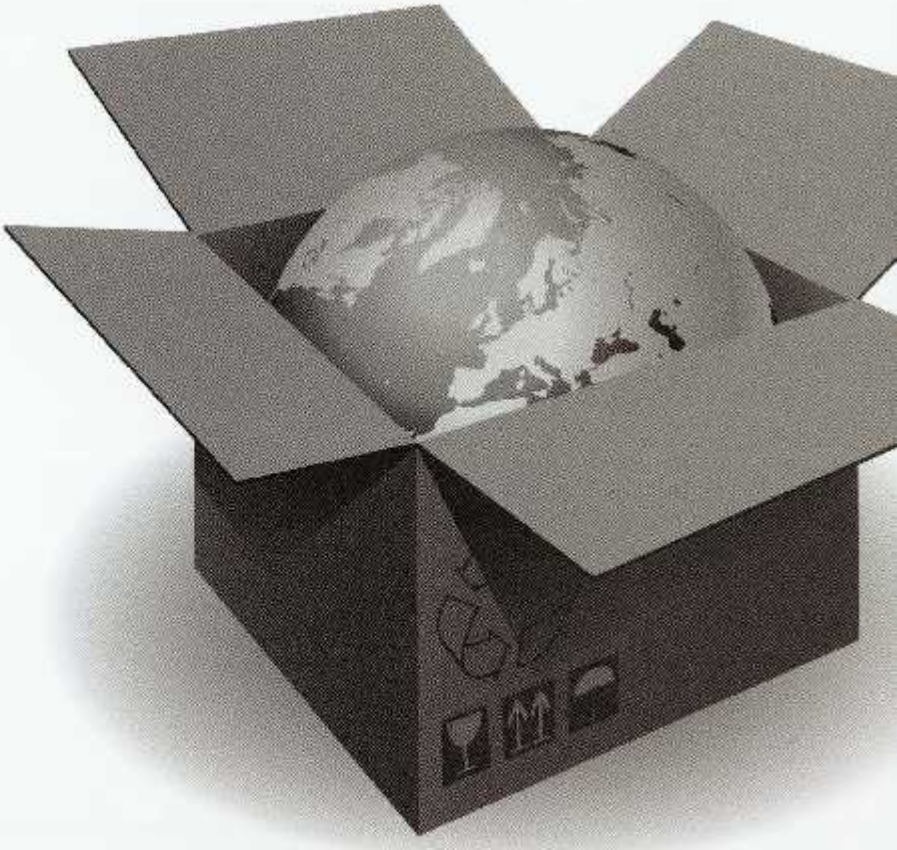
BAKER & MCKENZIE

International Agency and Distribution Handbook



Greece

1. Agency Agreements

1.1 General

1.1.1 Law Applicable

The rules that govern the relationship between commercial agents and their principals are set out in Presidential Decree No. 219/1991 (hereinafter, the "PD") as amended, by which Greece has implemented the provisions of the Agency Directive.

Under Article 1, par. 2 of the PD, the commercial agent is an intermediary who has continuing authority to negotiate the sale or purchase of goods or services on behalf of the principal, or to negotiate and conclude such transactions on behalf of and in the name of that principal.

A commercial agent does not include a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association, a partner who is lawfully authorised to enter into commitments binding on his partners and an administrator appointed by a Court, a liquidator or a trustee in bankruptcy.

The PD does not apply to commercial agents whose activities are unpaid or who operate on commodity exchanges or in the commodity markets.

1.1.2 Formal Requirements

Until recently (2007), the PD required a written commercial agency agreement as a condition for its application. Oral commercial agency agreements were governed by the Civil Code's provisions on "mandate". This provision sparked a heated debate, and case law was split down the middle, sometimes stating that without a written document an agent could not benefit from the PD and at other times ruling the opposite. Following the amendment by Law 3557/2007, a commercial agency agreement is not

subject to any formal requirements and may be concluded orally or in writing. As a result, all commercial agency agreements are now governed by PD 219/91, as amended. There is no other requirement (such as registration as a commercial agent with any professional or regional body).

However, each party is entitled to receive from the other on request a signed written document setting out the terms of the agency contract, including any terms subsequently agreed.

1.1.3 Individual/Corporate Entity

A commercial agent may be either an individual or a legal entity.

1.1.4 Duration of Agreement

There is no specific provision in PD 219/91, as amended, regulating the duration of a commercial agency. Therefore, the agreement's duration remains a matter for agreement between the contracting parties. A commercial agency agreement may be fixed or for an indefinite period.

According to article 8, par. 2 of said PD, "A contract for a fixed period which continues to be performed by both parties after that period has expired, shall be deemed to be converted into a contract for an indefinite period."

Accordingly, if the agreement is silent on this specific issue, it shall be deemed an agreement for an indefinite term.

Recently, the Supreme Court ruled that an agency agreement consisting of successive agreements for a definite period will be considered an agreement for an indefinite period if the content and the material provisions of the successive agreements are identical or substantially similar. Such agreements must therefore be terminated according to rules applying to indefinite term agreements.

1.2 Exclusive/Non-Exclusive

Subject to any competition law issues, a commercial agent may be appointed on either an exclusive or a non-exclusive basis.

In any case, any exclusivity or non-compete provisions are governed by the principles and legal requirements of EU and Greek competition law.

1.3 Non-Compete

The provisions of article 10 of the PD state that an agreement restricting the business activities of a commercial agent following termination of the agency contract is valid only if and to the extent that:

- it is concluded in writing; and
- it relates to the geographical area or the group of customers and geographical area entrusted to the commercial agent and to the kinds of goods covered by its agency under the contract.

A non-compete clause shall be valid for not more than one year after termination of the agency contract.

1.4 Termination

1.4.1 Formal Requirements

Termination of written agreements should be in writing even if the agreement is silent on the matter. Any specific formalities stipulated in a written agreement must be abided by. Other than these cases, neither the PD nor Greek civil law requires compliance with any formalities in order to terminate an agency agreement. It is advisable, however, for the avoidance of future disputes, that any termination notice be given in writing and specifically in a way that a proof of receipt of notice is generated.

The general principles of civil law also apply to the termination of an agency agreement, and, therefore, the contracting parties are absolutely free to stipulate all the relative terms, except those strictly regulated by the PD (as amended by Law 3557/2007).

1.4.2 Notice Period

According to article 8, par. 3 & 4 of the PD "Where a contract is concluded for an indefinite period either party may terminate it by notice. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, three months for the third year commenced, four months for the fourth year commenced, five months for the fifth year commenced and six months for the sixth year commenced and subsequent years. The parties may not agree on shorter periods of notice."

Moreover, according to article 8, par. 5 & 6 of the PD "If the parties agree on longer periods than those laid down in paragraphs 3 & 4 of PD 219/91, 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 end of the period of notice must coincide with the end of a calendar month."

The provisions of article 8, as set out above, shall apply also to fixed period contracts where such are converted under article 8, par. 2 into contracts for an indefinite period because of continued performance after expiry, subject to the proviso that any earlier fixed period must be taken into account in the calculation of the period of notice.

Also, as noted above, successive fixed term contracts will be treated as indefinite term contracts and must be terminated accordingly.

The agency contract may be immediately terminated without the observance of the above-cited periods of notice in case one of the contracting parties fails to carry out all or part of its obligations or where exceptional circumstances arise.

1.4.3 Liability of Principal on Termination

According to article 9 of the PD "The commercial agent, after termination of the agency contract, shall be entitled to a termination payment in the form of an indemnity if and to the extent that 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 the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission (profits) lost by the commercial agent on the business transacted with such customers".

The calculation of the indemnity is based on the provisions of article 9, par. 1(b) of PD, which state "The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question."

In particular, the Greek courts calculate the indemnity as follows.

- First of all, the court calculates the maximum indemnity payment according to the above method, i.e., a payment equal to the agent's average annual revenues over the last five years (or over the period the agreement lasted if it was less than five years).

- Then the court calculates the benefit that the principal will enjoy over a certain period following termination of the agreement (normally, five years) by (a) extrapolating the revenues (gross profits) of the agent during the last year of the agreement which concern new customers, (b) adjusting this number to reflect an annual percentage of loss of customers (normally, in the area of 30%), and (c) deducting from this amount the discount interest of 5% due to the fact that the substantial indemnity payment will be paid at once.

- If the amount of the total loss of the agent's revenues is less than the amount of the agent's average annual revenues over the last five years (or over the period the agreement lasted if it was less than five years), then the lesser amount is, in principle, the amount of the indemnity payment.

Additionally, according to Greek case law, the awareness of the brand and the

advertising expenses incurred by the principal are factors that may decrease the amount of the indemnity payment.

Furthermore, under article 9, par. 3 of the PD the indemnity is not payable:

- where the principal terminates the agency contract because of default attributable to the agent which justifies immediate termination of the contract;

- where the agent terminates the agency contract unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the agent as a consequence of which he may not reasonably be required to continue his activities; or

- where, with the agreement of the principal, the agent assigns his rights and duties under the agency contract to another person.

The obligation to pay an indemnity payment is absolute (subject, of course, to article 9, par. 3 PD see above). The grant of such a termination payment, however, may not prevent the agent from seeking any damages he has suffered as a result of the termination of his relations with the principal.

In particular, such damages include the costs incurred by the commercial agent as a result of the termination. For example: such costs include the cost of redundancy, penalties paid by the agent on terminated leases which are not needed by the commercial agent as a result of the reduction in turnover and non-amortized investments which were incurred for the purpose of the terminated business. If the circumstances surrounding the termination coule be deemed tortuous damages in tort, such as lost profits and damage to reputation, they would also be compensated.

Entitlement to a termination payment or to compensation for damages also arises where the agency contract is terminated as a result of the agent's death.

The agent may not be asked to derogate from his right to claim a termination

payment or compensation for damages before the agency contract expires.

1.4.4 Return of Products

In the absence of an agreement to the contrary, in the event of termination of a commercial agency agreement, the Greek Supreme Court has ruled that unsold stock must be repurchased if the stock is unsalable and was purchased in the normal course of business, even in cases where termination was for cause. The Greek Courts apply the rules on mandate which prescribe that the mandatee must be compensated for any expenses incurred for the performance its duties. The reverse, though, is not the case: the agent has no legal obligation to return any unsold products to the supplier. The rules on mandate are non-mandatory law, and hence the parties are free to enter into different arrangements or even exclude repurchase of stock.

1.5 Limitation Periods

According to article 9, par. 2 of the PD "The agent shall lose his entitlement to the indemnity payment or to compensation for damages in the instances provided for above, if within one (1) year following termination of the contract he has not notified the supplier that he intends pursuing his entitlement".

Generally, commercial claims among traders/merchants are prescribed after five years from the date when the relevant party became entitled to claim.

2. Distribution Agreements

2.1 General

2.1.1 Law Applicable

With regard to other kinds of distributors/dealers, until the recent enactment of Law 3557/2007, there was no specific legislation in Greece regulating the relationship between suppliers and distributors. For this reason, majority opinion and case law held that the provisions of civil law, especially those governing mandate agreements, applied by analogy to distribution agreements other than commercial agency. However, where distributors (other than

commercial agents) were integrated in their supplier's commercial organisation to such an extent that the commercial relationship became similar in structure and function to a commercial agency, then the provisions of the PD would also apply by analogy.

Following the recent amendment of the PD by Law 3557/2007, its provisions, including the indemnity claim under article 9, now expressly apply not only to commercial agents but also to exclusive distributors, on the condition that these constitute part of the commercial structure and organisation of the producer/supplier.

It should be noted that even prior to the recent amendment of the PD, the European Court of Justice had ruled (Case C-85/2003, Decision of 10.2.2004) that, despite the fact that Directive 86/653 was designed to apply only to commercial agents, it did not contain any provision prohibiting any national legislation from extending the application of the Directive to other categories of commercial relationships. To this effect, the Greek Supreme Court, confirming the application by analogy of the provisions of the PD to commercial relationships which are similar in structure and function to a commercial agency, handed down its ruling in Decision 139/2006, stating that there is no legal impediment to applying the PD to other continuous contracts "which present similarities as to the actual interests with commercial agency."

The Supreme Court defined the conditions under which a commercial relationship may be considered similar to a commercial agency structure and, therefore, the provisions of the PD apply to any such relationship, as follows: (i) the dealer acts as part of the commercial organisation of its supplier, occupying a weak position and having an intense dependence on the supplier and is integrated to the same degree as a commercial agent in the supplier's distribution system, (ii) the dealer contributes to expanding the supplier's customer base by acting in a manner comparable to the commercial agent manner, (iii) the dealer undertakes a non-competition/exclusivity obligation, (iv) the supplier is aware of the dealer's customers and at the end of the business relationship the dealer's customers are forwarded to the supplier and (v) generally, the financial activity of the dealer and its financial rewards (irrespective of their legal characterisation) are similar to those of a

commercial agent. These conditions are merely indicative, not cumulative nor exclusive.

Since handing down Decision 139/2006, the Supreme Court has reaffirmed its position in a number of decisions (212/2006, 57/2007). It seems that the Supreme Court, when confronted with a complex business relationship comprising agency and distribution, looks at the relationship as a whole rather than dissects each function and examines whether the distribution/resale function fulfils the criteria of its Decision 139/2006.

The Supreme Court's stance has drawn both criticism and support. Naturally, in view of what, in the absence of legislative intervention, seems to be now an irreversible trend in case law at least with regard to distributors, the trend seems to encompass, at least initially, all and any types of distribution agreement where there is a degree of integration, such as selective distribution and franchise agreements. To be clear, although there is no rebuttal to the argument that, in principle, there is nothing to prevent commercial agency concepts from being applied to other forms of distribution where there is a degree of integration with the supplier, the criteria of Decision 139/2006 have to be applied in establishing whether there are sufficient similarities between the function of any particular retailer and that of a commercial agent before one can say with any certainty that the provisions of the PD may be applied by analogy.

2.1.2 *Formal Requirements*

A distribution agreement is not subject to any formal requirements and may be concluded orally or in writing, or may arise impliedly from the conduct of the parties.

However, whereas it is often clear that "real" agency agreements no longer need to be in writing, the question of whether a written agreement is still required for the analogous application of the PD to other distribution relations remains undecided.

In order to avoid evidential difficulties in the event of a subsequent dispute between the parties, it is of course advisable that the terms of the distribution

relationship be documented in a formal agreement.

2.1.3 *Individual/Corporate Entity*

A distributor may be either an individual or a legal entity.

2.1.4 *Duration of Agreement*

There is no specific provision in the PD, as amended, regulating the duration of a commercial agency or distribution agreement. Therefore, the agreement's duration remains a matter for agreement between the contracting parties.

According to article 8, par. 2 of said PD "A contract for a fixed period which continues to be performed by both parties after that period has expired, shall be deemed to be converted into a contract for an indefinite period."

In case the agreement is silent on this specific issue, it shall be deemed an agreement for an indefinite term.

Recently, the Supreme Court ruled that a distributorship agreement consisting of subsequent agreements of definite periods is considered an agreement for an indefinite period if the content and the material provisions are the same or nearly the same.

2.2 Exclusive/Non-Exclusive

Subject to any competition law issues, a distributor may be appointed on either an exclusive or a non-exclusive basis. If an exclusive distributor constitutes an integral part of its supplier's sales organisation, performing functions similar to those performed by commercial agents, the PD will apply.

Exclusive distribution means the supplier agrees to sell its products to only one distributor for resale in a particular territory. This is also called "sole exclusivity" as opposed to "shared exclusivity," pursuant to which the supplier agrees to supply a specific number of undertakings for resale only within a defined territory.

On the other hand, in a non-exclusive distribution agreement, the supplier is

free to sell its products in the particular territory to various distributors and, being a distributor itself, even via direct sales to the customers.

As a general principle, exclusive distributorship agreements impose more restrictions/obligations on the distributor than non-exclusive agreements usually do. For example, a supplier may impose a non-compete obligation on its distributors in the case of both sole and of shared exclusivity. In this case, the distributor agrees not to distribute products for any other suppliers to the extent that they compete with the supplier's products.

In any case, any exclusivity or non-compete provisions are governed by the principles and legal requirements of EU and Greek competition law.

2.3 Non-Compete

The provisions of Article 10 of the PD stipulate that an agreement restricting the business activities of a distributor following termination of the agency contract is valid only if and to the extent that:

- it is concluded in writing; and
- it relates to the geographical area or the group of customers and the geographical area entrusted to the distributor and to the kinds of goods covered by its distribution agreement under the contract.

The existence of a non-compete clause in a distributorship relationship constitutes evidence of the distributor being part of the commercial structure and organisation of the producer, increasing the likelihood of the analogous application of the agency provisions of the PD.

A non-compete clause shall be valid for not more than one year after termination of the distribution agreement.

2.4 Termination

2.4.1 *Formal Requirements*

Termination of written agreements should be in writing even if the agreement is silent on the matter. Any specific formalities agreed in a written agreement must be abided by. Other than these cases, neither PD 219/91 nor Greek civil law requires compliance with any formalities in order to terminate a distributorship agreement. It is advisable, however, for the avoidance of any misunderstandings and future disputes, that any termination notice be given in writing and in a way that a proof of receipt is generated. This way, there would be no room for uncertainty, particularly in relation to whether the termination notice was ever actually given or its effective date.

The general principles of civil law apply also in the termination of a distributorship agreement, and, therefore, the contracting parties are absolutely free to stipulate all the relative terms, except those strictly regulated by the PD, as amended by Law 3557/2007 (see sections 2.4.2 and 2.4.3 below).

2.4.2 *Notice Period*

According to article 8, par. 3 & 4 of the PD "Where a contract is concluded for an indefinite period either party may terminate it by notice. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, three months for the third year commenced, four months for the fourth year commenced, five months for the fifth year commenced and six months for the sixth year commenced and subsequent years. The parties may not agree on shorter periods of notice."

Moreover, according to article 8, par. 5 & 6 of the PD, "If the parties agree on longer periods than those laid down in paragraphs 3 & 4 of PD 219/91, 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 end of the period of notice must coincide with the end of a calendar month."

The provisions of article 8, as set out above, shall apply to a contract for a fixed period where it is converted under article 8, par. 2, into a contract for an indefinite period, subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

Greek courts have ruled that these provisions are mandatory law in all situations where a distributor is integrated into its supplier's sales organisation in order to perform functions similar to those of a commercial agent.
By application of the principle of avoidance of abusive exercise of rights (Article 281, Greek Civil Code), any long-term distribution agreement (other than commercial agency or similar distribution agreements, which are treated the same) may be lawfully terminated for convenience only if a "reasonable" notice period after which termination shall take effect is given. What constitutes a reasonable notice period is determined by taking into account the duration and other special characteristics of the distribution relationship.

The distributorship contract may be immediately terminated without the observance of the above-cited periods of notice in case one of the contracting parties fails to carry out all or part of its obligations or where exceptional circumstances arise.

2.4.3 *Liability of Supplier on Termination*

According to Article 9 of the PD "The distributor, after termination of the distributorship contract, shall be entitled to a termination payment in the form of an indemnity if and to the extent that 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 the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission (profits) lost by the distributor on the business transacted with such customers."

These circumstances also include the application of a post-termination non-competition clause. Provisions of Greek laws which may impose restrictions on the validity or enforceability of restraint of trade clauses or which enable the courts to reduce the obligations of the parties resulting from such an

agreement shall not be affected.

The calculation of the termination payment is based on the provisions of article 9, par. 1(b) of the PD, under which "the amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the distributor's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question."

In particular, the Greek courts calculate the termination payment as follows.

- First of all, the court calculates the maximum termination payment according to the above method, i.e., a termination payment equal to the distributor's average annual revenues over the last five years (or over the period the agreement lasted if it was less than five years).

- Then the court calculates the benefit that the supplier will enjoy over a certain period following termination of the agreement (normally, five years) by (a) extrapolating the revenues (gross profits) of the dealer during the last year of the agreement which concern new customers, (b) adjusting this number to reflect an annual percentage of loss of customers (normally, in the area of 30%), and (c) deducting from this amount the discount interest of 5% due to the fact that the substantial termination payment will be paid at once.

- If the amount of the total loss of the dealer's revenues is less than the amount of its average annual revenues over the last five years (or over the period the agreement lasted if it was less than five years), then the lesser amount is, in principle, the amount of the termination payment.

Additionally, according to Greek case law, awareness of the brand and the advertising expenses incurred by the supplier are factors that may decrease the amount of the termination payment to 20%.

Furthermore, under article 9, par. 3 of the PD, the termination payment shall

not be payable:

- where the supplier terminates the distributorship contract because of default attributable to the distributor which will justify immediate termination of the contract;

- where the distributor terminates the distributorship contract unless such termination is justified by circumstances attributable to the supplier or on grounds of age, infirmity or illness of the distributor as a consequence of which he may not reasonably be required to continue his activities;

- where, with the agreement of the supplier, the distributor assigns the supplier's rights and duties under the distributorship contract to another person.

The obligation to pay a termination payment is absolute (subject, of course, to article 9, par. 3 of PD; see above). The grant of such a termination payment, however, does not prevent the distributor from seeking any damages it has suffered as a result of the termination of its relations with the supplier.
In particular, such damages include the costs incurred by the commercial agent as a result of the termination. For example: such costs include the cost of redundancy, penalties paid by the agent on terminated leases which are not needed by the commercial agent as a result of the reduction in turnover and non-amortized investments which were incurred for the purpose of the terminated business. If the circumstances surrounding the termination coule be deemed tortuous damages in tort, such as lost profits and damage to reputation, they would also be compensated.

Entitlement to a termination payment or to compensation for damages shall also arise where the distributorship contract is terminated as a result of the distributor's death.

The distributor may not derogate from its right to claim a termination payment or compensation for damages before the distributorship contract expires.

2.4.4 *Return of Products*

In the event of termination of a distributor agreement of any kind, the Greek Supreme Court has ruled that unsold stock must be repurchased, even in cases where termination was for cause. The Greek Courts apply, by analogy, the rules on mandate which prescribe that the mandatee must be compensated for any expenses incurred for the performance of its duties. The reverse, though, is not the case: the distributor has no legal obligation to return any unsold products to the supplier.

Even though administering stocks post-termination is not commonly regulated under distributorship agreements, it certainly constitutes a serious problem to be solved in case of a non-amicable termination of the parties' business relationship. For this reason, it is highly advisable for the contracting parties to agree in advance under the distributorship contract that the distributor shall sell any unsold products back to the supplier on equitable terms upon termination. Such a clause may be of great commercial significance to the supplier, since it can help protect its products from being sold via channels other than authorised distributors.

2.5 Limitation Periods

According to Article 9, par. 2 of the PD "The distributor shall lose his entitlement to the indemnity or to compensation for damages in the instances provided for above, if within one (1) year following termination of the contract he has not notified the supplier that he intends pursuing his entitlement".

Generally, commercial claims among traders/merchants are prescribed after five years from the date when the relevant party became entitled to claim.