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1. COMMERCIAL AGENCY

Commercial agency and distribution agreements are in the forefront of agreements concluded between multi-nationals and their local subsidiaries throughout the EU territory since they both constitute a vehicle for expanding principals' commercial activities and thus maximizing their profits in multiple and not familiar to them, markets. The legal consequences deriving therefrom vary depending on the choice of the specific agreement, ie. agency or distribution agreement, given that each one mainly entails different rights and obligations for the principal but also for the agent. However, what is fundamental in these contractual forms, becoming one of its *essentialia negotii*, is the element of trust that hopefully should characterize the early negotiation process as well as their performance and discharge¹.

1.1 Definition of Various Types of Commercial Agency and Criteria to Distinguish

1.1.1 Independent Commercial Agents

Council Directive No 86/653 of 18 December 1986 "on the coordination of the legislation of Member States relating to self-employed (independent professionals) commercial agents"² provided that Member States should harmonize their laws with the provisions of the Directive in question within the time-limits determined by article 22. However, it took 17 months for Greece to enact its legislation to this effect that includes Presidential Decree No 219/1991⁴, as subsequently amended by Presidential Decrees No 264/1991, 249/1993, 88/1994 and 312/1995.

Greek courts tended to apply the provisions of the Greek Civil Code⁵ regarding the contract for the lease of work and supplementary the provisions concerning mandate⁶ through articles 90, 91 of the Greek Commercial Law and article 3 of the Introductory Law of the G.C.C., prior to the entry into force of the Presidential

¹ About the general obligations of "disclosure" and "protection" in the framework of good faith during negotiations see Ap. Georgiadis, *General Principles of Civil Law*, 1997, p. 376ff; M. Karasis in Ap. Georgiadis - M. Stathopoulos - *Interpretation of the Civil Code*, Volume I, 1978, p. 318ff; S. A. Alexakis, *Responsibility arising from negotiations according to the G.C.C. (articles 197-198) under the perspective of principled negotiation*. 2005, (<http://www.alba.edu.gr/academic/law/articles/>). See also article 288 of the G.C.C. (*ius cogens*).

² Hereinafter "the Council Directive".

³ The reasons, for which the rules of Council Directive were adopted, were connected to the fact that the differences in national laws concerning commercial representation substantially affected the conditions of competition and the carrying on of that activity within the Community and were detrimental both to the protection available to commercial agents as well as their principals and to the security of commercial transactions. Moreover, those differences were such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agents were established in different Member States. As it was underlined in the introductory notes of the Council Directive, trade in goods between Member States should be carried on under conditions which are similar to those of a single market and this necessitates approximation of the legal systems of the Member States to the extent required for the proper functioning of the common market; in this regard the rules concerning conflict of laws did not, in the matter of commercial representation, remove the inconsistencies referred above, nor would they even if they were made uniform and accordingly the proposed harmonization was necessary notwithstanding the existence of those rules.

⁴ Hereinafter "the Presidential Decree".

⁵ Hereinafter "G.C.C".

⁶ See articles 68Iff and 713ff of the G.C.C. Also, see Decision No 812/1991 of the Supreme Court. Avt|, 32, p. 1490ff; Decision No 824/1977 of the Supreme Court. NoB 26, p. 672ff.

Decree, also characterizing the agency agreement as a contract for the lease of independent services⁷. The confusion was partially settled by article 1, para. 2 of the Presidential Decree which reproduces article 1, para. 2 of the Directive and defines the commercial agent as the self-employed (independent) intermediary who has continuing authority to negotiate on a permanent basis the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal. In other words, the commercial agent is entrusted to act as a broker when negotiating on behalf of principal the sale or the purchase of goods or as an agent in his capacity to negotiate and conclude such contracts on behalf of and in the name of the principal⁸.

The Council Directive as well as the Presidential Decree did not provide for "commission agent" ("Kommissionsagent"), according to which, a commercial agent can negotiate and enter such agreements on behalf of principal but in his own name. An additional gap in the Presidential Decree is noticed when the commercial agent provides services instead of selling or buying goods⁹. However, it is argued¹⁰ that

⁷ See Decision No 159/1990 of the Multi-member Court of First Instance of Thessaloniki, Apu., 1990, p. 123ff; Decision No 2820/1990 of the Court of Appeal of Thessaloniki, Apu., 1991, p. 121 Off; Decision No 70/1977 of the Supreme Court, EEuTtA, 1987, p. 553ff; Decision No 1072/1972 of the Supreme Court, EEuTtA, 1973, p. 338ff; Decision No 887/1974 of the Supreme Court, EEpiA, 393ff; Decision No 3857/1983 of the Court of Appeal of Athens, EEurcA, 1984, p. 584ff.

⁸ About the concepts of brokerage, agency and commercial agency as lasting commercial collaboration see E. E. Perakis, General Part of Commercial Law, 1999, p. 397ff; Th. Liakopoulos, General Commercial Law, Vol. I, 1998, p. 77-89 and 177ff; Th. Liakopoulos, Issues of Commercial Law, Vol. II, 1997, p. 75ff (Agency), p. 94ff (Commercial agency); I. K. Rokas, Commercial Law-General Part, 2003, p. 273ff (Agency) and p. 235ff (Commercial agency); K. Pampoukis, Commercial Agency Operating as Order-Differentiation Between Order and Brokerage. Apu., 1986, p. 213ff; Th. Liakopoulos, Agency Agreement, EEptA, 1990, p. 561ff; Androutopoulos, Commercial Agency Agreement, EjitncEA, 2003, p. 376-400. With regard to Commercial Agency see Decision No 1912/2004 of the Court of Appeal of Athens, AEE, 2004, p. 930ff; Decision No 76/2004 of the Court of Appeal of Larisa, ETrwncEujrA, 2004, p. 458ff; Decision No 2193/2004 of the Multi-member Court of First Instance of Athens, AEE, 2004, p. 1030ff; Decision No 509/2003 of the Supreme Court, "Nomos Database" (<http://lawdb.intrasoftnet.com/>); Decision No 685/2003 of the Supreme Court, Nomos Database; Decision No 269/2003 of the Court of Appeal of Athens, AEE, 2003, p. 552ff; Decision No 4503/2003 of the Court of Appeal of Athens, Avn, 2004, p. 194ff; Decision No 6352/2003 of the Court of Appeal of Athens, Avn, 2004, p. 192ff; Decision No 7371/2003 of the Court of Appeal of Athens, ETrtCTKEujrA, 2004, p. 438ff; Decision No 1401/2003 of the Court of Appeal of Thessaloniki, EEujtA, 2003, p. 820ff; Decision No 1612/2002 of the Supreme Court, Avr], 2003, p. 715ff; Decision No 874/2002 of the Court of Appeal of Athens, Avn, 2003, p. 250ff; Decision No 7813/2002 of the Court of Appeal of Athens, AEE, 2003, p. 667ff; Decision No 5808/2002 of the Court of Appeal of Athens, AEE, 2003, p. 1088ff; Decision No 310/2002 of the Court of Appeal of Patra, EmaicEuTrA, 2002, p. 807ff; Decision No 627/2001 of the Multi-member Court of First Instance of Thessaloniki, AEE, 2001, p. 392ff; Decision No 7635/2000 of the Multi-member Court of First Instance of Athens, AEE, 2000, p. 1093ff; Decision No 1686/2000 of the Court of Appeal of Thessaloniki, EmaicEuTtA, 2000, p. 1062; Decision No 1246/2000 of the Court of Appeal of Piraeus, AEE, 2001, p. 893 ff; Decision No 2419/2000 of the Court of Appeal of Athens, AEE, 2000, p. 642ff; Decision No 3099/1999 of the Court of Appeal of Athens, Avq, 2000, p. 150ff; However, Greek courts are not bound by parties' characterization of their contracts (Decision No 269/2002 of the Court of Appeal of Athens, AEE, 2003, p. 552ff, in distribution; Decision No 2948/2002 of the Court of Appeal of Athens, AEE, 2002, p. 614ff; Decision No 843/2000 of the Supreme Court, Avn, 42, p. 159ff; Decision No 1800/1999 of the Supreme Court, Avr], 41, p. 1037ff).

⁹ As far as it concerns Greek legislation regarding shipping agent, insurance agent and insurance broker, see Presidential Decree No 229/1955, Law No 1569/1985 and Presidential Decree No 298/1985 respectively.

¹⁰ K. G. Pampoukis, Introduction to Commercial Agency Law. Apu., 53, 1999, p. 301-313 (despite of the limited practical significance of "Kommissionsagent"); A. Karagounidis, Issues of Termination and Indemnification in Distribution Agreement. EmeicEA, 2003, p. 376ff, especially p. 379-380. See Decision No 3710/2001 of Multi-member Court of First Instance of Athens, EEuTtA, 2003, p. 593ff; Decision No 3857/1983 of the Court of Appeal of Athens, Apu., 1984, p. 717ff. About the gap as to the

both these gaps, being in breach with the constitutional principle of reciprocity, should be filled by analogy, thus applying the rules settled in the Presidential Decree, unless otherwise and explicitly provided in specific situations by Greek legislation, such as in case of shipping and insurance agent or insurance broker. Furthermore, if it is noticed that a "commission agent" ("Kommissionsagent") or an agent who provides services, possess significant commercial power, compared to principal, the character of rules in the Presidential Decree as *ius cogens* shall be raised.

The consequences deriving from the aforementioned definition of commercial agent are the following:

- (a) the commercial agent organizes independently his commercial activity without the intervention of the principal; commercial agent shall be considered only as independent professional having "legal autonomy" compared to principal. However, the economic and thus bargaining position of commercial agent in the framework of commercial agency agreement should be examined in concrete. However, by revealing his "legal autonomy" we are in the position to apply or not the provisions relating either to Labor Law or to Law of Commercial Agency.
- (b) the commercial agent maintains his own professional premises; and
- (c) the commercial agent may maintain sub-agents ("Untervertreter") in the place of his domicile or in other cities within the geographical area where he exercises his activity¹¹. In this case, article 716 para. 2 of the G.C.C. shall apply, according to which, if the mandatory has appointed a substitute while being entitled to do so the mandatory shall only be liable for the faulty choice of the substitute and for the instructions he gave to such substitute¹². On the contrary, if the parties had agreed not to allow the agent / mandatory to substitute another for himself in the performance of the commercial agency contract and, nevertheless, the mandatory has proceeded with such substitution, he will be responsible for the fault of the substitute as for his own fault. In both cases the mandator, meaning the principal, may exercise directly against the substitute the rights of action against the latter belonging to the mandatory¹³.
- (d) the legally expected standard of skill and care in terms of agent's contractual performance is determined by articles 714 and 330 of the G.C.C.⁴. A commercial agent shall not be deemed responsible for the breach of contract, which he has negotiated or (/and) concluded on behalf of his principal, unless otherwise explicitly stipulated in a specific or all contracts with third parties, known as "del credere" term⁵. Under these circumstances, a supplementary commission shall be

provision of services, see Decision No 509/2003 of the Supreme Court, Nomos Database.

¹ See para 3 b of article 1 of the Presidential Decree that explicitly provides for sub-agents.

² "Culpa in eligendo".

³ See also article 72 of the Greek Code of Civil Procedure.

⁴ According to the former, a mandatory shall be responsible for any fault while the latter indicates that subject to any different provision a debtor shall be responsible for any default in the performance of his obligation resulting from fraud or negligence imputable to the debtor or to his lawful representatives, adopting negligence when the care required in the carrying out of business has not been furnished. It should be noted that an agreement excluding *ex ante* or limiting the responsibility resulting from fraud or gross negligence is null (*ius cogens* - article 332 para. 1 of the G.C.C.).

⁵ This term can be considered under the scope of articles 847ff ("Guarantee") or article 477 of the G.C.C. ("Cumulative assumption of debt") providing that if a person has by contract concluded with a creditor promised payment of the debt of another, the debtor shall not be released but an additional obligation shall be created on charge of the promisor unless a contrary conclusion clearly results. In addition, "del credere" term can be viewed as "Garantievertrag", as leading to creditor's satisfaction. Ap. Georgiadis mentions that "del credere" shall be deemed guarantee in order articles 849 and 855 of the

justified by such commercial agent's additional "service" (in form of additional liability) while the nature of the contract as commercial agency shall not be diversified.

- (e) the commercial agent (as well as the principal) shall be liable towards his clients on grounds of article 922 of the G.C.C. (tort) by which a person who has assigned to another the task of performing a service shall be liable for the prejudice caused illegally to a third party (i.e. a client) by the person assigned while performing his service¹⁶.

A necessary requirement is that he must be registered as a commercial agent in the relevant chamber of commerce or the commercial section of other chambers, the tax authority of the place where he exercises his profession and the Merchants Pension Fund¹⁷. However, the contract entered by an agent without the prior fulfillment of the above requirement shall be deemed effective since article 174 of the G.C.C. shall not apply in that case¹⁸.

A commercial agent shall be understood within the meaning of the Council Directive and the Presidential Decree¹⁹ as not including in particular; (a) a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association (b) a partner who is lawfully authorized to enter into commitments binding on his partners and (c) a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy²⁰.

1.1.2 Sales Representatives

Commercial agents and sales representatives may be under the close dependence of their employer, although it is not common for the former, and act in accordance with his instructions and supervision receiving a regular salary or a commission percentage or both. In such cases it is admitted that they have entered into an employment contract of dependent work²¹.

G.C.C. to be applied (Credits' Security, 2001, p. 235ff, especially p. 241-244; Th. Liakopoulos, General Commercial Law, Vol. I, 1998, p. 181, para. 6). Contra, Androutsopoulos, Commercial Agency Contract, 1968, p. 189ff. See Decision No 31543/1995 of the Multi-member Court of Thessaloniki, Ap[^]., 1996, p. 361ff; Decision No 2680/1987 of the Court of Appeal of Thessaloniki, EEuTtA, 1989, p. 30ff.

¹⁶ See Decision No 4503/2003 of the Court of Appeal of Athens, Avn, 2004, p. 194ff; Decision No 91/1968 of the Supreme Court, EEurcA, 1968, p. 267ff. The clients can also bring an action against the principal because of their justified, by good faith, belief that they contracted with him on grounds of articles 221, 224, 426 and 281 of the G.C.C. About, see Decision No 7371/2003 of the Court of Appeal of Athens, EjtiaKEuTiA, 2004, p. 438ff; Ap. Georgiadis, New Contractual Forms of Temporary Economy, 2000, p. 232ff (in franchising); F. Doris, in Interpretation of the G.C.C., 1978, Vol. I, p. 367ff, especially p. 372-373.

¹⁷ Article 1, para, 1 a, b, c, d of the Presidential Decree. See also Law No 2765/1941, Law No 307/1976 and Presidential Decree No 249/1993 (articles 1,2 and 4) about the past prerequisite of license.

¹⁸ According to same article, a transaction that is inconsistent with a prohibitive provision of the law shall, unless a different conclusion can be drawn, be null. See Decision No 310/2002 of the Court of Appeal of Patra, EEujrA, 2003, p. 597ff; K. G. Pampoukis. Introduction to Commercial Agency Law. Apu. 53. 1999, p. 304. ¹⁹ Article 1 para 3 and 1 para 4. respectively.

²⁰ Additionally, the Presidential Decree as well as the Council Directive shall not apply to commercial agents whose activities are unpaid and to those who operate on commodity exchanges or in the commodity market.

²¹ However. Th. Liakopoulos indicates that such employment contracts are inconsistent with the independent commercial activity of merchants (Agency Contract. EEujtA. 1990. p. 561ff). In case the link with the employer is loose and there exist no commitments as to time, place of work and manner of provision of services the contract is one related to the lease of independent services and possibly

1.2 Basic Aspects of Commercial Agency under Greek Law

1.2.1 Formalities

The Presidential Decree as well as the Council Directive does not require that agency agreements be drawn up in writing in order to be effective²². Difficulties may arise in the case of agents who do not fall under the definition of merchant, although in practice an agent in most cases will act in the capacity of a merchant in the meaning of the Greek Commercial Law. In any case, it is accepted that the capacity of a merchant is not presumed but must be proven accordingly.

1.2.2 Exclusivity

Exclusivity is a usual, but not a characteristic, term in commercial agency contracts and, therefore, the parties are free to determine the formulation of the relevant provisions in conjunction with article 361 of the G.C.C.²³.

1.2.3 Consideration of Agent (Commission)

Under the provisions of the Presidential Decree²⁴, the commercial agent is entitled to the agreed commission. In the absence of any agreement on this matter between the

lease of work. See G. Karouzos, Commercial Agent- Sales Representative; Independent Professional or Employee?, *OopEjnO.*, 2001, p. 1112ff; Decision No 1657/1995 of the Supreme Court, AEN, 1997, p. 955ff; Decision No 1247/1994 of the Supreme Court, AEE, 1995, p. 104ff; Decision No 7425/1995 of the Court of Appeal of Athens, AEE, 1996, p. 634ff.

²² Article 8 para. 1 a of the Presidential Decree shall not be interpreted as providing that an agency contract is not valid unless evidenced in writing since that would be in breach with the letter and the ratio of the Council Directive as revealed by a systematic interpretation of para. 2 and 1 of article 13 of same Council Directive. Under the scope of article 13 of the Council Directive, each party shall be entitled to receive from the other on request a signed written document setting out the terms of the commercial agency contract including any terms subsequently agreed. Waiver of this right shall not be permitted (see also para. 1 b of article 8 of the Presidential Decree). Para. 2 of same article indicates that notwithstanding para. 1 of article 13 of the Directive, a Member State may provide that an agency contract shall not be valid unless evidenced in writing. See K. Pampoukis, The document in Commercial Agency Contract. *EEu.jrA*, 2001, p. 21ff; Th. Liakopoulos, General Commercial Law, Vol. I, 1998, p. 185-187; N. Tellis, Amendment of Legislation regarding Commercial Agents by P.D. 312/1995, *EmmcEEA A / 1995*, p. 657ff. See also articles 392 para. 2 and 3 in light of article 394 para. 1 d of the Greek Code of Civil Procedure, as analyzed in Kerameas / Kondilis / Nikas, Interpretation of the Greek Code of Civil Procedure, 2000, Vol. I, p. 738ff. Similarly, see Decision No 1401/2003 of the Court of Appeal of Thessaloniki, *EEuJtA*, 2003, p. 820ff; Decision No 310/2002 of the Court of Appeal of Patra, *EmaicEuTtA*, 2002, p. 81 Off; Decision No 1246/2000 of the Court of Appeal of Piraeus, *E3aioicEn3tA*, 2001, p. 1032ff. Contra, see Decision No 77/2004 of the Court of Appeal of Larisa, *Nomos Database*; Decision No 1638/2004 of the Court of Appeal of Athens, AEE, 2004, p. 1177ff; Decision No 5539/2001 of the Court of Appeal of Athens, *EjuaicEA, B / 2002*, p. 418ff; Decision No 8316/1999 of the Court of Appeal of Athens, *EEu.jrA*, 2000, p. 1025ff; Decision No 1686/2000 of the Court of Appeal of Thessaloniki, *EEuJiA*, 2000, p. 1062ff. It should be also mentioned that in case a party cannot receive from the other on request a signed written document regarding the commercial agency agreement, it is entitled to bring an action based on article 949 of the Greek Code of Civil Procedure (see also article 165 of the G.C.C., according to which, if the parties upon concluding an agreement reserved the right to draw up a written document in case of doubt the agreement shall be valid even without the drawing up of the document). See also Decision No 2193/2004 of the Multi-member Court of First Instance of Athens, AEE. 2004,

²³ "Subject to any different provision of the law a contract is required to create or to amend an obligation" ("Freedom of Contracts"). See M. Stathopoulos, General Law of Obligations. 1998. p. 243ff; Ap. Georgiadis. Law of Obligations-General Part. 1999. p. 12ff.

²⁴ Articles 5-7 (also. Chapter III, articles 6-12 of the Council Directive). See Decision No 9099/94 of the Multi-member Court of First Instance of Athens. *EEuTiA*. 1995. p. 563ff; Decision No 159/1990 of the Multi-member Court of First Instance of Thessaloniki. *Apu.*. 1990. p. 123ff. E. E. Perakis. General Part of Commercial Law, 1999, p. 406ff; Th. Liakopoulos. General Commercial Law. Vol. I, 1998, p. 183ff.

parties, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his commercial agency contract are customarily allowed in the place where he carries on his activities. If there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction in question²⁵. A consideration, in the meaning of the Presidential Decree, is deemed to be the kind of commission of the commercial agent determined on the basis of the number and the value of sales negotiated and possibly concluded whereas the provisions pertaining to commission apply, provided the commercial agent is remunerated in whole or in part by commission.

In particular, a commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract (a) where the transaction has been concluded as a result of his action²⁶; or (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind²⁷. It should be underlined that the aforementioned, prior transactions of the same kind may relate to different products, brands or quality than those described in the transaction in question but still within commercial agent's main activities²⁸. Additionally, a commercial agent shall be entitled to commissions on transactions concluded during the period covered by the agency contract either where he is entrusted with a specific geographical area or group of customers or where he has an exclusive right to a specific geographical area or group of customers and where the transaction has been entered into with a customer belonging to that area or group²⁹.

On the other hand, for a commercial act entered into after the discharge of the commercial agency agreement, the commercial agent shall be entitled to commission (a) if the transaction in question is mainly attributable to the commercial agent's efforts during the period covered by the commercial agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or (b) if, in compliance with the conditions mentioned in article 7 para. 1 of the Presidential Decree, the order of the third party reached the principal or the commercial agent prior to the termination of the commercial agency contract³⁰.

Moreover, the commission shall become due from the time and to the extent (a) the principal has executed the transaction; or (b) the principal should, according to his agreement entered into with the third party, have executed the commercial act; and (c)

²⁵ Th. Liakopoulos, *Issues of Commercial Law*, Vol. II, 1997, p. 119ff.

²⁶ The phrase "where the transaction has been concluded as a result of his action" shall be interpreted in a wider sense since commercial agent's action must not be the exclusive (or the main) cause, that led to the conclusion of the transaction in question. However, commercial agent's contribution shall not be trivial. See N. Tellis, *Amendment of Legislation regarding Commercial Agents by P.O. 312/1995*, EmcncEA. A / 1995, p. 663ff. In case of more than one commercial agents, unless otherwise agreed, article 480 of the G.C.C. shall apply, according to which, if several persons owe a divisible performance or if several persons are entitled to such performance in case of doubt each debtor shall be obligated to pay and each creditor shall have the right to receive an equal share.

²⁷ See K. Pampoukis, *Protection of Commercial Agent in Contemporary Law*. M.A.E.B.E.®. Vol. 11, 1975. p. 8ff; K. Pampoukis, *Studies of Commercial Law B'*. 1980, p. 126ff.

²⁸ Possible relation of substitution or alternation between the abovementioned products shall not interfere the grant of commission as well (see L. Kotsiris, *Competition Law*, 2000. p. 509ff).

²⁹ Adversely, commercial agent's contractual exclusion from specific clients was deemed legitimate (see Decision No 4729/2001 of the Court of Appeal of Athens. Avr], 2002. p. 180ff).

³⁰ On the contrary, a commercial agent shall not be entitled to commission if that commission is payable to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.

the third party has executed the transaction. Especially, the commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of transaction, as he should have³¹. The right to commission can be extinguished only if and to the extent it is established that the contract between the third party and the principal will not be executed and that face is due to a reason for which the principal is not to blame³².

A commercial agent shall be entitled to demand that he be provided with all the information and in particular an extract from the books, which is available to his principal and which he needs in order to confirm the amount of the commission due to him. It should be emphasized that agreements to derogate from the provisions connected with commercial agent's commission, to his detriment, are not permitted³⁴.

1.2.4 Territory

The issue of territory may be freely agreed upon by the contracting parties, whether linked with exclusivity or not. The geographical area of the agreement may include the entire territory of Greece (together with other neighboring countries) or part thereof.

1.2.5 Main Obligations of Principal

In general, both the agent and the principal are required to act with due diligence, precision, honesty and good faith in the conclusion, promotion and execution of their commercial acts³⁵. Specifically, the principal must:

(a) place at the disposal of his commercial agent with the necessary documentation

³¹ According to article 351 of the G.C.C., a creditor shall also (meaning apart from the case of article 349 of the G.C.C.) be placed under notice if although invited by the debtor the said creditor has not proceeded with the required action or cooperation without which the debtor cannot furnish the performance. An invitation shall not be required with regard to action that must be taken by the creditor if a fixed date or a certain period from the date of notification has been already agreed. Furthermore, the commission shall be paid not later than on the last day of the month following the quarter in which it became due.

³² In that case any commission which the commercial agent has already received shall be refunded. See article 904 of the G.C.C. that provides that a person who has become richer without a lawful cause by means or to the detriment of the property of another shall be bound to reconstitute the benefit. Such obligation shall particularly arise by reason of a payment made which was not due or payment for a consideration that did not materialize or that ceased to exist (as in concrete) or that was illegal or immoral.

³³ For that reason, the principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has become due. This statement shall set out the main components used in calculating the specific amount of commission (see also article 450 of the Greek Code of Civil Procedure as well as article 902 of the G.C.C.).

³⁴ Para. 7 of article 7 of the Presidential Decree.

³⁵ See article 4 of the Presidential Decree by virtue of articles 3-5 of the Council Directive (ius cogens). With respect to the content of good faith, it should be argued that in concreto it concerns the "objective" good faith or the integrity, honorableness and honesty that somebody has to observe in commercial transactions and generally in social co-existence (see articles 197, 200, 281, 288 of the G.C.C.). The "objective" good faith in contrast to the "subjective" (i.e. articles 1036, 1041 of the G.C.C.). judges the exterior behavior of the person without regard to the motives and generally the subjective factors (About, see Ap. Georgiadis, General Principles of Civil Law. 1997. pages 22ff; M. Stathopoulos. Contract Law. 1998. pages 98ff; Decision No 194/1957 of the Supreme Court. EEN 24. p. 709ff. About principal's general obligation of support see Androutsopoulos. Commercial Agency Agreement. 1968, p. 193IT. Principal's secondary obligations, originated in good faith, refer to non excessive interference in commercial agent's activity and to confidentiality. However, article 288 of the G.C.C. shall define the extent of these obligations ad hoc.

relating to the goods concerned (i.e. price lists, leaflets etc.)³⁶;

- (b) obtain for his commercial agent the information necessary for the performance of the commercial agency contract and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be appreciably lower than the one which the agent should expect in the normal course of events; and
- (c) inform the commercial agent within a reasonable period of his acceptance, refusal and any non-execution of a commercial transaction which the commercial agent has procured for the principal.
- (d) reimburse the commercial agent of everything the latter has spent to achieve an orderly performance of the mandate whereas compensate any prejudice the commercial agent suffered without fault on his part in the performance of the mandate³⁷.

1.2.6 Main Obligations of Agent

Furthermore, the agent has the following obligations:

- (a) to look after his principal's interests. Commercial agent's activities must be systematic and continuous³⁸. On the other hand, a commercial agent shall not have the right to effect either for his own account or for the account of a third party operations that are contrary to principal's interests³⁹.
- (b) to make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of⁴⁰; According to article 719 of the G.C.C., he shall be bound to restitute to the mandator (meaning his principal) everything he had received for or has acquired from the performance of the mandate⁴¹.

³⁶ However, the principal shall not be obligated to disclose information pertaining to the basis of his product, e.g. synthesis of colour/metal that is subject to intellectual property rights. See V. Antonopoulos, *Intellectual Property*, 2002; Th. Liakopoulos, *Intellectual Property*, Vol. I-II, 1995.

³⁷ See articles 722-723 of the G.C.C. About the suitability of articles 713ff of G.C.C. to regulate in general contracts of providing commercial services see K. Triantafillopoulos, *Draft of Civil Code*. Vol 11, 1935, p. 226ff.

³⁸ For this reason, the parties may agree upon a necessary minimum of sales/purchases. In this case, the non accomplishment of the above minimum should not justify contract's termination if it is not attributable to commercial agent's fault. However, these kind of terms should be examined under the scope of articles 178, 179 of the G.C.C. See Decision No 2419/2000 of the Court of Appeal of Athens, AEE, 2000, p. 642ff; Decision No 34339/1998 of the Court of First Instance of Athens, AEE, 1999, p. 494ff; Decision No 7635/2000 of the Multi-member Court of First Instance of Athens, AEE, 2000, p. 1093ff (in case of distribution); Decision No 2680/1987 of the Court of Appeal of Thessaloniki, EEujtA. 1989. p. 30ff. See Androutsopoulos, *Commercial Agency Agreement*. 1968, p. 140ff; E. Perakis in Decision No 7635/2000 of the Multimember Court of First Instance of Athens, AEE, 2000, p. 1096ff.

³⁹ See Decision No 1612/2002 of the Supreme Court, Avn, 2003, p. 715ff; Decision No 627/2001 of the Multi-member Court of First Instance of Thessaloniki, AEE. 2001. p. 382ff; Decision No 58/2000 of the Multi-member Court of First Instance of Mitilini, Avn, 2001, p. 832ff; Decision No 3640/1990 of the Court of Appeal of Athens, AEN, 1990. p. 902ff with case-law citations. For this purpose, articles 652 and 288 of the G.C.C. shall apply. See N. Rokas. *Elements of Commercial Law*, 1998. p. 64ff; Th. Liakopoulos, *General Commercial Law*, 1998. p. 177-178.

⁴⁰ It should be accepted that the commercial agent is obliged to confirm his clients' solvency to the extent he is in a position to perform such research, his refusal would be contrary to the requirements of good faith and this does not entail additional expense. See article 659 of the G.C.C.

⁴¹ See Decision No 874/2002 of the Court of Appeal of Athens, EEuTiA. 2003, p. 54ff; Decision No 695/1995 of the Supreme Court, EEN, 1996, p. 594ff.

- (c) to communicate to the principal all the information available to him, for example, as regards market's evaluations, supply and demand, prices, quality and availability of products, infringement of principal's rights such as trademarks, patents etc⁴².
- (d) to comply with reasonable recommendations given by the principal⁴³. Specifically, the agent may be obliged to maintain stock as well as to carry out advertising and marketing of principal's products and to organise and supervise a distribution system at principal's expense by entering into agreements with sub-agents or distributors.
- (e) to render account in compliance with articles 303 and 718 of the G.C.C.

1.2.7 Termination

Commercial agency agreements may be entered into for a fixed term or for an indefinite term. In the former case, the agreement is automatically discharged upon expiry of the agreed duration term⁴⁴. In the latter case, no expiry date has been included in the agreement and same may be terminated *ex nunc*, following notice which must be communicated⁴⁵ to the other party within a fixed time limit⁴⁶.

In parallel, commercial agency agreement may be terminated at any time, be it for a definite or an indefinite term, without complying with the above time-limits thus having immediate effect, on serious grounds that do not justify further performance of commercial agency contract in light of good faith⁴⁷. In particular, these fundamental

⁴² See article 718 of the G.C.C.

By virtue of article 717 of the G.C.C. ("Deviations from the limits set in the mandate"), a mandatory may only deviate from the limits set in the mandate if he finds himself in the impossibility to notify the mandator and it is at the same time obvious that the mandator would have allowed such deviation if he had knowledge of the circumstances that prompted such deviation.

⁴⁴ Article 8 para. 2 of the Presidential Decree provides that a commercial agency contract for a fixed period that continues to be performed by both parties after that period has expired shall be deemed to be converted into a commercial agency contract for an indefinite period. See also article 671 of the G.C.C.

⁴⁵ Specifically, termination, as a right of formative nature (see article 390 of the G.C.C.), may be exercised explicitly (especially in case of such provision in the contract) or implicitly (see article 158 of the G.C.C.). Regarding the last possibility, see Decision No 2071/1997 of the Court of First Instance of Athens, AEE, 1997, p. 579ff; Androutsopoulos, *Commercial Agency Agreement*, 1968, p. 274-275. Contra, A. Karagounidis, *Issues of Termination and Indemnification in Distribution Agreement*, ETnaicEA, 2003, p. 387-388 who indicates that termination (in distribution agreements) must be explicitly exercised due to the significant content of good faith in lasting agreements (article 288 of the G.C.C.). However, the systematic omission of fulfilling contractual obligations might be considered as implicit termination (see Decision No 305/1997 of the Multi-member Court of First Instance of Athens. EEurcA, 1998, p. 53 Iff).

⁴⁶ Under the provisions of the Presidential Decree (para. 4 of article 8), the time limit is one month for the first year of the agreement, two months from the beginning of the second year, three months from the beginning of the third year, four months from the beginning of the fourth year, five months from the beginning of the fifth year and six months from the beginning of the sixth year and the following years, otherwise the termination is void (M. Marines. EE|irA, 1999. p. 47). The existence of these time-limits is justified by the basic element of trust characterizing this kind of agreements. The parties may not agree to shorter periods. If the parties agree on longer periods than the aforementioned, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent. Unless otherwise agreed by the parties, the expiry of the termination time limit must coincide with the end of a calendar month. In the case of an agreement of a fixed period that was converted into a contract for an indefinite period, the earlier fixed period must be taken into account in the calculation of the period of notice. See Decision No 21602/2003 of the Multi-member Court of First Instance of Thessaloniki, AEE. 2003, p. 109Iff; also article 669 of the G.C.C. Finally, the parties have the right of rescission before the contract being performed (see articles 389IT of the G.C.C.).

⁴⁷ An agreement to the contrary shall be void. See articles 672. 724 and 725 of the G.C.C. About the

reasons are connected with the failure of one party to perform all or part of his obligations as well as where exceptional circumstances arise (force majeure^{*}).

If the termination was notified at an inappropriate time without serious grounds the party who terminated shall be liable to compensate the prejudice caused thereby to the other while the commercial agency contract shall be effective⁴⁹. Accordingly, the fact that there was not any serious reason, justifying contract's termination, may constitute itself a serious reason for the other party to terminate it and in parallel, ask for damages⁵⁰.

It should be emphasized that termination of the contract may be in breach with article 281 of the G.C.C.⁵¹ and hence, void, while the party, who terminated it, shall be obliged to pay damages on grounds of article 914 of the G.C.C.⁵². However, in view of Decision No 12/2004 of the Supreme Court⁵³, the right of termination shall not obviously exceed the limits imposed by good faith if the result thereof, being the discharge of the contract, can be considered as a foreseen business possibility, adequately justified by the legitimate interests of the party who terminated it. Of course, in case of recognition of serious grounds, article 281 of the G.C.C. shall not apply.

1.2.8 Indemnification upon Termination

Upon termination of the agency agreement, be it for a fixed or for an indefinite term,

meaning of "serious grounds", see Ap. Georgiadis, *Law of Obligations-General Part*, 1999, p. 525ff; M. Stathopoulos, *General Law of Obligations*, 1998, p. 97-98; L. Georgakopoulos, *Law of Lasting Obligations*, 1979, p. 150ff; Decision No 567/1973 of the Court of Appeal of Thessaloniki, Apu., 1973, p. 613. See Decision No 2419/2000 of the Court of Appeal of Athens, AEE, 2000, p. 642ff; In addition, the recognition of serious grounds eliminates the possibility of appliance of article 2 a of Law No 703/1977.

⁴⁸ See Decision No 5539/2001 of the Court of Appeal of Athens, EmaicEA, 2002, p. 418ff; A. Argyriadis, *Termination of Agency Agreements*, EEunA, 1987, p. 155ff; Th. Mitroulis, *Termination of Commercial Agency-Requirements and Consequences*, EEuTtA, 1963, p. 11ff. Thus, termination can result not only from non or mal-performance of the contract (see articles 380ff of the G.C.C.) but also from anticipatory breach (article 686 of the G.C.C.). This remedy shall not deemed sanction (see Decision No 12/2004 of the Supreme Court, EEptA, 2005, p. 44ff.

⁴⁹ See Decision No 588/2002 of the Supreme Court, AEE, 2003, p. 194ff; Decision No 4249/1991 of the Court of First Instance of Athens, EEu^A, 1995, p. 122ff.

⁵⁰ See Decision No 8316/1999 of the Court of Appeal of Athens, EjtiaicEA, 2000, p. 1025ff.

⁵¹ According to that, the exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by good faith or morality or by the social or economic purpose of the right. See Decision No 34339/1998 of the Court of First Instance of Athens, AEE, 1999, p. 494.

⁵² "A person who has caused illegally and through his fault prejudice to another shall be liable for compensation" (tort). See also article 919 of the G.C.C. It should be taken into consideration that the exact legal consequences of such termination are disputed. See Androutsopoulos (*Commercial Agency Agreement*, 1968, p. 276ff) who accepts nullity of such termination in terms of article 174 of the G.C.C., while M. Karasis (*Interpretation of the G.C.C.*, 1980, Vol. III, p. 725ff) argues that such termination entails damages only. For a comprehensive analysis, see Th. Liakopoulos. KprcEjnO., 1999, p. 55ff; See Decision No 58/2000 of the Multi-member Court of First Instance of Mytilini, Avn, 2001, p. 832ff. About the continuation of the agreement by the grant of injunctions see Decision No 12796/1987 of the Court of First Instance of Athens, EAlAvr], 1991, p. 843; contra Decision No 19234/1991 of the Court of First Instance of Athens. NoB, 1993, p. 324ff. Apart from that and subject to any agreement to the contrary, the commercial agency contract shall be discharged by the death of the parties as well as by placing under judicial assistance or by the bankruptcy of either whereas liquidation of a company shall entail the same effect (see articles 651 and 726 of the G.C.C.). See N. Tellis. *Commercial Agent's Indemnification*. 1997. p. 55ff. In any case, the contract can be discharged by *actus contrarius* (article 436 of the G.C.C.). About, the concept of "frustration" in G.C.C.. see article 388 of the G.C.C. and Decision No 3375/1999 of the Court of First Instance of Athens. AEE. 2000. p. 1231ff.

⁵³ EEuTtA, 2005. p. 44ff.

the right to compensation of the commercial agent arises if and to the extent that:

- a. he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and
- b. the payment of this indemnity is equitable having regard to all the circumstances and in particular, the commission lost by the commercial agent on the business transacted with such customers⁵⁴.

The amount of indemnity due, following the expiry of the agency agreement, cannot exceed an amount equivalent to the annual average of commissions, received by the agent, during the last five years⁵³. However, the grant of such an indemnity does not prevent the commercial agent from seeking damages³.

As Th. Liakopoulos argues, the above provision is inequitable, given that the benefit of the principal is not presumed and, further, that the commercial agent bears the burden of proof of the substantive requirements for the grant of that indemnity.

The jurisprudence and doctrine claim that the phrase "...so that the mandator maintains substantial benefits deriving from the business with existing (new or old) customers..." shall be interpreted broadly, taking into account the circumstances of each particular case. Along this line of interpretation, it is admitted that substantial benefits are maintained not only when the agreements entered into by the commercial agent survive (permanent agreements), but also when, even indirectly, the actions of the commercial agent have established a clientele (for example, market of spare

⁵⁴ See article 9 of the Presidential Decree in conjunction with articles 17-19 of the Council Directive (ius cogens). See the analysis on these criteria by N. Tellis, *Indemnification for Clientele of Commercial Agent*, 1997, p. 47ff.

⁵⁵ If the agreement expired earlier, the indemnity is calculated on the basis of the average commissions of the period in question. The indemnity due in such case is deemed fair as to the amount, under the perspective of article 288 of the G.C.C. and cannot exceed the aforementioned limits. It should be emphasized that such an indemnity is due in every case of termination of the agreement. Thus, it shall also arise where the agency contract is terminated as a result of commercial agent's death or bankruptcy (see N. Tellis, *Indemnification for Clientele of Commercial Agent*, 1997, p. 55ff). N. Rokas (*Elements of Commercial Law*, 1998, p. 66ff) and E. Perakis (*General Part of Commercial Law*, 1999, p. 408ff) believe that this indemnification is an offset ("Ausgleichsanspruch") for commercial agent's lost profits (see article 298 of the G.C.C) while Th. Liakopoulos (*General Commercial Law*, 1998, p. 189, point c) associates it with general, substantial benefits. See also Decision No 310/2002 of the Court of Appeal of Patra, EEu;rA, 2003, p. 597ff; N. Tellis, *Indemnification for Clientele of Commercial Agent*, 1997, p. 21-46; M. Marines, EEujtA, 1999, p.48ff. On the contrary, such an indemnity shall not be payable: (a) where the principal has terminated the contract because of default attributable to the commercial agent that would justify immediate termination of the contract; (See L. Georgakopoulos. Consultatory Response. AEE, 1998, p. 112ff (b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; (c) where, with principal's consensus, the commercial agent assigns his rights and duties under the commercial agency contract to another person since in that case he shall be compensated by the assignee (see N. Tellis, *Apu*, 1996, p. 541ff).

³⁶ Hence, the commercial agent can ask for damages that shall comprise the decrease in his property (Positive damage) as well as lost of profit being what can be anticipated as probable in the usual course of things or by reference to special circumstances in particular to the preparatory steps taken (article 298 of the G.C.C.). See Decision No 1612/2002 of the Supreme Court. Avn, 2003, p. 715ff; Decision No 2193/2004 of the Multi-member Court of First Instance of Athens, AEE, 2004, p. 103Off; M. Stathopoulos. *General Law of Obligations*. 1998. p. 170ff. Also, articles 914. 919 of the G.C.C. (torts) offer another possibility.

⁵⁷ *General Commercial Law*, 1998. p. 188ff. Indeed, it is not an indemnity but a claim for remuneration.

parts, circle of potential buyers, establishment of the agent's enterprise in the relevant market etc.). In general it is sufficient that the entrepreneur derives (or could derive) profits from the clientele even after the expiry of the agreement³⁸. The whole issue is associated to the purpose of this indemnification being, in my opinion, a remedy for the surplus-value or goodwill that was created by the commercial agent. That value would not be compensated otherwise, even on grounds of article 904 of the G.C.C. ("Enrichment without just cause"), although Greek law recognizes such surplus-value in certain circumstances⁵⁹.

Finally, the commercial agent's claim to the aforementioned indemnification is subject to five years prescription, provided he notifies the principal within one year from the termination of the agency agreement to this effect⁶⁰.

1.2.9 Non-competition after Termination

The non-competition obligation following the expiry of the agreement is valid for one year if and to the extent it has been agreed in writing, even without a fair consideration and it relates to the geographical area (save this sector, there exist no further restrictions) or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his commercial agency under the contract⁶¹.

1.2.10 Issues of Private International Law

As far as it concerns applicable law regarding commercial agency agreements, *lex contractus* shall be, *primo loco*, the *lex voluntatis*⁶²; especially, according to article 3 ("Freedom of choice") of Rome Convention on the law applicable to contractual obligations, concluded on 19.6.1980, a contract shall be governed by the law chosen by the parties (including *lex mercatorid*)³. It should be underlined that this rule

³⁸ See Decision No 685/2003 of the Supreme Court, Nomos Database; Decision No 509/2003 of the Supreme Court, Nomos Database; Decision No 7813/2002 of the Court of Appeal of Athens, AEE, 2003, p. 667ff; Decision No 5539/2001 of the Court of Appeal of Athens, EjucncEA, 2002, p. 418ff; Decision No 8316/1999 of the Court of Appeal of Athens, EmaKEA, 2000, p. 1025ff.

⁵⁹ Concerning G.C.C., see articles 630 para. 3, 641 para. 2, 668 and 1103. See Decision No 1097/1999 of the Court of First Instance of Athens, EEuTiA, 1999, p. 46-47; N. Tellis, *Commercial Agent's Indemnification*, 1997, p. 29ff. Regarding the formation of a general principle *de lege ferenda*, on grounds of article 630 para. 3 see Ap. Georgiadis, *New Contractual Forms of Temporary Economy*, 2000, p. 254ff.

⁶⁰ "Burden of notification". See article 250 point 1 of the G.C.C.

⁶¹ See article 10 of the Presidential Decree. Such restraint of trade clauses may also entail the prohibition of the disclosure of certain secrets of the principal as regards technology, know-how, synthesis and other qualities of the products. However, this Article does not impair the provisions of Greek law, which imposes other restrictions as to the validity or the application of clauses containing a non-competition clause or which provide that courts may mitigate the obligations of the contracting parties deriving from such an agreement (Law No 146/1914 on illicit competition etc.). See G. Babetas, *The Commercial Agency in light of Restrictions of Competition Law*, 2003; D. Tzouganatos, *Exclusive and Selected Agreements of Distribution in Competition Law*, 2001.

⁶² See S. V. Vrellis, *Private International Law*, 2001, p. 167ff. The proper law of the contract being *ius* and *notfactum* can be reassessed in concrete* by the Supreme Court under article 559. case 1 of the Greek Code of Civil Procedure. See Decision No 2594/1997 of the Multi-member Court of First Instance of Thessaloniki. Apu.. 1997, p. 807ff; A. Argyriadis, *Termination of Commercial Agency*, EEurcA, 1987, p. 153ff; Th. Liakopoulos, *Issues of Commercial Law. Vol II*, 1997, p. 1281T; Androutsopoulos, *Commercial Agency Agreement*, 1968, p. 88ff.

⁵³ Article 29 of Convention of Rome provides that the aforementioned Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval. In particular, Greece has ratified its accession agreement to the Convention of Rome with Law No 1792/1988 and in accordance with the provisions made in that accession, the Convention of Rome was entered into force on 1.4.1991.

regarding *lex voluntatis* has been applied in Greece since 1856 under article 6 of Law TAV1856⁶⁴. The choice must be explicitly expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case⁶⁵. On the contrary, the choice cannot be hypothetical⁶⁶ but it must be the indisputable result of the interpretation of parties' explicit or implicit will⁶⁷ through the fulfillment of the criteria provided in articles 173 and 200 of the G.C.C⁶⁸. However, the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, called "mandatory rules"⁶⁹.

By their choice the parties can select the law applicable not only to the whole but also to a part of the contract⁷⁰, provided that the final selection in the latter case can be deemed rational⁷¹. Additionally, the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice or of other provisions of the Convention of Rome⁷².

To the extent that the law applicable to the contract has not been chosen, the contract shall be governed, *secundo loco*, by the law of the country with which it is most closely connected⁷³. Nevertheless, a separable part of the contract which has a closer

⁶⁴ See Decision No 110/1973 of the Supreme Court, NoB 21, 1973, p. 783ff.

⁶⁵ See Decision No 276/1982 of the Supreme Court, EEN 50, 1983, p. 151ff; Decision No 985/1982 of the Supreme Court, NoB 31, 1983, p. 999ff; Decision No 1206/1982 of the Supreme Court, NoB 31, 1983, p. 1168ff. It should be emphasized that the choice itself is an agreement since para. 4 of article 3 of Convention of Rome indicates that the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of articles 8, 9 and 11 of same Convention.

About the concept of "hypothetical choice", see G.-P. Kranzlin, *Das deutsche Internationale Handelsvertreterrecht*, ZVglRWiss 83, 1984. p. 273ff.

⁶⁶ See Decision No 888/1984 of the Court of Appeal of Piraeus, NoB 33, 1985, p. 305ff; Decision No 904/1985 of the Multi-member Court of First Instance of Piraeus, EEujA 1985, p. 699ff; Decision No 2133/1984 of the Multi-member Court of First Instance of Piraeus, FlisipN 6, 1984, p. 396ff; Decision No 1100/1983 of the Court of Appeal of Piraeus, fleipN 5, 1983, p. 283ff; Decision No 3544/1978 of the Court of Appeal of Athens, App. 1979, p. 727ff; Decision No 380/1978 of the Court of Appeal of Thessaloniki, Apu 1978, p. 958ff; Decision No 220/1976 of the Multi-member Court of First Instance of Piraeus, NoB 24, 1976, p. 919ff.

⁶⁸ Particularly, article 200 of the G.C.C. ("Interpretation of contracts") mentions that contracts shall be interpreted according to the requirements of good faith taking also into consideration business usages while in view of article 173 of same code when interpreting a declaration of will the true intention shall be sought without sticking to (the literal meaning of) the words. Only interpretation of the contract can lead to its "qualification". See Ap. S. Georgiadis, *General Principles of Civil Law*, 1997, p. 449ff.

It concerns *ius cogens*.

⁷⁰ It is the so-called "Depepage". However, the parties should take into consideration the radical difference between "Internationalprivatrechtliche Verweisung" and "Materiellrechtliche Verweisung" since only in the last case the relevant contractual terms shall be assessed under the view of *ius cogens* of *lex contractus*.

⁷¹ Under this scope, the law applying to the rights of one contracting party cannot be different from the law concerning the obligations of the other party since they both constitute different views of the same contractual unity.

In that case, any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under article 9 of the Convention of Rome or adversely affect the rights of third parties.

⁷³ Article 4 of the Convention of Rome. See Decision No 742/1985 of the Supreme Court. NoB 34. 1986. p. 5661T; Decision No 415/1976 of the Supreme Court. NoB 24. 1976, p. 942ff; Decision No 1133/1975 of the Supreme Court, NoB 24, 1976, p. 418ff; Decision No 276/1982 of the Supreme Court, EEN 50, 1983, p. 151-153; Decision No 492/1979 of the Supreme Court, NoB 27, 1979, 148 Iff; Decision No 985/1982 of the Supreme Court. NoB 31, 1983, p. 999ff.

connection with another country may by way of exception be governed by the law of that other country. Furthermore, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract⁷⁴ has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or incorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. The aforementioned presumption relating to characteristic performance shall be disregarded if it appears from the circumstances as a whole that the contract is most closely connected with another country thus the closest connection being the paramount criterion.

It should be emphasized that Greek courts should not apply article 25 of the G.C.C. in view of articles 2 and 17 of the Convention of Rome⁷⁵. Specifically, article 25 of the G.C.C. provides that contractual obligations shall be governed by the law to which the parties have submitted themselves. Failing this shall be applicable the law which is appropriate to the contract having regard to the whole of the special circumstances. The so-called term in Greek law theory 'dualism', meaning the parallel existence of Convention of Rome and same article shall not be advanced since article 25 maintains its scope only to these cases that are described in article 1 para. 2 of the Convention of Rome.

Finally, in case Greek law is applicable, "renvoi" is not allowed since article 32 of the G.C.C. underlines that in the applicable foreign law are not included the rules of private international law of the Foreign State.

1.2.11 International Jurisdiction of Greek Courts

The jurisdiction of the Greek courts is assessed upon the fulfilment of the territorial principle that leads to the evaluation of article 3 in view of articles 22ff of the Greek Code of Civil Procedure. In particular, unless articles 22 and 25 para. 1 of the Greek Code of Civil Procedure (thus domicile or seat of defendant being in Greece) apply, the applicant may bring an action before the Greek Courts as soon as commercial agency (or distribution) contract was concluded or should be performed in Greece (forum negotii) .

⁷⁴ In our case, the characteristic performance of commercial agency contract shall be considered as to commercial agent's performance. The same applies in distribution agreements as to distributor's performance. With respect to "characteristic performance" see A. Grammatikaki-Alexiou / Z. Papasiopi-Pasia / E. Vasilakaki, Private International Law. 1997, p. 272ff; Z. Papasiopi-Pasia, Applicable law in contracts, NoB 40, 1992, p. 1346ff.

⁷⁵ Article 2 ("Application of law of non-contracting parties") provides that the rules of the Convention of Rome shall apply to contractual obligations in any situation involving a choice between the laws of different countries whereas article 17 ("Non retrospective effect") states that the aforementioned Convention shall apply in a Contracting State to contracts made after the date on which it has entered into force with respect to that State.

⁷⁶ See Decision No 812/1991 of the Supreme Court, Avn, 1991. p. 1490ff; Decision No 77/2004 of the Court of Appeal of Larisa. EmcKEuTtA, 2004, p. 200ff; Decision No 6642/1992 of the Court of Appeal of Athens, After], 1993. p. 255ff. See Kerameus / Kondilis / Nikas. Interpretation of the Greek Code of Civil Procedure, 2000, Vol. I, p. 17-31, 65-66 and 78-83. See also Chapter II, Section I and II of Council Regulation (EC) No 44/2001 of 22 December 2000 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (ius cogens).

2. DISTRIBUTION

2.1 Definitions

The sole distribution agreement is a continuous contractual relationship whose content is the conclusion of a general-frame agreement, on the basis of which, the supplier-manufacturer-seller is obliged to sell exclusively the products to the "distributor" ("Vertragshandler" or "Concessionnaire") or "authorized dealer" for the particular territory while the latter undertakes the obligation to purchase supplier's products exclusively, following his instructions and commercial terms (i.e. as to trademarks etc).⁷⁷ In particular, the distributor is an independent merchant who has adopted manufacturer's business organization of known products, he is connected with him by means of a continuous contractual agreement, and undertakes on a permanent basis, on his (meaning distributor's) behalf and in his name, to resell (distribute) the products, specified in the frame agreement, in the agreed territory, to promote the sales thereof and to cover, at his risk, the expenses related to the organization and promotion of the products (advertising, stock, technical support, after-sales service) as well as the performance of his clients' contracts. Thus, he absolutely undertakes the commercial risk being a merchant with the economic sense whereas, in parallel, he is incorporated in supplier's distribution network protecting his interests and fame⁷⁹. Distributor's profit is related to the difference between his purchasing and selling (to third parties) price and not to commission⁸⁰.

The distribution agreement is neither a sale nor a commercial agency agreement but a lasting, frame agreement, having the main characteristics of the lease of independent services, the provisions of the Presidential Decree in commercial agency being applicable by analogy. At a secondary level, articles 648ff and 713ff of the G.C.C. shall also apply, subject to the peculiarities, that distribution agreements present, as

⁷⁷ See Th. Liakopoulos, General Commercial Law, 1998, p. 191ff; Th. Liakopoulos, Issues of Commercial Law, Vol II, 1997, p. 102ff and 128ff; L. Georgakopoulos, Contract of Exclusive Sales in Contemporary Practice of Commercial Law, 1992, p. 67ff and 366ff; Farmakidis. Sole Distribution Agreement, 1990; Douvlis, Integrated Distribution, FleipN, 4; E. Perakis. General Part of Commercial Law, 1999, p. 412ff; D. Tzouganas, The Legality of the Exclusive Distribution Agreements in accordance with the Competition Law provisions of the EC Treaty, EEjiTtA, 1989, p. 160ff; M. Marines, EXAAvn, 1991, p. 1491ff; A. Argyriadis, Commercial Agency Agreement, EEuTtA, 1987, p. 153ff; A. Karagounidis, Issues of Termination and Indemnification in Distribution Agreement, Em0KEA, 2003, p. 376-400; K. Pampoukis, EmericEA, 2002, p. 399ff. It must be mentioned that the general-frame agreement consists of more sales of goods which are governed by articles 513ff ("Sale", as amended by Law No 3043/2002) as well as article 386 ("Contract providing for successive partial performances") of the G.C.C. by which if the contract is to be implemented by successive partial performances and the debtor has been placed under notice in respect of or it has not been possible due to his fault for him to furnish a partial performance the creditor shall have the right to claim damages or to rescind the contract only with regard to the said partial performance; in so far as the remaining partial performances are concerned the creditor shall only have the same rights if the delay or the impossibility affecting a partial performance is so substantial that the creditor has no more interest in the performance of the remainder of the contract or if there is a well founded apprehension that the debtor shall fail to furnish the remaining performances. Under these conditions the right of the creditor to claim damages or to rescind the contract shall also be extended to the part of the contract that has already been performed. See L. Georgakopoulos, Law of Lasting Obligations, 1979. p. 162ff; E. Papakosta/ X. Katsiani, NoB, 1980. p. 790ff.

⁷⁸ In fact, he enjoys greater independency compared to commercial agents.

⁷⁹ A. Karagounidis (Issues of Termination and Indemnification in Distribution Agreement. ETTKTKEA. 2003. p. 376-377, point 2) underlines the existence of a special spectrum of contractual obligations on the part of distributor, that secure supplier's interests and hence exceed those of a typical merchant.

⁸⁰ Especially, due to discounts offered by the supplier. However, the distinction between commercial agency and distribution agreement can be problematic when the aforementioned difference is equal to commercial agents' commission (E. Perakis. General Commercial Law. 1999. p. 413).

well as to parties' specific intention and interests, to the extent these are not in breach with good faith and generally accepted, business usages⁸¹.

2.1.1 Formalities

Distribution contracts are not required to be concluded in writing, thus an oral agreement being valid⁸².

2.1.2 Territory

In light of sole distribution agreement, the manufacturer is obliged to sell his products exclusively to the exclusive distributor in the agreed territory. This means that the manufacturer is not allowed to sell his products to another person or business entity or to have another distributor, active in the territory of the exclusive distributor at the same time. This obligation is often accompanied by a clause, contained in the distribution agreement, by means of which, the supplier is obliged to indemnify the distributor with a predetermined amount (penalty clause)⁸³.

2.1.3 Main Obligations of Supplier

The main obligation of the supplier, in case of an exclusive distribution agreement, is to sell his products exclusively to the distributor in the agreed territory and to continuously support him (i.e. providing documents, certificates or advertising leaflets regarding the products, machinery, know-how, trademarks, information about the relevant market, methods of marketing)⁸⁴. Furthermore, the negative aspect of freedom of contracts shall be eliminated under the perspective of good faith established by articles 281 and 288 of the G.C.C. since the distributor often depends

⁸¹ Articles 281 and 288 of the G.C.C. See Ap. Georgiadis, *New Contractual Forms of Temporary Economy*, 2000, p. 20-22. About the different views in Greek case-law see Decision No 1612/2002 of the Supreme Court, Nomos Database; Decision No 812/1991 of the Supreme Court, EEujtA, 1992, p. 221ff; Decision No 269/2003 of the Court of Appeal of Athens, AEE, 2003, p. 552ff; Decision No 8710/2001 of the Court of Appeal of Athens, Nomos Database; Decision No 7303/2002 of the Court of Appeal of Athens, EmaKEA, 2003, p. 446ff; Decision No 6642/1992 of the Court of Appeal of Athens, EEuTtA, 1992, p. 558ff, Decision No 1251/1991 of the Court of Appeal of Piraeus, EEurcA, 1991, p. 625ff; Decision No 33805/2002 of the Multi-member Court of First Instance of Thessaloniki, Nomos Database; Decision No 1876/2002 of the Court of Appeal of Thessaloniki, Nomos Database; Decision No 9658/1995 of the Court of Appeal of Athens, AEE, 1996, p. 154ff; Decision No 627/2001 of the Multi-member Court of Thessaloniki, AEE, 2001, p. 382ff; Decision No 3375/1999 of the Court of First Instance of Athens, AEE, 2000, p. 1231ff; Decision No 2948/2002 of the Court of Appeal of Athens, AEE, 2002, p. 614ff; Decision No 3099/1999 of the Court of Appeal of Athens, EmcjKEA, 2000, p. 240ff; Decision No 7635/2000 of the Multi-member Court of First Instance of Athens, AEE, 2000, p. 1093ff ; Decision No 849/2002 of the Supreme Court, Nomos Database; Decision No 588/2002 of the Supreme Court, XpIA, 2001, p. 630ff; Decision No 1912/2004 of the Court of Appeal of Athens, AEE, 2004, p. 930ff; Decision No 159/1990 of the Multi-member Court of First Instance of Thessaloniki, Apu., p. 123ff (in commercial agency).

See the relevant chapter in commercial agency agreements. See also Decision No 1876/2002 of the Court of Appeal of Athens, EmoKEA, 2003, p. 437ff; Decision No 904/1976 of the Court of First Instance of Ioannina, EEN, 1976, p. 202ff; Decision No 2676/1974 of the Court of First Instance of Athens, NoB, 1974, p. 1416ff; Decision No 36/1967 of the Court of Appeal of Athens, NoB, 1967, p. 997ff; Decision No 59/1977 of the Court of First Instance of Corinth, EEuTtA, 1977, p. 477ff.

⁸² See articles 404ff (especially article 409) of the G.C.C. See Decision No 1876/2002 of the Court of Appeal of Athens, EmoicEA, 2003, p. 437ff; Decision No 9658/1995 of the Court of Appeal of Athens, AEE, 1995, p. 154ff.

⁸³ See Decision No 1876/2002 of the Court of Appeal of Athens, EmmcEA, 2003, p. 437IT; Decision No 7635/2000 of the Multi-member Court of First Instance of Athens, AEE, 2000, p. 10931T; Decision No 9658/1995 of the Court of Appeal of Athens, AEE, 1995, p. 154ff. However, the exclusivity shall be viewed under the scope of articles 85 and 86 of the Treaty of Rome.

on supplier's sales⁸⁵. Other ancillary obligations can arise from good faith in concreto, taking also into consideration the level of distributor's incorporation in supplier's overall network. Nevertheless, it shall be accepted that the supplier is obliged to inform the distributor on time, as regards difficulties relating to the proper supply of products and radical changes in distribution network or in technology, that may have an influence on distributor's business efficiency.

2.1.4 Main Obligations of Distributor

Distributors are obliged to purchase the agreed products and to resell them on their own responsibility and risk as well as to protect the interests of their suppliers, in the territory agreed, following their instructions and despite of their commercial independency, while, sometimes, they have to pursue a continuous increase of sales⁸⁷. Additionally, they are often obliged to organize a distribution network by contracting with other sub-distributors. In terms of marketing, they have to advertise the products and for this purpose, they participate in exhibitions at their expense whereas they are obliged to inform their suppliers in time concerning any infringement of their rights. On the other hand, exclusive distributors must not sell competitive products or disclose to third parties confidential information to which they have access, due to the distribution agreement⁸⁸. In general, distributors may undertake obligations of same character and content to those of commercial agents (i.e. stock), running, in addition, the commercial risk⁸⁹.

2.1.5 Termination

According to Greek case-law, article 8 para. 2-8 of the Presidential Decree shall apply regarding the termination of distribution agreements since these provisions express, in details, general principles that are met in G.C.C. only in certain circumstances but nevertheless, govern all lasting contractual obligations⁹⁰. Hence, these provisions shall maintain their mandatory character. Furthermore, articles 724-725 of the G.C.C. shall not apply since they do not take into consideration the basic distinction (that is also noted in distribution agreements) between contracts for a fixed or an indefinite

⁸⁵ For that reason, the distributor must provide him with a plan of future orders in due time. See Farmakidis, *Sole Distribution Agreement*, 1990, p. 22ff.

⁸⁶ Regarding the prescription of distributor's rights against his supplier in case of defective products, see articles 560 and 561 of the G.C.C.

⁸⁷ Decision No 1876/2002 of the Court of Appeal of Athens, EjnoKEA, 2003, p. 437ff; Decision No 84/2000 the Court of Appeal of Athens, AEE, 2000, p. 1228; Decision No 7635/2000 of the Multi-member Court of First Instance of Athens, AEE, 2000, p. 1093ff.

⁸⁸ Articles 717, 718 and 303 of the G.C.C. shall also apply.

⁸⁹ This is the reason why L. Georgakopoulos indicates that distributors perform a further step than commercial agents (Consultatory Response, AEE, 1998, p. 112ff) while K. Pampoukis describes that as a difference in the final allocation of commercial risk (Commercial Agency, EmmcEA, 1995, p. 696ff, especially p. 697, point 2). As it has been noted, "del credere" terms in commercial agency agreements do not affect the aforementioned conclusion.

⁹⁰ See articles 585ff, 594, 608ff, 669ff, 700, 724ff, 766ff of the G.C.C. See Decision No 1912/2004 of the Court of Appeal of Athens, AEE, 2004, p. 930ff (competitive behavior constitutes a serious reason for termination with immediate effect); Decision No 1628/2004 of the Court of Appeal of Athens, AEE, 2004, p. 1177ff; Decision No 849/2002 of the Supreme Court, NoB, 2003, p. 47ff; Decision No 9155/2002 of the Court of Appeal of Athens, AEE, 2004, p. 677ff; Decision No 7635/2000 of the Multi-member Court of First Instance of Athens, AEE, 2000, p. 1093ff (termination due to non achievement of minimum sales term, provided for in distribution agreement); Decision No 8316/1999 of the Court of Appeal of Athens, XpIA, 2001, p. 353ff; Decision No 3375/1999 of the Court of First Instance, AEE, 2000, p. 123 Iff; Decision No 305/1997 of the Multi-member Court of First Instance of Athens, BE^TiA, 1998, p. 53 Iff; Decision No 1097/1999 of the Court of Appeal of Athens, EEn?tA, 1999, p. 45; Decision No 34339/1998 of the Court of First Instance of Athens, AEE, 1999, p. 494ff (termination in excess of good faith as provided in article 281 of the G.C.C.).

term . Given the aforementioned points, the relevant chapter in commercial agency is also applicable.

2.1.6 Indemnification upon Termination

Under the scope of Decisions No 7303/2002 and No 119/2002 of the Court of Appeal of Athens⁹², indemnification of article 9 of the Presidential Decree is recognized to distributors only exceptionally, to the extent their commercial position in suppliers' distribution network does not substantially differ from the presumably weak position of commercial agents. That conclusion should be justified by certain circumstances of each distributor (i.e. disproportion of economic power) and mainly by an evaluation of the internal perspective and operation of the distribution agreement⁹³.

Provided that the aforementioned weak position is revealed, it should be emphasized that, apart from the additional prerequisites analyzed in commercial agency for such compensation, the payment of this indemnity shall be equitable whenever the distributor has proceed to valuable investments in anticipation of future performance of the distribution agreement. On the contrary, such consideration shall not be granted if distributors enjoy significant independency and thus are not obliged to follow suppliers' instructions or to create a distribution network, to advertise their products and to inform them if their legitimate rights (i.e. trademarks, copyright) are infringed. Furthermore, suppliers' substantial benefits will be extinguished if distributors violate a restraint of trade clause following termination of the distribution contract⁹⁴.

Finally, the compensation payable by suppliers may include the damage sustained by distributors and in particular the expenses incurred for advertising as well as for press announcements and participations in exhibitions, their general operating costs⁹⁵, their lost profits in light of article 298 of the G.C.C.⁹⁶, the value of stock or spare parts under the scope of article 722 of the G.C.C.⁹⁷ and a fair reparation for moral prejudice

⁹¹ Particularly, article 724 of the G.C.C. ("Revocation of mandate") provides that a mandatory shall have the right to revoke the mandate at any time. An agreement to the contrary shall be void except if the mandate also concerns the interest of the mandatory or of a third party. Apart from that, good faith imposes that contracts fixed for indefinite term must be terminated following prior notice that must be communicated to the other party within a fixed time limit. See A. Karagounidis, *Issues of Termination and Indemnification in Distribution Agreement*, EmoicEA, 2003, p. 387, point I; M. Marines in Decision No 12796/1987 of the Court of First Instance of Athens, EUAvn, p. 845ff; X. Tsene, *Exercise of Termination in Law of Contracts-Distribution Framework*, EEU3rA, 2004, p. 220-236; L. Georgakopoulos, *Law of Lasting Obligations*, 1979.

⁹² EraoKEA, 2003, p. 437ff; EmaicEA, 2002, p. 425ff (respectively). See also Decision No 1246/2000 of the Court of Appeal of Piraeus, AEE, 2001, p. 893ff; Decision No 8316/1999 of the Court of Appeal of Athens, XpIA, 2001, p. 353.

For that purpose distributor's rights and obligations should be compared with those of a typical commercial agent. See A. Karagounidis, *Issues of Termination and Indemnification in Distribution Agreement*, EmaKEA, 2003, p. 388-394; Th. Liakopoulos, *General Commercial Law*, 1998, p. 192-193; Th. Liakopoulos, *Issues of Commercial Law*, Vol II, 1997, p. 130ff; L. Georgakopoulos, *Consultatory Response*, AEE, 1998, p. 113. Furthermore, their profits must be taken into account by way of analogy of the provisions applicable to commercial agency.

⁹⁴ See M. Marines in Decision No 1097/1999 of the Court of First Instance, EEujIA, 1999, p. 48-49.

⁹⁵ See Decision No 1876/2002 of the Court of Appeal of Thessaloniki, EmoKEA, 2003, p. 437ff.

Decision No 849/2002 of the Supreme Court is of importance in order a lawsuit concerning distribution agreements and mainly lost profits not to be rejected as indefinite by the Greek Courts. See also Decision No 22/1995 of the Supreme Court. EAlAvr], 1995, p. 1538ff; Decision No 17426/1996 of the Multi-member Court of First Instance of Thessaloniki, EEUtTA, 1997, p. 493 ff. ⁹⁷ See Decision No 269/2003 of the Court of Appeal of Athens. AEE, 2003, p. 552ff; Decision No 7303/2002 of the Court of Appeal of Athens. EmmcEA. 2003. p. 4461T; Decision No 812/1991 of the Supreme Court, EAAAvn, 1991, p. 1490ff; Decision No 6642/1992 of the Court of Appeal of Athens, EEpiA, 1992. p. 559ff; Decision No 1007/1993 of the Multi-member Court of First Instance of Athens, EE^tA, 1995, p. 226ff. According to Decision No 34339/1998 of the Court of First Instance

in case of tort .

(AEE. 1999. p. 494ff). the manufacturer must repurchase the stock and spare parts in distribution agreement with a stock clause if termination is attributable to his fault.

⁹⁸ **Article 932 of the G.C.C. See also Decision No 1628/2004 of the Court of Appeal of Thessaloniki, BE[^]TiA, 2004. p. 512ff; Decision No 5808/2002 of the Court of Appeal of Athens, AEE, 2003, p. 1088ff; Decision No 3099/1999 of the Court of Appeal of Athens, Avq, 2000, p. 150ff.**