations wrongly (e.g. on the basis of deceptive behaviour, by means of very limited motivation or demonstrably untimely).

c. Consequences of pre-contractual liability:

The damaged party may be entitled to damages by the party that is held liable for the improper termination of the pre-contractual negotiations.

Austrian case law quantifies such damages as the costs incurred, damages for the loss of the opportunity to negotiate agreements with other parties or reputational damage, if the termination goes against the principles of reasonableness and fairness. This means that the party that is held liable must restore the other party's financial situation as if no negotiations have taken place.

Other case law quantifies such damages as the loss of revenue, if the damaged party had legitimate expectations that an agreement would be concluded. In such case the party that is held liable must restore the other party's financial situation as if the pre-contractual obligations had been respected and an agreement had been concluded.

The court shall assess each case on a case-by-case basis, taking into account the obligation to negotiate in good faith and the freedom of each party to terminate pre-contractual negotiations on the basis of justified reasons.

Q8. Are there other relevant rules and/or restrictions that apply during pre-contractual negotiations between supplier and distributor?

No.

Part 3: Contractual phase

A. Form of distribution agreements

Q9. Must a distribution agreement be executed in writing to be valid and enforceable?

No, never.

Q10. Are there any (other) requirements as to the form of the distribution agreement for it to be valid and enforceable?

No.

B. Content of distribution agreements

Q11. Other than restrictions imposed by EU competition law (including Regulation (EU) 330/2010), do specific rules and/or restrictions apply in distribution agreements with respect to

- the territory in which or the customers to whom the goods/services will be sold;
- an exclusivity granted to the distributor;
- (exclusive) sourcing/purchasing obligations;
- resale prices;
- non-compete clauses?

No.

Q12. Do specific rules and/or restrutions apply in distribution agreements with respect to

- obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor;
- obligations of the distributor vis-à-vis the supplier or vice versa;
- a non-solicitation clause during and/or after the term of the distribution agreement;
- minimum sales quota imposed on the distributor;

- specific sector rules?

Yes, specific rules with respect to obligations of the distributor vis-à-vis the supplier or vice versa and specific sector rules apply.

If yes, what do these specific rules and/or restrictions entail?

For specific obligations of the distributor see our remarks above in Q3 regarding the Austrian Fair Competition Act.

The Motor Vehicle Sector Protection Act contains sector-specific provisions for distribution agreements for the purchase or sale of new passenger cars and light commercial vehicles and spare parts for such motor vehicles and for repair or maintenance services for motor vehicles. These provisions concern in particular (i) special obligations in connection with the termination of the agreement (special notice periods; repurchase-obligation), (ii) requirements for guarantee and warranty compensation, (iii) access to technical information and (iv) rules for the out-of-court settlement of disputes.

C. Term and termination

1. Term

Q13. Is an oral or written distribution agreement that does not specify the term always considered to be an agreement of indefinite duration?

Yes.

Q14. Does a distribution agreement of definite duration that is continued after its expiry turn into a distribution agreement of indefinite duration?

Yes.

If yes, what is meant by ‘continuation’ (a) and what should a party do to avoid this (b)?

a. What is meant by ‘continuation’?

According to Art. 863 of the Austrian Civil Code, contracting parties may also make implied declarations. According to case law, however, a strict standard must be applied. The performance of main obligations of the contract after the expiry of time by one party and the acceptance due to lack of protest by the other party is to be qualified as an implied extension of the fixed term contract. Usually, an indefinite contract will be assumed in these cases. In certain forms of distribution contracts, the extension is considered as unlimited by law (e.g. Art 20 Commercial Agents Act).

b. What should a party do to avoid this?

If a party continues to provide its obligations under the contract after the expiry of the term, the other party must

oppose/protest. Of course, their own provision of contractual obligations must also be ceased.

2. Termination

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of definite duration

Q15. Can a distribution agreement of definite duration be terminated for convenience?

Yes.

If yes, is an express provision allowing for termination for convenience necessary?

Yes.

Q16. Must a reasonable notice period be observed in order for the termination to be valid even if the distribution agreement provides for the immediate termination for convenience?

Only in certain instances.

If only in certain instances, please explain when a reasonable notice period is in any case required?

Under general contract law, immediate termination is permitted, and this also applies to distribution agreements. However, it would have to be examined in each individual case whether immediate termination would grossly disadvantage the other party (Art. 879 para 3 Austrian General Civil Code). Thus, immediate termination for convenience will actually be permissible in very few constellations. For a reasonable notice period see Q18 below.

Q17. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

The terminated party may choose between damages or fulfilment. In the case of fulfilment, the termination in violation of the term is reinterpreted as a termination in compliance with the term.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

Art. 349 of the Austrian Commercial Code expressly provides for loss of profit as compensation. In addition, contractual penalties may also be agreed. If the damage is higher than the contractual penalty, the difference may be claimed additionally.

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of indefinite duration

Q18. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement

does not provide for termination for convenience?

Yes.

If yes, must a reasonable notice period be observed?

Yes.

If a reasonable notice period must be observed, how is this reasonable notice period calculated (e.g. 1 month per year) (a)? Should a minimum notice period be observed (b), is there a maximum notice period (c)?

a. How is this reasonable notice period calculated (e.g. 1 month per year)?

Art. 21 Commercial Agents Act provides for a mandatory notice period for termination in agreements of indefinite duration (one month per contract year up to a total of six months). These notice periods can be used as a reference when assessing comparable distribution agreements. Depending on individual contract conditions, it may be necessary to extend the period beyond these periods (especially if the dealer has to make significant investments at the beginning of the contract period). In case law, a benchmark of one year has also sometimes been stated. The greater the contractual imbalance, the more likely it is that a longer period will be necessary. Another important factor in the assessment of notice periods is the duration of the contract.

For motor vehicles, long notice periods apply (one or two years, depending on the reason for the termination, see Art. 3 Motor Vehicle Sector Protection Act).

b. Should a minimum notice period be observed? If yes, how long is this minimum notice period and are the parties allowed to contractually deviate from this minimum notice period

Specific rules apply to certain types of distribution agreements. These mandatory rules are included in the Austrian Commercial Agents Act. The Austrian Supreme Court generally applies Austrian Commercial Agents Act not only to agents in the strict sense, but – by way of analogy – also to distributors who are integrated in the principal's distribution system like an agent. When assessing the level of integration, all facts must be taken into account in an overall assessment. Distribution agreements covered by this regime can only be terminated at the end of the month (unless agreed otherwise) and are subject to a statutory notice period of one month (in the first contract year) up to six months (after six contract years). Contracting parties can only deviate from these notice periods when agreeing on longer notice periods. However, the principal must not be subject to a notice period shorter than the agent's or the authorised distributor's (see, Art. 21 Austrian Commercial Agents Act).

For the motor vehicle sector, a two-year period is prescribed, unless the bound contractor is granted territorial protection. It reduces to one year if the binding contractor significantly restructures the distribution network (Art. 3 Motor Vehicle Sector Protection Act).

c. Is there a maximum notice period? If yes, how long is this maximum notice period and are the parties allowed

to contractually deviate from this maximum notice period?

There is no maximum notice period. Ultimately, excessively long notice periods must not result in the contractual partner being unreasonably bound. This requires an assessment in each individual case

Q19. Is a contractual notice period always legally valid and enforceable?

No.

If not, which rules of mandatory law can have an impact on this?

Any provision of a contract may be void if it is unlawful or unfair. For unlawfulness, see the statutory minimum periods presented in Q18.

An unfair agreement may also be void in individual cases. This can be the case if a stronger contractual partner leverages its position excessively. An example would be a purely one-sided agreement in favour of the stronger party. When drawing up contracts, attention must be paid to the individual fairness, but generally only the statutory periods apply.

Q20. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

See, Q17.a.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

See, Q17.a.

Q21. Must the terminating party comply with certain formalities?

Only in certain instances.

If yes or only in certain instances, when is a written notice required (a), must the notice contain a motivation in order for the termination to valid (b) and what are the consequences if any of the formalities are not observed (c)?

a. Is a written notice required? If yes, is a registered letter (or similar) required?

In the motor vehicle sector, Art. 3 of the Motor Vehicle Sector Protection Act requires written notice of termination.

b. Must the notice contain a motivation in order for the termination to valid?

Generally, no. However, in the event of extraordinary termination, it is recommended to state the reasons. Further, in the motor vehicle sector, the periods can vary due to the motivation for termination, which is why a statement of reasons may still be necessary in certain cases.

c. What are the consequences if any of the formalities are not observed?

The notice of termination was not validly declared, therefore the notice period does not start to run. The contract remains in force until the valid notice is issued, and the cancellation of the contractual obligations leads to a claim for damages or a claim for fulfilment of the contract.

Q22. Can the parties stipulate the formalities in the distribution agreement?

Yes.

If yes, what are the consequences if those formalities are not observed?

The desired act can be set only if the formal requirements are met. For example, termination in breach of the formal requirements would not trigger the notice period. A violation can lead to compensation for damages.

Q23. Is the terminated party entitled to damages or another type of compensation even if the correct notice period has been observed?

Only in certain instances.

If yes, does this concern goodwill compensation or another type of compensation? Do the legal consequences vary depending on the type of agreement (definite/indefinite duration; exclusive/non-exclusive; franchise etc.)?

Austrian law recognizes several compensation claims:

Most prominently, the Austrian Commercial Agents Act provides for a special compensation payment (so-called "Ausgleichsanspruch"; cf. Art. 24 Austrian Commercial Agents Act). A distributor could – provided that it notifies the principal accordingly within one year after termination of the agreement – be entitled to a compensation fee under the following conditions, if met cumulatively:

i. the distributor has acquired new customers or significantly expanded the existing business relationships of the principal;
ii. it is to be expected that the principal will gain substantial benefits from such business relationships even after termination of the cooperation with the distributor; and
iii. such compensation fee is equitable considering all the facts of the case at hand, especially the loss of profit suffered by the distributor.

In any way, the distributor will not be entitled to any payment if

i. the distributor has terminated or prematurely dissolved the agreement, unless the principal has given the distributor reasons for doing so; or
ii. the principal has terminated or prematurely dissolved the agreement due to an important reason, based on fault in the behaviour of the distributor; or
iii. the distributor, with the agreement of the principal, assigns his rights and duties under the agreement to

another person.

The maximum financial exposure is the average annual net profit (= "fictive trade margin") of the distributor in the last five years. Within this cap, a calculation method has been developed by case law taking into account reductions in particular for atypical activities, non-regular customers, estimated pulling effect of the principal's brand and estimated customer churn rate after termination.

Further, the distributor may be entitled to the reimbursement of costs pursuant to Art. 454 Austrian Commercial Code. Provided that, within one year after termination of the agreement, the distributor notifies the principal accordingly, the distributor could be entitled to the reimbursement of costs, if (i) the distributor was obliged in its contractual relationship to make investments due to its membership in the distribution network, and (ii) these investments have not been amortised as of termination or cannot be used for other purposes afterwards. The exceptions provided by Art. 454 Austrian Commercial Code generally correspond to the exceptions provided in Art. 24 Austrian Commercial Agents Act.

In addition, there are sector-specific provisions governing the termination of distribution agreements in the motor vehicle industry that provide for notice periods of up to two years in specific cases (see Art. 3 Motor Vehicle Sector Protection Act).

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q24. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

Under Austrian law, extraordinary termination is always possible and generally cannot be waived. Various occurrences that make it unreasonable to continue the contract can serve as grounds.

The non-exhaustive list of Art. 22 of the Commercial Agents Act can be used as a reference list for other distribution agreements too:

- Incapacity of the contracting party to continue the fulfilment of the contract (factual or legal hurdles).
- Substantially violated trust (particularly, fraudulent or fraud-like acts)
- breach of essential contractual obligations
- assault or defamation against the contractual partner

- insolvency

The grounds, even if broadly defined, must be strictly evaluated and must usually be exercised substantially and persistently.

b. Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement?

No.

Q25. Will an (extrajudicial) termination continue to have effect if the court rules that the agreement was wrongfully terminated on account of serious breach and/or exceptional circumstances?

Only in certain instances.

If not or only in certain instances, what are the consequences of the termination not being upheld?

An extrajudicial termination without good cause does not automatically terminate the distribution agreement with immediate effect. The terminated party has the right to choose between the further performance of the contract or the validity of the termination and compensation for the damage caused to him (for commercial agents see Art. 23 Commercial Agents Act). If there is a lack of good cause and the party terminated insists on performance, the invalid extrajudicial termination can be reinterpreted as an ordinary termination at the next possible date.

Q26. Does the terminated party have a right to compensation if it appears that the agreement was wrongfully terminated or dissolved on account of serious breach and/or exceptional circumstances?

Yes.

If yes, is this right based on statute or case law (a) and how is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill) (b)?

a. Is this right based on statute or case law and what this right entail?

If the own contractual obligations are suspended due to the invalid termination, which will usually be the case, the contract has been breached by the terminating party. Damages incurred due to this (temporary) suspension of contractual obligations must be compensated. Further, it is possible that contractual penalties have to be paid. The unlawful discontinuation of one's own contractual obligations may constitute grounds for extraordinary termination of the contract by the other party.

b. How is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill)?

In terms of amount, the "termination compensation" refers to the contractual claims to remuneration for the period that should have elapsed before the distribution agreement was duly terminated by the party liable to pay compensation. The basis of calculation shall be the loss of earnings which, according to the normal course of events, is to be expected until the next termination date to be observed by the entrepreneur (or until the expiry of

an agreed fixed term). Foreseeable developments in the fictional notice period are to be taken into account when calculating the claim for damages. On the other hand, the person entitled to compensation must, within the scope of his duty to mitigate damages, take into account everything that he has saved as a result of the omission of his service or has acquired or deliberately failed to acquire by using it elsewhere. The amount of the damage must in any case be asserted and proven by the person entitled to compensation. Alternatively a contractual penalty may be agreed.

Q27. If a party believes that the distribution agreement has been wrongfully terminated or dissolved, can it apply to the judge in interim relief proceedings to have the effects of the termination suspended?

No.

Part. 4: Post-contractual phase

Q28. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

Yes.

Q29. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

Yes.

If yes, which obligations apply?

See, Q23 to the compensation payment according to Art. 24 Austrian Commercial Agents Act as well as the reimbursement of costs pursuant to Art. 454 Austrian Commercial Code.

According to the case law of the Austrian Supreme Court, an obligation to repurchase the stock/parts may arise for the supplier from the contractual duty of loyalty, in particular if the distributor is contractually obliged to maintain an adequate stock until the end of the contract and the distributor is not at fault for the termination of the contract (cf. Austrian Supreme Court 6 Ob 254/06f – Nissan).

Moreover, there are special repurchase-obligations in the motor vehicle sector (see, Art. 3 Motor Vehicle Sector Protection Act). In case of termination of the agreement, the distributor is entitled to sell back to the supplier, products purchased under the agreement. According to the wording of Art. 3 Motor Vehicle Sector Protection Act, it makes no difference whether the distributor or supplier terminates the agreement, or whether it is an ordinary or extraordinary termination. The distributor loses his right to sell the products back to the supplier if he has not notified the supplier of its claims before the end of the term of the agreement or, in case of extraordinary termination, within four weeks after the receipt of termination.

Part 5: Dispute resolution

Q30. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

Yes.

If yes, what do these specific rules and/or restrictions entail?

In case of the motor vehicle sector, legal disputes pertaining to distribution agreements must be clarified before a conciliation board before bringing them before a court (see, Art. 7 Motor Vehicle Sector Protection Act).

Q31. Can the parties opt for arbitration?

Yes.

If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

No.

Q32. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

All contractual claims related to the performance of a distribution agreement are limited to three years from the date of occurrence (see Art. 1486 Austrian General Civil Code; Art. 18 Austrian Commercial Agents Act).

Contractual tort claims for breach of a distribution agreement are limited to three years after gaining knowledge of the damage and the damaging party or, if no such knowledge is obtained, to 30 years (Art. 1489 of the Austrian General Civil Code).