

Saint Louis University School of Law Scholarship Commons

All Faculty Scholarship

2018

International Contracts

William P. Johnson
Saint Louis University School of Law

Sabin Volciuc-Ionescu
Volciuc-Ionescu SCA


Catalin-Sergiu Dinu
Volciuc-Ionescu SCA

Katya Logunov
Barrister & Solicitor, Jones & Co.

Adrián Lucio Furman
M. & M. Bomchil Abogados

See next page for additional authors

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>

 Part of the [Commercial Law Commons](#), [Contracts Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Johnson, William P. and Volciuc-Ionescu, Sabin and Dinu, Catalin-Sergiu and Logunov, Katya and Lucio Furman, Adrián and Rose, Adam and Hertog, Willem den, International Contracts (April 1, 2020). 52 The Year in Review 69, 69-71; Forthcoming.

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

Authors

William P. Johnson, Sabin Volciuc-Ionescu, Catalin-Sergiu Dinu, Katya Logunov, Adrián Lucio Furman, Adam Rose, and Willem den Hertog

International Contracts

WILLIAM P. JOHNSON, SABIN VOLCIUC-IONESCU,
CATALIN-SERGIU DINU, KATYA LOGUNOV (STEPANISHCHEVA),
ADRIÁN LUCIO FURMAN, ADAM ROSE, AND WILLEM DEN HERTOOG*

I. Introduction

Since at least the days of *lex mercatoria*, merchants in different jurisdictions have had to navigate the distinctive issues and risks that are present when entering into contractual arrangements or undertaking obligations across borders or in foreign lands. And, as the village marketplace of old has become a global marketplace, international contracts have become ubiquitous. Today, issues that frequently arise in international contracts are not limited to merchants or business transactions, but instead cut across practice area and across jurisdiction. This article identifies some of the key developments for international contracts that occurred in 2017 in a variety of jurisdictions, with particular attention to commercial relationships that arise in connection with product distribution. Specifically, in this article we cover developments concerning international sales law, choice of law in Romania, franchising in Canada, termination of commercial agency in Argentina, a court decision on scope of commercial agency law in the UK, and the creation of a new commercial court in the Netherlands.

II. Status of the UN Convention on Contracts for the International Sale of Goods

The United Nations Commission on International Trade Law, or UNCITRAL, is a legal body of the United Nations whose purpose is to promote the progressive harmonization and unification of laws affecting international trade.¹ In order to accomplish its mandate, UNCITRAL (among other things) prepares and promotes the use and adoption of legislative instruments in key areas of commercial law, including legislative

* The authors are William P. Johnson, Dean and Professor, Saint Louis University School of Law, St. Louis, Missouri (Sections I and II); Sabin Volciuc-Ionescu and Catalin-Sergiu Dinu, Volciuc-Ionescu SCA, Bucharest, Romania (Section III); Katya Logunov (Stepanishcheva), Barrister & Solicitor, Jones & Co., Toronto, Canada (Section IV); Adrián Lucio Furman, Partner, M. & M. Bomchil Abogados, Buenos Aires, Argentina (Section V); Adam Rose, Partner, Mishcon de Reya LLP, London, England (Section VI); and Willem den Hertog, denhertog legal, The Hague, The Netherlands (Section VII). The article was edited by William P. Johnson.

1. See U.N. GAOR, 21st Sess., Supp. No. 16 at 99, U.N. Doc. A/6316 (Dec. 20, 1965).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

70 THE YEAR IN REVIEW

[VOL. 52

instruments that apply to international transactions in goods.² This update describes one such instrument, the United Nations Convention on Contracts for the International Sale of Goods (CISG),³ and identifies recent developments relating to the expanding scope, and increasing relevance, of the CISG due to the regular increase in the number of parties to the CISG.

The CISG is a multilateral treaty that governs certain sale of goods transactions.⁴ It is one of UNCITRAL's most significant legislative texts.⁵ The CISG's significance is due in part to its automatic application to most international sales transactions occurring every day.⁶ Its significance is also due to its widespread adoption.⁷ The CISG entered into force nearly three decades ago on January 1, 1988.⁸ The CISG continues to gain greater relevance for international sales of goods, as more and more countries accede to the CISG.⁹ Indeed, today most (though not all) member states of the European Union are parties to the CISG.¹⁰ And most of the top trading partners of the United States, including Canada, China, and Mexico, are parties to the CISG.¹¹

The CISG sees steady growth each year in the number of countries that become parties.¹² In recent years, much of the growth has been from non-European countries, expanding the CISG's reach to more and more of the developing world.¹³

The CISG entered into force for two new Asian countries during 2017: Vietnam on January 1 and Azerbaijan on June 1.¹⁴ In addition, three more non-European countries, as well as Palestine (which the United Nations recognizes as an independent state—but the United States and some other countries do not), acceded to the CISG throughout 2017.¹⁵ Specifically, Fiji

2. *See id.* at 100.

3. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (*entered into force* Jan. 1, 1988) [hereinafter CISG].

4. *See id.*

5. U.N. Convention on Contracts for the International Sales of Goods, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

6. CISG, *supra* note 3, art. 1(1).

7. *See id.* ¶ 4 at 34.

8. *See* Status of CISG, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [hereinafter Status of CISG]. Article 99(1) provides: "This Convention enters into force. . . on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession. . ."; CISG, *supra* note 3, art. 99(1).

9. CISG, *supra* note 3, art. 99(1).

10. *See* Status of CISG, *supra* note 8. Of the 27 EU Member States that will remain a part of the European Union after Brexit, only Ireland, Malta and Portugal are not yet parties to the CISG; *See* CISG, *supra* note 3, art. 99(1).

11. *See* Status of CISG, *supra* note 8.

12. *See id.*

13. *See id.*

14. *See* Status of CISG, *supra* note 8.

15. *See id.*

acceded to the CISG on June 7, Costa Rica acceded to the CISG on July 12, Cameroon acceded to the CISG on October 11, Palestine acceded to the CISG on December 29, all in 2017.¹⁶ The CISG will therefore enter into force for each of these three countries during 2018, bringing the current total number of parties to the CISG to eighty-nine.¹⁷

As more states become parties to the CISG, more transactions will be governed by the CISG under Article 1(1).¹⁸ Because many of the new states parties to the CISG are developing states, the goal of widespread adoption appears to be very likely.¹⁹ Similarly, two of the CISG's purposes—to remove legal barriers and to promote the development of international trade, both of which are identified as important to the promotion of friendly relations among countries²⁰—appear increasingly likely to be achieved. As more countries join the CISG, it is essential for practitioners and decision makers to be aware of the CISG, its potential applicability, and the consequences of its application.

III. Choice of Law—A Romanian Perspective

Romanian subsidiaries of companies that are part of an international corporate controlled group are increasingly subject to arrangements at the group level known as International Framework Contracts.²¹ The International Framework Contract is intended to be applicable to each member of the controlled group. For instance, if two international groups of companies have dealings between themselves in several jurisdictions and at different levels of the controlled group, there may be a strong preference to use the same contract in all jurisdictions, even when specific contractual relationships exist only at the local level (e.g., a contract between two Romanian subsidiaries). The choice of foreign law in contracts between Romanian companies (Domestic Contracts) in the context of International Framework Contracts has raised certain concerns in practice in Romania for many years.²²

In general, matters of choice of law in contracts in case of conflict of laws are regulated by EU Regulation no. 593/2008 on the law applicable to

16. *See id.*

17. *Id.* Two additional countries, Ghana and Venezuela, have signed but not yet ratified the CISG.

18. *See* CISG, *supra* note 3, art. 1(1).

19. *See* Status of CISG, *supra* note 8.

20. CISG, *supra* note 3, Preamble.

21. "A framework [contract] is an agreement. . . to establish terms governing contracts that may be awarded during the life of the agreement." *See What is a Framework?*, CONSTRUCTING EXCELLENCE, <http://constructingexcellence.org.uk/tools/frameworkingtoolkit/what-is-a-framework>.

22. *See generally Law Applicable to Contracts*, DARIE, MANEA & ASSOCIATES, <https://www.rolegal.com/law-applicable-contracts-private-international-law>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

contractual obligations (Rome I).²³ Rome I enshrines the principle of party autonomy, or freedom of contract, in relation to choice of law (Freedom of Choice of Law Principle).²⁴

There have been views in Romanian legal doctrine arguing that the mere choice of foreign law and jurisdiction in Domestic Contracts constitutes a foreign element and triggers a conflict of laws that would suffice for the purposes of the application of the Freedom of Choice of Law Principle under Rome I, making the choice of law clause enforceable.²⁵ On the other hand, the view of various other Romanian legal scholars has been that the parties' choice of a foreign law and/or foreign jurisdiction alone does not create a foreign element or conflict of laws and, instead, is domestic.²⁶ In domestic situations, the parties should not be able to choose a foreign governing law, according to such scholars.²⁷

Recent Romanian case law supports the view that the Freedom of Choice of Law Principle should not apply to a Domestic Contract even if it is related to International Framework Contracts.²⁸ In Decision 814/2016, the Romanian High Court of Cassation and Justice maintained that, in the absence of a foreign element, a contract is not subject to international private law rules and parties are not free to choose the applicability of a foreign law or foreign jurisdiction.²⁹ In this dispute, the parties were Romanian companies—subsidiaries of a French company and a U.S. company, respectively—and the contract subject to the dispute was based on an International Framework Contract between their parent companies.³⁰ By its terms, the contract was governed by French law and subject to the jurisdiction of French courts.³¹ The Romanian court concluded, however, that there was no foreign element, as the Romanian subsidiaries were entities different from their parent companies, with their own legal personality, and because the contract was wholly performed in Romania.³² Hence, the contract was governed by Romanian law and subject to the jurisdiction of the Romanian courts, despite the choice of law clause.³³

While the Romanian legal system, like other civil law systems, does not recognize case law as legal precedent, in practice, the decisions of the High Court of Justice and Cassation are frequently used as guidance by lower

23. Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 177/6) 1 (EC) [hereinafter Rome I].

24. *Id.*

25. *See id.*; *see generally Romania: Which law will apply?*, E-JUSTICE EUROPA, https://e-justice.europa.eu/content_which_law_will_apply-340-ro-en.do?member=1.

26. *See* Rome I, *supra* note 23; *see generally Romania: Which law will apply?*, *supra* note 25.

27. *See Romania: Which law will apply?*, *supra* note 25.

28. Romanian High Ct. of Cassation and Justice [Rom.] Apr. 19, 2016, Decision 814/2016.

29. *Id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

courts.³⁴ The authors tend to believe that the practice of choosing a foreign law to govern Domestic Contracts will continue to be discontinued as a result.

IV. Franchising in Canada

A. BRITISH COLUMBIA ENACTS FRANCHISE LEGISLATION

On February 1, 2017, British Columbia became the sixth Canadian province to enact franchise legislation.³⁵ The British Columbia Franchises Act³⁶ is modeled on the Uniform Franchises Act³⁷ developed by the Uniform Law Conference of Canada and is similar in many respects to the franchise statutes currently in force in Alberta, Ontario, New Brunswick, Prince Edward Island and Manitoba.³⁸

The Franchises Act establishes a disclosure regime for franchises to be operated, wholly or partly, in the province.³⁹ Franchisors must deliver to prospective franchisees a compliant disclosure document at least fourteen days before a franchise agreement is signed or any payment is made to the franchisor.⁴⁰ Franchisors must disclose not only information as prescribed by the regulations, but also all “material facts,” which are defined as any information about the system or the franchisor that can reasonably be expected to have a significant adverse effect on the value or price of the franchise or on the franchisee’s decision to buy it.⁴¹ The requirement to disclose all material facts in addition to the prescribed information does not exist in some jurisdictions, including the United States.⁴² International franchisors should take note of this requirement when they enter the Canadian market, as failure to disclose a material fact may give rise to a sixty-day or even two-year rescission remedy, depending on the severity of the omission.⁴³

The Franchises Act allows franchisors to charge a non-refundable deposit before providing disclosure, so long as the deposit does not exceed 20

34. See Dana Neacsu and Anamaria Corbescu, *Doing Legal Research in Romania*, NYU GLOBAL LAW (Feb. 2017), <http://www.nyulawglobal.org/globalex/Romania1.html>.

35. See *New BC Franchises Act and regulation in force on 1 February 2017*, BRITISH COLUMBIA LAW INSTITUTE (Oct. 4, 2016), <https://www.bcli.org/new-bc-franchises-act-and-regulations-in-force-on-1-february-2017>.

36. Franchises Act, SBC 2015, c 35 (Can.).

37. *Report on A Franchise Act For British Columbia*, Report no. 76, at x, B.C. LAW INST. (March 2014), http://www.bcli.org/wordpress/wp-content/uploads/2014/05/report-76_BC-franchise-act_final_3_with_cvr1.pdf.

38. See *id.*

39. See Franchises Act, *supra* note 36, at §§ 2(1)-2(2).

40. See *id.* § 5(1).

41. See *id.* § 1(1) (defining material facts).

42. There is no broad requirement to disclose *all* material facts under the Federal Trade Commission’s franchise rule. See 16 C.F.R. § 436.

43. See Franchises Act, *supra* note 36, § 6; see also *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 O.A.C. 236.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

percent of the initial franchise fee.⁴⁴ Entering into a confidentiality and site selection agreement before providing disclosure is also permissible.⁴⁵

There are certain exemptions from disclosure requirements available under the Franchises Act, including exemptions for a grant of a franchise to a director or officer of the franchisor, a grant of an additional franchise to an existing franchisee, and the grant of a fractional franchise.⁴⁶

The Franchises Act imposes a duty of fair dealing, requiring both franchisors and franchisees to act in good faith in the performance and enforcement of the franchise agreement.⁴⁷ The Act also gives franchisees the right to associate with other franchisees, and franchisors are prohibited from impeding this right.⁴⁸ Franchisors from foreign jurisdictions where the right to associate is not protected by legislation should take note that respective prohibitions in their franchise agreement will not be enforceable against Canadian franchisees.⁴⁹

The Franchises Act gives franchisees two very powerful tools to protect their interests against franchisors' misconduct: the right to rescind the franchise agreement without penalty for insufficient disclosure or lack of it, and the statutory damages right.⁵⁰ A franchisee may rescind the franchise agreement within sixty days after receiving an incomplete or non-compliant disclosure, or within two years if no disclosure was provided at all.⁵¹ In Ontario, courts have ruled that the two-year rescission period also applies to claims where a disclosure document was provided, but misrepresentations or omissions in it were so significant that it amounted to no disclosure at all.⁵² It remains to be seen whether courts in British Columbia will follow the same approach.

If a franchisee suffers a loss because of a franchisor's misrepresentation or failure to comply with the disclosure requirements or the duty of fair dealing, the franchisee can claim damages against the franchisor.⁵³ A franchisee does not need to select between claiming a rescission remedy and claiming statutory damages, but no double recovery will be allowed if a franchisee succeeds on both claims.⁵⁴

International franchisors, and particularly operators from the United States, should note that in British Columbia (and the rest of the Canadian disclosure provinces), it is not sufficient to update the disclosure document

44. See generally Franchises Act, *supra* note 36, § 5(13); see also Franchises Reg., BC Reg 238/2016, § 11.

45. See Franchises Act, *supra* note 36, § 5(11).

46. See *id.* § 5(8).

47. See *id.* § 3.

48. See *id.* § 4.

49. See Franchises Act, *supra* note 36, § 4.

50. See *id.* §§ 6-7.

51. See *id.* §§ 6(1)-(2).

52. See 6792341 *Canada Inc. v. Dollar It Ltd.*, 2009 ONCA 385; 2337310 *Ontario Inc. v. 2264145 Ontario Inc.*, 2014 ONSC 4370.

53. See Franchises Act, *supra* note 36, § 7.

54. See *id.* §§ 11(2)-(3).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL CONTRACTS 75

only once per year.⁵⁵ The information set out in the disclosure document must be current as of the date of disclosure (with certain exceptions specified in the regulations).⁵⁶ Even if there were no changes in the information since the disclosure document was last updated, the certificate of franchisor must be signed and dated as of the date of issue of the disclosure document.⁵⁷ Franchisors should pay attention to this seemingly minor difference, as failure to provide a properly signed and dated certificate has been declared a major deficiency giving rise to a rescission remedy in other provinces.⁵⁸

At the same time, the Franchises Act includes some provisions that differ from other Canadian franchise statutes.⁵⁹ Most importantly, in British Columbia a defect in form or a technical irregularity of disclosure document will not affect its validity, provided that the substance of disclosure is not affected and the document is otherwise substantially compliant with the Franchises Act.⁶⁰ This significant compliance provision is a welcome retreat from the strict compliance regime of the Ontario franchise statute, which allows rescission remedy for even a minor error in the content or method of delivery of the disclosure document.⁶¹

Although the disclosure requirements of the Act apply to new grants of franchises made after February 1, 2017, the Act applies retroactively to claims for damages related to breaches of the duty of fair dealing and the right to associate.⁶² Accordingly, as of February 1, 2017, franchisees can claim damages for breaches of the duty of good faith and fair dealing in the performance and enforcement of franchise agreements entered into prior to February 1, 2017.

The Franchises Act has not yet been considered by courts. It remains to be seen whether British Columbia's judiciary takes a predominantly franchisee-friendly approach to franchise disputes, as the judiciary has in Ontario and Alberta. Although the Franchises Act is a remedial legislation, the adoption of the significant compliance doctrine in British Columbia may reduce the risks of rescission of franchise agreements by franchisees based on minor deficiencies of franchise disclosure.⁶³

55. See *id.* §§ 11(2)-(3).

56. See Franchises Reg., *supra* note 44, §§ 5(4), 25-26.

57. *Hi Hotel Ltd. Partnership v Holiday Hospitality Franchising Inc.*, 2008 ABCA 276, ¶¶ 103-04, available at <http://canlii.ca/t/208h3>.

58. See *id.* ¶¶ 61, 67; 6792341 *Canada Inc. v. Dollar It Ltd.*, 2009 ONCA 385, ¶¶ 22, 32; *Sovereignty Investments Holdings Inc v. 9127-6907 Quebec Inc.*, 2008 CanLII 57450 (ON SC) [2008], ¶¶ 15, 19, available at <http://canlii.ca/t/21fvh>.

59. See generally Franchises Act, *supra* note 36.

60. See *id.* § 9.

61. See 4287975 *Canada Inc. v Imvrescor Restaurants Inc.*, 2009 ONCA 308, leave to appeal ref'd 2009 SCCA No 244; *Vijh v Mediterranean Franchise Inc.*, 2013 ONCA 698, aff'g 2012 ONSC 3845.

62. See Franchises Act, *supra* note 36, §2(2).

63. See *Raibex Canada Ltd v ASWR Franchising Corp.*, 2016 ONSC 5575, rev'd 2018 ONCA 62.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

76 THE YEAR IN REVIEW

[VOL. 52]

B. ONTARIO AVOIDS THE JOINT EMPLOYER PROBLEM

On June 1, 2017, Ontario's liberal government introduced Bill 148, the Fair Workplaces, Better Jobs Act, 2017,⁶⁴ following a two-year review of Ontario workplace legislation and practices by the Ontario Ministry of Labour.

The issuance of the Changing Workplaces Review: Special Advisors' Interim Report⁶⁵ in January 2016 raised concerns that Ontario may change the test for related employer status (similar to the joint employer status in the United States) in a way that would target the franchise industry.⁶⁶

The Ontario Labour Relations Act and Employment Standards Act provide that two or more companies may be treated as one employer if they are engaged in a related business and are commonly controlled or directed.⁶⁷ While in certain cases Ontario tribunals did declare a franchisor and a franchisee as a related or joint employer,⁶⁸ there is no hard and fast rule to treat franchisors as employers of their franchisees' employees.⁶⁹

Joint or related employer status could expose franchisors to claims advanced by franchisees' employees for wrongful dismissal, wage and overtime payments, collective agreements claims, and even human rights complaints.

Although the Interim Report suggests an option to amend existing legislation and make franchisors liable for employment standards violations of their franchisees,⁷⁰ Bill 148 did not adopt these suggestions and does not specifically target the franchise industry.⁷¹ But Bill 148 does introduce significant changes to Ontario's workplace legislation,⁷² which will impact many businesses in the province, including the franchise industry.

C. ONTARIO FRANCHISE STATUTE AMENDED

On November 14, 2017, Bill 154, the Cutting Unnecessary Red Tape Act, 2017,⁷³ an omnibus bill which amends various Ontario laws in an effort to reduce barriers for business, received Royal Assent. For the franchise

64. Fair Workplaces, Better Jobs Act, S.O. 2017, c. 22 (Can.) [hereinafter Bill 148].

65. C. Michael Mitchel and John C. Murray, *Changing Workplaces Review: Special Advisors' Interim Report*, ONTARIO MINISTRY OF LABOUR (July 27, 2016), https://www.labour.gov.on.ca/english/about/cwr_interim/index.php.

66. See *id.* at 67.

67. See *Labour Relations Act*, S.O. 1995, c. 1, Sch A, § 1(4) (Can.); See *Employment Standards Act*, S.O. 2000, c. 41 § 4.

68. See *United Brotherhood of Carpenters and Joiners of America, Local 785 v Second Cup Ltd.*, 1993 CanLII 7903 (ON LRB), ¶¶ 28-29, available at <http://canlii.ca/t/fkgrf>.

69. See generally *Labour Relations Act*, *supra* note 67; *Employment Standards Act*, *supra* note 67.

70. See C. Michael Mitchel and John C. Murray, *supra* note 65, § 4.2, 5.2.

71. See generally Bill 148, *supra* note 64.

72. See *id.* at Schedule 1.

73. Cutting Unnecessary Red Tape Act, 2017 S.O. 2017, c. 20 (Can.), available at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=5000 [hereinafter Bill 154].

industry, the most important amendments introduced by Bill 154 are amendments to the Arthur Wishart Act (Franchise Disclosure), 2000 (AWA).⁷⁴

While Canadian provincial franchise legislation is harmonized to a large extent, Ontario has for a time been an outlier with respect to certain issues covered in (or omitted from) the AWA.⁷⁵ In particular, Ontario is the only disclosure province that does not allow the parties to enter into a confidentiality agreement or site selection agreement before the disclosure is made, as these agreements are considered franchise agreements and can only be signed after disclosure is provided.⁷⁶ Franchisors are also not allowed to charge a deposit, whether refundable or not, before delivering a disclosure document.⁷⁷

These activities will be allowed in Ontario when the proclamation is made by the Lieutenant Governor of Ontario.⁷⁸ It is expected that the proclamation will be made once the government makes the respective revisions to the regulations made under the AWA.⁷⁹

But Bill 154 did not introduce the concept of significant compliance with disclosure obligations to the AWA, leaving franchisors vulnerable to rescission claims for what may be considered a minor noncompliance with the AWA.⁸⁰ Bill 154 also makes other amendments to the AWA, including refinement to the large investment exemption from disclosure requirements and the clarification that the single license exemption is a license granted for all of Canada.⁸¹

V. Early Termination – Distribution Agreements in Argentina

Early termination clauses in contracts with distributors are among the most important, and the most judicially challenged, contractual provisions for companies producing goods and services and using distributors to get their products to market.⁸² More often than not, producers reach a point when they determine that they must restructure their distribution

74. Arthur Wishart Act (Franchise Disclosure), 2000SO, c 3.

75. *See id.*

76. *See id.* §§ 1(1), 5(1).

77. *See id.* § 5(1).

78. *See* Bill 154, *supra* note 73, Schedule 9, § 15(2).

79. *See* Marianne Kennedy Beaulne and Andrew S. Cunningham, *Ontario Snips Red Tape in Over 40 Statutes, including OBCA, PPSA, and Franchise Legislation*, STIKEMAN ELLIOT (November 29, 2017), <https://www.lexology.com/library/detail.aspx?g=47081154-55f3-4ebb-9c92-e4f4bd7cecf8>.

80. *See generally* Bill 154, *supra* note 73; Arthur Wishart Act (Franchise Disclosure), *supra* note 74.

81. *See* Bill 154, *supra* note 73, Schedule 9, § 2(2), 3(8).

82. *See generally* Peter Godwin, Dominic Roughton, David Gilmore, Gavin Margetson, Elaine Wong and Christopher Hunt, *Terminating distribution agreements – know where you stand*, HERBERT SMITH FREEHILLS (January, 11, 2013), <https://www.lexology.com/library/detail.aspx?g=16176486-7f65-4724-9e2b-f99ab10b776e>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

channels.⁸³ At that point, they often become aware of the challenges they face in order to achieve a clean exit with existing intermediaries while minimizing potential liabilities and indemnification costs.⁸⁴ Understanding the rules governing early termination is essential for minimizing such liabilities and costs and for maximizing efficiency in the restructuring process, and is also recommended when entering into new agreements with distributors.

Until the enactment of the new Argentine Civil and Commercial Code (the Code) in August 2015, there was no specific regulation for agency, concession, or distribution agreements.⁸⁵ Consequently, all applicable principles stemmed from relevant case law.⁸⁶ One of these principles was that early termination by the manufacturer should consider granting a reasonable prior notice, allowing the distributor, within that period of time, to restructure and reorganize its business in order to minimize the effects of the termination.⁸⁷ The reasonableness requirement did not correlate to a specific number of months or to a pre-determined rule; it was analyzed on a case-by-case basis and depended on the characteristics of each relationship, including investments made by the intermediary, number of employees of the distributor devoted to the terminating client's operations, other clients of the intermediary, and so on.⁸⁸

Upon the enactment of the Code, specific rules for agreements with marketing intermediaries were established.⁸⁹ While the Code includes a specific chapter regulating agency and concession agreements, distribution agreements are mentioned in a single article that establishes that the rules for concession agreements shall apply when appropriate.⁹⁰ This vague regulation has been largely criticized by legal experts, especially when considering that distribution agreements are one of the most utilized and judicially tested agreements in the Argentine corporate world.⁹¹ Considering that the nature of distribution agreements is similar but not identical to concession agreements, determining which of the rules shall apply might be challenging and subject to judicial interpretation. But there is consensus with respect to the application of the early termination regulations provided for in concession agreements to distribution agreements.⁹²

83. *See id.*

84. *See id.*

85. *See* Marval, O'Farrell & Mairal, *Guide to Doing Business: Argentina*, LEXMUNDI (August 15, 2016), § 5.1, <https://www.lexmundi.com/Document.asp?DocID=8722>.

86. *See id.*

87. CODIGO PROCESAL CIVIL Y COMERCIAL DE LA NACION [COD. PROC. CIV. Y COM.] art. 1492 (Buenos Aires, 2014) (Arg.) [hereinafter the Code].

88. *See id.* Book Third, Title IV, Chapters 17 & 18.

89. *See id.* art. 1504.

90. *See id.* art. 1511 § (b).

91. *See generally* Peter Godwin, Dominic Roughton, David Gilmore, Gavin Margetson, Elaine Wong and Christopher Hunt, *supra* note 84.

92. *See* the Code, *supra* note 87, art. 1511 § (b).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL CONTRACTS 79

The Code establishes that prior notice of one month per year of duration is required for early termination without cause, with no cap.⁹³ The absence of a cap has been subject to criticism by those who believe that it may lead to unreasonable or inviable situations in certain relationships that have spanned decades (a twenty-four-year relationship could only be terminated with a two-year prior notice, for example).⁹⁴ If no prior notice is granted, or if such notice is not sufficient, the Code establishes that the terminating party shall be liable for the damages arising from such alleged sudden termination, including loss of profits.⁹⁵

Despite this straightforward disposition, some recent case law has departed from the Code's regulation and has returned to the pre-Code doctrine.⁹⁶ A recent case issued by Room D of the National Commercial Court of Appeals established that the term for a prior notice is not directly related to the duration of the agreement or to the number of months that remain before expiration of the term of the contract, but instead is correlated with the time needed by the distributor to reengage with the market after termination.⁹⁷ This decision also reinforced the importance of considering the investments made by the distributor and the need for the distributor to amortize its investments, and to do so during the term of the agreement.⁹⁸ Moreover, another case issued by the same court has established that the required amount of prior notice should not be conceived as a pre-determined number of months but should instead be directly related to the time needed by the distributor to take appropriate measures in order to avoid damages resulting from the termination.⁹⁹

Consequently, while the Code has provided some clarity with respect to early termination clauses and terms, it should also be noted that certain jurisprudence reflects a different approach.

As a matter of prudence, when entering into a new agreement with a distributor, the Code's regulation that requires prior notice of one month per year of duration should arguably be followed and reflected in the agreement.¹⁰⁰ But when a company is entering into a restructuring phase of its marketing channels and is in need of estimating the costs and timing to effect the termination with its existing distributors, in accordance with recent case law, other factors should be taken into account (investments made by the distributor, number of employees of the distributor devoted to the operations of the terminating party, other clients of the distributor, and

93. *See id.* art. 1492, 1508.

94. *See* Camara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [National Court of Commercial Appeals], 1/3/2016, "Sola Andres Valentin c/ Diageo Argentina S.A. s/Ordinario," (Arg.).

95. *See id.* art. 1493.

96. *See* Sola Andres Valentin c/ Diageo Argentina S.A. s/Ordinario.

97. *Id.*

98. *Id.*

99. Camara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [National Court of Commercial Appeals], 1/9/2016, "Cellularnet c/Telecom Personal," (Arg.).

100. *See* the Code, *supra* note 87, art. 1492, 1508.

the like) in order to determine the amount of prior notice that will allow the intermediary to reorganize its business and minimize the damages resulting from the termination.

VI. English Court Decision on Commercial Agency

The Commercial Agents (Council Directive) Regulations 1993¹⁰¹ (the Regulations) apply to the activities of commercial agents in Great Britain. The Regulations implement the European Union's Directive 86/653/EEC on the coordination of the laws relative to self-employed commercial agents (the Directive).¹⁰² This article does not address any impact of Brexit on the post-Brexit application of the Directive, but as the Regulations apply under English law, Brexit should not affect their application.¹⁰³ Any impact of Brexit would be seen if the EU were to update the Directive or if, post-March 2019, decisions are made at the Court of Justice of the EU (the CJEU), which the UK Government has made clear will not impact UK laws.¹⁰⁴

The term commercial agent means a self-employed intermediary who has continuing authority to negotiate (or to negotiate and conclude) the sale or purchase of goods on behalf of another person.¹⁰⁵ The Regulations do not apply to commercial agents when they operate on commodity exchanges or in the commodity market (the commodities exception).¹⁰⁶

Pluczenik is a Belgian company founded in 1948.¹⁰⁷ It is a world-leading diamantaire, purchasing rough diamonds from, among others, the De Beers organisation, which in 2013 moved its Global Sight operations from London to Botswana.¹⁰⁸ A Global Sight (Sight) is a week-long gathering convened by De Beers at which approved diamantaires would be invited to make purchases of boxes of rough diamonds.¹⁰⁹ Ten Sights are held annually.¹¹⁰ Historically, and certainly at the time when Pluczenik engaged Nagel to be its broker, Sightholders (such as Pluczenik) were required to use a broker to intermediate between the Sightholder and De Beers.¹¹¹ At some time in the

101. Commercial Agents (Council Directive) Regulations (EC) No. 3053/1993 of 1 January 1994. (For non-UK readers, the clauses of Regulations are each referred to as a Regulation).

102. Council Directive 86/653, art. 1, 1986 O.J. (L 382/17) (EC).

103. *See id.*

104. Brian Wheeler & Alex Hunt, *Brexit: All you need to know about the UK leaving the EU*, BBC (September 29, 2016), <http://www.bbc.com/news/uk-politics-32810887>.

105. Commercial Agents (Council Directive) Regulations, *supra* note 101, at 1(1).

106. Commercial Agents (Council Directive) Regulations, *supra* note 101, at 1 (2)(b).

107. *See History*, PLUCZENIK, <http://www.pluczenik.com/global.html#history>.

108. *See* Carli Cooke, *De Beers Names Tiffany Unit, Pluczenik, Suashish as Buyers*, BLOOMBERG (April 2, 2012), <https://www.bloomberg.com/news/articles/2012-04-02/de-beers-names-tiffany-unit-pluczenik-suashish-as-buyers>.

109. *Global Sightholder Sales*, DE BEERS, <http://www.debeersgroup.com/botswana/en/who-we-are/de-beers-in-botswana/global-sightholder-sales.html>.

110. *Id.*

111. *See W Nagel v. Pluczenik Diamond Company NV*, [2017] EWCA (Comm) 1750, ¶ 6.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL CONTRACTS 81

1960s, Pluczenik had appointed Nagel as its broker.¹¹² By 2000, it was no longer a requirement of De Beers that Sightholders use brokers.¹¹³ Pluczenik nonetheless retained Nagel as its broker, but terminated the arrangement when the Sight moved from London to Botswana in 2013.¹¹⁴

Regulation 17(1) states that “this regulation has effect for the purposes of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below,”¹¹⁵ and Regulation 17(2): “except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.”¹¹⁶ In other words, the Regulation provides that a self-employed commercial agent (which can be an individual, partnership, corporation or any other form of business structure) is entitled to be compensated by way of damages or indemnity on termination—indeed, under Regulation 17(8), even “where the agency contract is terminated as a result of the death of the commercial agent.”¹¹⁷

When Pluczenik refused to pay Nagel compensation following the termination of their arrangements, Nagel sued.¹¹⁸ A nine-day trial followed in the English High Court, and The Hon. Mr. Justice Popplewell’s judgment was handed down in July 2017.¹¹⁹

Most of the pleadings, Counsels’ oral submissions, the witness evidence, and cross-examination of the witnesses turned on traditional agency questions around contract terms, scope of authority, agent’s performance, and, especially, quantification of damages under Regulation 17¹²⁰ But one theme, raised in the defendant’s initial defense submission and opening remarks to the court, related to Pluczenik’s contention that the Sights involved sales on a commodity market, thus engaging the commodities exception.¹²¹ As the case progressed in court, arguments were made that the two expressions used in Regulation 1(2)(b) were synonymous, with counsel referring to the Oxford English Dictionary definition of commodity exchange as “an organised market for the bulk purchase of certain commodities, a commodities market.”¹²² In any event, if they were not synonyms, both terms applied.¹²³

The Judge determined that the English dictionary meaning of the language was less important than the French and German—after all, the

112. *See id.* ¶¶ 1, 6.

113. *See id.* ¶ 9.

114. *See id.* ¶ 1.

115. Commercial Agents (Council Directive) Regulations, *supra* note 101, at 17(1).

116. *Id.* at 17(2).

117. *Id.* at 17(8).

118. *See Nagel*, [2017] EWCA (Comm) 1750, ¶ 88.

119. *Id.*

120. *See id.*

121. *See id.* ¶ 58.

122. Commercial Agents (Council Directive) Regulations, *supra* note 101, at 1 (2)(b).

123. *See Nagel*, [2017] EWCA (Comm) 1750, ¶ 58.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

English law was implementing European law, which itself was based on French and German law.¹²⁴ As the Judge noted,¹²⁵ the French text of the Directive provides that the Directive rights do not apply: “. . .aux agents commerciaux dans la mesure où ils opèrent dans les bourses de commerce ou sur les marchés de matières premières.”¹²⁶ A “*bourse de commerce*” is a place where one buys and sells products that become value-added—in other words, base products of any description, and “*les marchés de matières premières*” more directly translates as “commodity markets.”¹²⁷ As the Judge went on to note, the commodity market must be wider than simply connoting the sum of all commodity exchanges for a particular commodity, otherwise their inclusion would be superfluous.¹²⁸ The Judge concluded that the sale of the boxes of rough diamonds at Sights at De Beers were sales on the commodity market and the Sights were in this respect a commodity exchange.¹²⁹

The importance of this decision is both specific to this case, in that the Regulations did not apply, and more widely relevant—and looked at with great interest by the industry—in that the Regulations did not apply to the industry as a whole.¹³⁰ Diamantaires would be free to terminate their brokers without concerns as to the financial consequences under the Regulations.¹³¹ It should also be noted that those financial consequences extend beyond the Regulation 17 compensation provisions.¹³² There are a number of other regulations that would then also fall away: Regulation 8 (entitlement to commission earned on transaction concluded after termination if mainly attributable to the efforts of the agent), Regulation 9 (possible commission sharing between old and replacement agent), Regulation 15 (minimum notice periods), and Regulation 20 (restrictions on restraint of trade clauses).¹³³

The other heavily contested issue in the case related to the quantification of the compensation under Regulation 17.¹³⁴ The Judge held that although the Regulations did not apply (because the commodities exception did), much of the trial had focused on a Regulation 17 compensation quantification exercise (on the basis that if the Regulations did apply, as Nagel contended, that exercise was required to be undertaken).¹³⁵ The leading case on compensation valuation was the 2007 case of *Lonsdale v*

124. *Id.* ¶ 57.

125. *See id.*

126. Council Directive 86/635, art. 54, 1986 O.J. (L 372) 1, 17 (EU).

127. *See id.*

128. *Id.* ¶ 58.

129. *Id.* ¶ 68.

130. *See generally* Council Directive 86/635, art. 54, 1986 O.J. (L 372) 1, 17 (EU).

131. *See id.*

132. *See id.*; *see also* Commercial Agents (Council Directive) Regulations, *supra* note 101, at 17.

133. *See* Commercial Agents (Council Directive) Regulations, *supra* note 101, at 8, 9, 15, 20.

134. *See Nagel*, [2017] EWCA (Comm) 1750, ¶ 28(4).

135. *See generally id.*

Howard & Hallam.¹³⁶ In *Lonsdale*, compensation was assessed by “valuing the net future income stream from commissions at the date of termination, and applying a suitable multiplier, by reference to what a purchaser would have been prepared to pay for it.”¹³⁷ In *Nagel*, in the Judge’s words, “by contrast, quantification of a common law claim is not concerned with a notional sale.”¹³⁸ “Damages for breach of contract are intended to put the innocent party in the same financial position as if the contract had been performed.”¹³⁹ As such, one might have thought that an explicit exercise would need to be carried out to assess common law quantum, which would be a different exercise from that undertaken in *Lonsdale*; valuing “what a purchaser would have been prepared to pay” for a terminated business seems to play no part in determining damages for breach of contract.¹⁴⁰ The Judge in *Nagel* found otherwise: “the damages for breach of the . . . agreement are to be calculated . . . in respect of the Regulation 17 claim . . .”¹⁴¹

Pluczenik sought leave to appeal the judgment, and leave was granted. The outcome will be eagerly awaited by principals, agents, and market participants in this and any other industry in which agency arrangements are common.

VII. The Netherlands Commercial Court

The Netherlands is in the process of instituting a Netherlands Commercial Court to compete with similar International Commercial Courts already existing elsewhere.¹⁴² It aims to provide a specialized, English-speaking, and affordable forum for international commercial disputes.¹⁴³ Its justices will be Dutch judges with relevant experience in international disputes and will be selected based in part on their fluency in English.¹⁴⁴

The NCC will not be a completely separate court, but will consist of special chambers of the Amsterdam District Court and Court of Appeal.¹⁴⁵ For the NCC to have jurisdiction, the following must be satisfied:

- a) the case must be of a commercial nature (and not concern patent, maritime, or employment issues) and have a value of more than € 25,000;
- b) the case must have an “international aspect”;

136. *Lonsdale v. Howard & Hallam Limited* [2007] UKHL 32, (appeal taken from EWCA Civ 63).

137. *See id.*; *Nagel*, [2017] EWCA (Comm) 1750, ¶ 84.

138. *See Nagel*, [2017] EWCA (Comm) 1750, ¶ 85.

139. *Id.*

140. *See id.* at ¶ 84; *Lonsdale*, [2007] UKHL 32, ¶ 12.

141. *See Nagel*, [2017] EWCA (Comm) 1750, ¶ 88.

142. *Netherlands Commercial Court (NCC)*, NCC, <https://www.rechtspraak.nl/English/NCC>.

143. *See id.*

144. *Id.*

145. *See id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

- c) the Amsterdam Court must have jurisdiction by normal Dutch rules, or all parties in the proceedings must have declared the Amsterdam Court competent; and
- d) all parties in the proceedings must have explicitly made a choice for proceedings in the English language and must have declared that the special procedural rules of the NCC shall apply.¹⁴⁶

A special set of procedural rules applies, but overall common Dutch procedure is applicable.¹⁴⁷ Parties must be represented by a Dutch *advocaat* and the normal Dutch rules of awarding costs are applicable, unless parties have explicitly agreed otherwise.¹⁴⁸

The advantage of the NCC over proceeding in a normal Dutch court is seen as twofold: the judges are more specialized in international commercial matters and the use of English on the one hand facilitates foreign parties and attorneys to represent their clients at a hearing and on the other saves on interpreters' and translation costs.¹⁴⁹ The advantage over proceeding in other international commercial courts and over arbitration is one of cost. Although the court fees are higher than in normal Dutch proceedings (normally about € 4,000 in the first instance to € 5,000 on appeal), they are less than in many foreign jurisdictions and less than an arbitrator's fees.¹⁵⁰ Also, unless parties agree otherwise, costs are awarded against the losing side according to the fixed-rate Dutch system (except in intellectual property cases, where full indemnification of the winning side's costs is possible).¹⁵¹

The court fees amount to € 15,000 (€ 20,000 on appeal)¹⁵² and cover the full proceedings. The costs awarded against the losing side (in the absence of a different agreement between parties) are computed according to a points system, and will typically be € 12,000 in simple cases, € 24,000 in intermediate cases, and € 48,000 in complex cases, with the order of complexity to be decided by the court.¹⁵³ On appeal, the corresponding amounts are € 18,000, € 36,000, and € 72,000.¹⁵⁴

As stated above, normal Dutch procedural rules apply, including the (in the eyes of common law lawyers) rudimentary Dutch rules of evidence.¹⁵⁵ There is essentially no discovery, no cross-examination of witnesses, no

146. Draft Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (Netherlands Commercial Court) and the Amsterdam Court of Appeal (Netherlands Commercial Court of Appeal) (The NCC Rules), *available at* https://www.rechtspraak.nl/SiteCollectionDocuments/concept-procesreglement-ncc_en.pdf [hereinafter NCC Rules].

147. *See Netherlands Commercial Court (NCC)*, *supra* note 143.

148. NCC Rules, *supra* note 147, art. 3.1.1.

149. *See Netherlands Commercial Court (NCC)*, *supra* note 143.

150. NCC Rules, *supra* note 147, art. 10.1, Annex II.

151. *See id.* at art. 10.3.

152. *See id.* at Annex II.

153. *See id.*

154. *See id.*; *See Legal Proceedings in the Netherlands*, BLENHEIM, <https://netherlands-commercial-court.com/proceedings-netherlands.html>.

155. *See Netherlands Commercial Court (NCC)*, *supra* note 143.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL CONTRACTS 85

verbatim report of the witnesses' statements, and no formal rules as to how to weigh the evidence; all is left to the court.¹⁵⁶ On the one hand, this leads to a less precise establishment of facts; on the other, it should save a considerable amount of money.

In the experience of the author, Dutch Courts typically aim to provide a decision within six to nine months from the time of the initial summons. It can be expected that in this new court, judges will aim for a speedy decision, especially early on. But parties are expressly given the possibility to ask for a postponement, provided they ask in unison.¹⁵⁷

The decision will be enforceable in any country in the EU and any other country with which the Netherlands has an enforcement treaty (including the UK after Brexit). In the absence of a civil enforcement treaty between the Netherlands and the United States, a decision of the NCC will not automatically be enforced in the United States without a renewed Court procedure, which U.S. parties might consider advantageous over arbitration: a foreign arbitral award is generally enforceable in the United States under the 1958 New York Convention.¹⁵⁸

The NCC was planned to begin operating on January 1, 2017.¹⁵⁹ But because under present law court proceedings must be conducted in Dutch, the launch was delayed until English as a court language is made legally possible.¹⁶⁰ This delay is expected to end by mid-2018.¹⁶¹ But of course, it is already possible to include a jurisdiction clause in contracts drafted now, conferring jurisdiction to the NCC.¹⁶²

The NCC (like all Dutch courts) will apply foreign law if that law governs the claims in dispute.¹⁶³ It is therefore not necessary (if advisable) to have Dutch law declared applicable.

A typical jurisdiction clause might read as follows:

Any and all disputes arising from or relating to this Agreement, including without limitation any amendments, addenda or supplements to this Agreement, shall be brought before the Courts of Amsterdam, The Netherlands. The Parties hereby irrevocably consent to the exclusive jurisdiction of such courts. The Parties declare to have chosen English as spoken and written in the United States as the procedural language and that the Rules of Procedure for the International

156. See generally NCC Rules, *supra* note 147.

157. NCC Rules, *supra* note 147, at art. 9.1.

158. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (*entered into force* June 7, 1959) [hereinafter New York Convention].

159. See *The Netherlands Commercial Court*, BLENHEIM, <https://netherlands-commercial-court.com/index.html>.

160. See *id.*

161. See *id.*

162. See NCC Rules, *supra* note 147, at art. 1.2, 6.1.

163. See *Going to Court in the Netherlands*, BLENHEIM, <https://netherlands-commercial-court.com/court-netherlands.html>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

86 THE YEAR IN REVIEW

[VOL. 52

Commercial Chambers of the Amsterdam District Court (Netherlands Commercial Court) and the Amsterdam Court of Appeal (Netherlands Commercial Court of Appeal) (The NCC Rules) shall be applicable.¹⁶⁴

¹⁶⁴. This clause is offered only as an illustration; drafting an agreement should always be tailored to the specifics of the case and the applicable prevailing and expected legal rules.

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**