



202 Differences in Civil & Common Law: Contracts

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Faculty Biographies

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Gabriella Porcelli

Gabriella Porcelli is the associate legal director of the Italian subsidiary of Pfizer, the US pharmaceutical company. She's responsible for providing legal support for competition law, M&A, commercial law, EC law, pharma IP matters and compliance training programs for business divisions.

Before Pfizer she served as senior corporate counsel with Agip, the ENI the Italian oil & gas state-owned company subsidiary, where she supported several multi-party international projects and joint-ventures in the upstream and later in the downstream business, also advising in the context of contract negotiations, company law and corporate restructuring. Her experience includes also five years in private practice, with Milan-based leading law firms and a specific study background in common law and relevant legal practice, acquired in the context of a university and practice training with UK law firms in London and in Scotland.

She currently serves as member of the executive committee on competition law and practice within the Italian Section of the International Chamber of Commerce and as member of the board of the Italian In-House Counsel Association (AIGI). She's also member of the European Lawyers Association, the association of alumni of the British Council European Young Lawyers Scheme.

Mrs Porcelli received a law degree com laude from the University of Rome "La Sapienza."

Selina Sagayam

Partner

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Comparative Contract Analysis

NDA

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|---|---------------|-----------|----------------|--------------------|--------------|--------------|
| 1. Remedy-- Article 13 of Template NDA | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |
| 2. Proof of Damages & Other Issues | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|--|---------------|-----------|----------------|--------------------|--------------|--------------|
| 3. Applicable Law & Courts-- Article 15 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |

Letters of Intent

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|---|---------------|-----------|----------------|--------------------|--------------|--------------|
| Legally Binding Effect-- Article 8 of Template | | | | | | |
| Local Law Issues | | | | | | |
| Recommended Redraft | | | | | | |

Distribution Agreement

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|---|---------------|-----------|----------------|--------------------|--------------|--------------|
| 1. Exclusivity— Article 1 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |
| 2. Indirect Solicitation of Orders-- Article 2.2 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|---|---------------|-----------|----------------|--------------------|--------------|--------------|
| 3. Transfer of Title-- Article 6.3 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |
| 4. Force Majeure-- Article 8 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|--|---------------|-----------|----------------|--------------------|--------------|--------------|
| 5. Limitations of Warranty-- Article 9 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |
| 6. Consequences of Termination-- Article 17 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |

| | <i>France</i> | <i>UK</i> | <i>Germany</i> | <i>Netherlands</i> | <i>Spain</i> | <i>Italy</i> |
|--|---------------|-----------|----------------|--------------------|--------------|--------------|
| 7. Arbitration --Article 20 | | | | | | |
| a. Local Law Issues | | | | | | |
| b. Recommended Redraft | | | | | | |

ACC Colleagues

Last year I presented with other colleagues at the Brussels annual event on the subject of civil vs common law. We had taken a vast subject and focused on some key ideas in the areas of standard contracts and litigation.

We would like to expand on that work for the upcoming annual conference, and have split the subject matters into two distinct areas, contracts and litigation. I would now like to work with you in the area of contracts.

I first enclose the key piece of work which was presented in Brussels, which compared key differences in a clause on limitation of liability based on a standard US contract for supply of products and services. The purpose was to show (a) how the laws of certain European jurisdictions could affect the validity of the standard clause and (b) a revised drafting of the clause in these jurisdictions designed to achieve a close as possible the intended commercial effect of the US contract.

After many requests to expand this exercise I have given some thought on how to do so, and would like to enlist your support in the following manner:

- a) Focus on certain contracts commonly used by in-house lawyers in their European practice.
- b) Focus on certain clauses in those contracts which are often problematic under European or civil laws.
- c) recommend modified clauses which both (i) comply with the law and (ii) come closest to achieving the original intent of the clause.
- d) Review these clauses under the laws of as many European countries as is practical
- e) present the recommendations in a practical easy to use format.

I therefore recommend we begin with the enclosed three template contracts and focus on the clauses specified below.

A) Non-Disclosure Agreement

A proposed template is enclosed.
Article 13 Remedies

Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information.

Article 15 - Applicable Law and Courts

Any comments on interesting case law in the jurisdiction, as well as advice as to whether arbitration should or should not be considered for confidentiality agreements for the jurisdiction.

*

B) International Distribution Agreement*

A proposed template is enclosed.
Article 1 - Appointment

Would applicable law in any circumstances require the agreement to be exclusive?

Article 2.2(ii) Limitations on the indirect solicitation of orders outside the Territory. Is this clause in conformity with European law as applied in the jurisdiction as regards the obligation to allow parallel imports into the Territory?

Article 5.3 - refer back to previous exercise on limitation of liability

Article 6.3 - Transfer of title

Article 8 - Force Majeure

Article 9 - Are the limitations of warranty provided in this article valid under local law?

Article 17 - Consequences of Termination - To what extent does local law limit the ability of the manufacturer

to limit its responsibility to the distributor as set forth in this Article.

Article 20 - Arbitration - would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors?

Would a local court enforce an arbitral judgement rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?

*

C) Memorandum of Understanding*

A proposed template is enclosed.
Article 8 - Legally Binding Effect

Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?

Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a claim of damages by the other party?

Volunteers per Country

Could I ask for volunteers to assist in reviewing these templates in accordance with those European laws in which you are most comfortable in advising. We may wish to discuss if local firms would be willing to contribute time and effort.

We could then collect the materials with the help of ACC in order to put the material in the most presentable format.

Your comments are welcome. Feel free to pass this on to whoever could assist us in this endeavor.

Best regards
Bertrand

AUTHORIZED DISTRIBUTOR AGREEMENT

This Authorized Distributor Agreement (the "Agreement") is made and effective as of this ___ day of _____, 2001, by and between Echostar International Corporation, incorporated under the laws of the State of Colorado, USA, and having a principal place of business at 5701 S. Santa Fe Drive, Littleton, Colorado, 80120 USA (the "Company"), and _____, incorporated under the laws of _____, and having a principal place of business at _____ ("Distributor").

INTRODUCTION

A. The Company is engaged, among other things, in the business of, marketing, distributing and selling digital satellite receivers and related components packaged therewith intended to be utilized for the reception of video, audio and/or data programming ("Products", which term shall include without limitation all consumer electronic devices and other items sold to Distributor by Company during the term of this Agreement).

B. Company desires to establish and maintain a network of distributors to distribute Products to retailers and consumers in specifically designated territories.

C. Distributor desires to become authorized on a non-exclusive basis to distribute Products in the territory specified and set forth in Exhibit A attached hereto, which is hereby incorporated by reference herein in its entirety (the "Territory").

AGREEMENT

In consideration of the mutual covenants contained herein and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Appointment. Subject to the conditions set forth in this Agreement, the Company hereby appoints the Distributor as its non-exclusive distributor for the Products in the Territory, which appointment the Distributor hereby accepts.
2. Duties of the Distributor.
 - 2.1 The Distributor hereby represents, warrants, and covenants to the Company that it will:
 - (i) Perform its duties under this Agreement to the best of its abilities and with the care of a conscientious merchant;
 - (ii) Exert its best efforts to promote and market the Products in the Territory at its own risk and its own expense;
 - (iii) Conduct its business as a lawful enterprise and in a manner which will not diminish the standards and reputation of the Products in the territory or elsewhere and will not impair or discredit the goodwill attached to the Company's name and Products
 - (iv) Maintain and promote the Company's name, trade marks, trade names, logos patents, copyrights, and any and all other identifying material upon or used in connection with the Products. Distributor shall also take all reasonable steps and action at Distributor's expense to protect and prevent Company's name, trade marks, trade names, and logos as well as patents, copyrights and any and all other identifying material upon or used in connection with the Product from being copied, duplicated, reproduced, defaced, pirated or in any other way used either directly or indirectly by any party or entity whatsoever within the Territory without the Company's written consent;
 - (v) Maintain adequate inventories of the Products;
 - (vi) Provide for and maintain at its sole expense its own sales organisation adequate and competent to promote and sell the Products effectively in the Territory;
 - (vii) Provide the Company with information on its sales and marketing activities relating to the Products; and

(viii) Provide the Company with surveys of the present and prospective market situation regarding the Products in the Territory every three (3) months, especially in relation to similar or competing products.

2.2 The Distributor hereby represents, warrants, and covenants to the Company that it will not:

- (i) Advertise the Products outside the Territory without the prior written consent of the Company;
- (ii) Directly or indirectly solicit orders for the Products from any person or entity residing or carrying business outside the Territory;
- (iii) Operate any branch, distribution warehouse or any other facilities for the sale of the Products outside the Territory;
- (iv) Sell, assign or sublet or otherwise transfer this agreement or its interests and rights hereunder without the prior written consent of the Company, nor shall Distributor's rights hereunder be transferable to any other party, entity or corporation by operation of law;
- (v) Directly or indirectly make any gift, bribe, or other payment to any government official, employee, or agent;
- (vi) Employ or pay commission to any person or entity residing or carrying business outside the Territory for the sale of the Products outside the Territory;
- (vii) Sell, distribute, or otherwise transfer any Products directly or indirectly in breach of this Agreement, including without limitation the provisions of Section 14.2 hereof; or
- (viii) Be involved directly or indirectly in the manufacture of any products identical or similar to or competitive with the Products without the prior written consent of the Company.

3. Servicing of Products by Distributor.

3.1 Unless the Distributor has received prior written authorization from the Company, Distributor shall not attempt to service or repair Products itself. Distributor will promptly deliver to the Company copies of any customer complaint related to the Products.

3.2 If Distributor has received prior written authorization from the Company to service Products, all service is to be performed as prescribed by the Company in standard service policies, and if there is a valid claim under the terms of the Limited Warranty provided herein, Distributor must first return the defective part to the Company, transportation charges prepaid, in which event Company will at its option replace, repair or issue credit for the product or part found defective under the terms of the Limited Warranty. In the event Company decides to recall any Products, Distributor will perform inspections and repairs in accordance with Company procedures.

4. Price and payment.

4.1 The Products will be supplied to the Distributor at the prices set forth in the Company's distributor price list effective at the time each purchase is made by Distributor from the Company. The Company may change its distributor price list at any time without notice to Distributor. In addition to the prices Distributor pays for Products, as provided above, Distributor is responsible for any and all sales, use, gross receipts, excise, VAT, and other taxes applicable to the sale, use, transportation or addition to value of Products. Distributor also agrees to promptly pay any and all personal property, inventory and similar taxes applicable to any Product inventory held by Distributor. If EchoStar in its sole discretion agrees to charge Distributor no VAT for Products delivered ex works in the European Union, Distributor agrees that it must deliver copies of documentation proving in EchoStar's sole discretion that the Products have left the EU country in which they were delivered. Unless EchoStar receives such documentation in full within 30 days following such delivery, Distributor agrees to immediately pay to EchoStar full VAT on the Products upon receipt of an invoice for such VAT from EchoStar. Distributor shall be solely responsible for obtaining any reimbursement of VAT paid.

4.2 Distributor shall pay all freight, handling and shipping costs. All Products are delivered ex works Almelo, Netherlands unless the Company notifies Distributor to the contrary in writing that some other ex works delivery point may be applicable. Distributor may request Company to insure a delivery, but such insurance shall be at Distributor's sole cost and expense. Accordingly, Distributor shall have the sole responsibility to file any claims with

the carrier for damage, missing items or otherwise, and Company shall have no liability or responsibility if Distributor is unable to obtain full compensation for any loss from the claim. If the Company agrees in writing to deliver Products to Distributor under terms other than Ex Works, Incoterms 2000 shall be used to determine the rights and obligations of the parties with respect to such delivery.

- 4.3 Unless otherwise agreed in writing all payments shall be made in U.S. dollars unless the Company agrees in writing to accept other currencies or credit. If payment is not in U.S. dollars, Distributor is responsible for all exchange rate and other bank fees charged for converting the funds to U.S. dollars. If the Company has approved in writing credit terms for the Distributor, all sales to Distributor must be paid for by Distributor according to the terms and conditions previously agreed upon in writing with the Company. The Company shall not be obligated to deliver any equipment to Distributor if Distributor is in default in the payment for any Products previously ordered or if the order is in excess of the Distributor's credit limit authorized by Company. Nothing herein shall obligate Company to extend Distributor any credit, and any credit which has been authorized may be modified or cancelled at any time in the sole discretion of the Company.
- 4.4 The Distributor relinquishes any right to set off amounts charged by and between the parties. Warranty or other service claims do not suspend the payment obligations of the Distributor.
- 4.5 If the Distributor does not pay any amount it owes pursuant to the foregoing, it is in default without notice. As soon as the Distributor is in default on any payment, all the Company's remaining claims on the Distributor are due, and the Distributor is immediately in default without notice with respect to those claims. From the day on which the Distributor is in default, Distributor shall also pay to the Company an interest charge of 1.5 % per month or part of a month during which the default continues.

5. Orders, Delivery Dates, Quantities And Returns.

- 5.1 Distributor will order Products by written purchase order, fax, or other similar written request or confirmation issued during the term of this Agreement (any of the foregoing, an "Order"). Orders of Distributor are binding commitments of Distributor and shall state only: (i) identity of goods; (ii) quantity of goods; and (iii) purchase price of goods. Any additional terms or conditions stated in or included with an Order shall not be binding upon the Company unless expressly agreed to in writing by the Company. The Company may accept or reject any Order, in whole or in part, in its sole discretion. Company will inform Distributor of any rejection of an Order, in whole or in part, within a reasonable time after such rejection; failure to send a rejection shall not be interpreted to mean that an Order has been accepted. Upon written acceptance and acknowledgement of Distributor's Order by Company, Distributor will be obligated to purchase from Company in accordance with the quantities specified by the Order. In the event of any conflict between the terms of an Order or other Distributor document and the terms of this Agreement, the terms of this Agreement shall prevail.
- 5.2 Distributor may not cancel or modify any Order which has been received by Company, unless specifically permitted to do so by the Company in writing. Changes to an Order will not be accepted if the Order has been delivered.
- 5.3 Company will use reasonable efforts to make deliveries of Products by the dates specified in Orders accepted from the Distributor. HOWEVER, COMPANY SHALL HAVE NO LIABILITY OR RESPONSIBILITY TO DISTRIBUTOR OR ANYONE CLAIMING THROUGH DISTRIBUTOR FOR ANY LOSS OR DAMAGE (INCLUDING, GENERAL, DIRECT, INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL AND CONSEQUENTIAL DAMAGES) ARISING OUT OF ANY FAILURE OR DELAY IN DELIVERY, LATE DELIVERY, OR PARTIAL DELIVERY OF ANY ORDER.
- 5.4 Company reserves the right to deliver all or a portion of any Order, including partial Orders. Company shall be permitted to deliver as and when Products are or become available and Distributor shall pay for such portion of the delivery as is actually delivered.
- 5.5 Distributor may return Products for credit against future deliveries, at the sole expense of Distributor, and with all risk of loss during delivery the responsibility of Distributor, but only if Company, in its sole judgment, gives its prior written consent. The credit (hereinafter "Return Credit") for each Product accepted for return shall equal the lesser of Company' price in effect on the date of receipt of the Product by Company, or the price for which the Product was originally purchased from Company, reduced by any Promotional Discounts or other discount or allowance which have the economic effect of reducing the bottom line cost of the Product to the Distributor and less a handling charge of ten percent (10%). In no event shall Company accept Products for return more than thirty (30) days after delivery by Company or which are damaged or used or not in their original, unopened containers. Prior to return, Distributor shall furnish Company an itemized inventory of the Products to be returned, and any other information Company may reasonably request. Return Products shall be deducted from the Semi-annual Minimums defined in Article 13 hereof.

6. Risk and transfer of title.

- 6.1 Products to be delivered by the Company are at the risk of the Distributor from the moment the Products are delivered to the carrier for transport or as otherwise provided in Article 7 below.
- 6.2 Loading, despatch or transport, unloading and insurance of the Products to be delivered takes place at the risk of the Distributor, even if the Company handles these.
- 6.3 All Products delivered by the Company remain the property of the Company until such time as the Distributor has paid in full all that which is owed to the Company in connection with the underlying agreement and/or earlier or later agreements of the same nature, including damages, costs and interest. The Distributor has no right of retention with respect to these Products.

7. Acceptance of delivery.

- 7.1 The Distributor shall accept delivery at the time at which the Products to be delivered are ready for transport or despatch.
- 7.2 If the Distributor does not cooperate in a timely fashion or at the agreed upon time in acceptance of delivery, the Products will be deemed to be delivered at the time that acceptance could have been expected by the Company.
- 7.3 The Company is entitled to compensation from the Distributor for damage and costs which are the consequences of refusal of or delay in the acceptance, and Distributor agrees to pay such amounts.

- 8. Force Majeure. The Company is entitled to invoke force majeure if the implementation of the agreement is, in whole or in part, temporarily or not, prevented or impeded by circumstances out of its control, including site or building blockades, strikes, war, embargoes, specific work interruptions or slowdowns or lockouts, delay in the provision to the Company of parts, goods or services ordered from third parties, accidents, interruptions of business operations, and acts of God. In the case of force majeure on the part of the Company, its obligations are suspended. If the force majeure lasts longer than three months, the Company and the Distributor are each authorised to rescind the non-feasible parts of the agreement by a written declaration. The parties agree that the Force Majeure provisions of this paragraph are not applicable to the payment of any amounts owed when due.

9. Limited Warranty.

- 9.1 Company warrants that each Product will be free from defects in materials and workmanship (the "Limited Warranty") for a period of twelve (12) months from the date the Product is delivered to a consumer; provided however, that in no event shall the term of the Limited Warranty period exceed eighteen (18) months from the date of delivery by Company or a third party on Company's behalf to Distributor or its designee.. The materials portion of this Limited Warranty shall not apply to any Product which the Company determines: (i) has been abused, damaged by external causes, or altered or misused; (ii) has been damaged due to improper installation or use; or (iii) has had its warranty seal broken, indicating an unauthorized repair has been attempted by anyone other than the Company or one of the Company's Authorized Service Centers.
- 9.2 ALL CLAIMS FOR BREACH OF WARRANTY MUST BE RECEIVED BY THE COMPANY NO LATER THAN THIRTY (30) DAYS AFTER THE EXPIRATION OF THE LIMITED WARRANTY PERIOD FOR THE PRODUCT. THIS LIMITED WARRANTY IS THE ONLY WARRANTY GIVEN BY THE COMPANY. THE COMPANY MAKES, AND DISTRIBUTOR RECEIVES, NO OTHER WARRANTY EITHER EXPRESS OR IMPLIED. ALL WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE, ARE EXPRESSLY DISCLAIMED AND EXCLUDED HEREFROM.
- 9.3 Distributor's exclusive remedy for any failure of a Product covered by the Limited Warranty shall be, at Company's sole option, repair by Company at a Company or third party facility of Company's choice, replacement of the defective Product, or return of the purchase price, within thirty (30) days of receipt of the Product by Company.
- 9.4 Distributor shall be responsible for all costs associated with the delivery of Product for warranty repair to Company or Company's designated agent for such purpose. Company shall be responsible for all costs associated with the delivery of Products to Distributor to replace failed units covered by the Limited Warranty. Distributor shall be responsible for all costs associated with the delivery and return of Product to the end user.

- 9.5 Any warranty obligation is suspended during such time as Distributor is in full or partial breach or default of this Agreement, or of any term or condition hereunder.
- 9.6 For goods or parts of goods which the Company procures from third parties, the guarantee obligations of the Company toward the Distributor are never greater or of longer duration than the guarantee obligations of those third parties toward the Company. The Company will be discharged with respect thereto when it transfers its claim on the third party to the Distributor.
- 9.7 The Distributor shall support, assist, and enable the Company upon request to carry out its warranty activities. In the event the Company or its representatives shall render any technical advice or service to Distributor, or anyone else in connection with the Products, Distributor hereby waives all liabilities and obligations on the part of the Company as a result thereof and Distributor agrees that no obligation or liability of any kind shall arise as a result of any such advice or service and the Limited Warranty as hereinbefore set forth shall not be enlarged or affected by such action by the Company.
- 10 Indemnification.
- 10.1 Distributor shall indemnify, defend and hold the Company, its Affiliates, and its and their officers, directors, employees, agents, and shareholders, and its and their respective assigns, heirs, legal representatives and successors (collectively, the "EchoStar Group") harmless from and against any and all costs, losses, liabilities, damages, lawsuits, judgments, claims, actions, penalties, fines and expenses (including, without limitation, interest, penalties, reasonable attorney fees and all monies paid in the investigation, defense or settlement of any or all of the foregoing) (hereinafter "Claims") arising out of, or incurred in connection with: (i) the breach or default of any of Distributor's representations, warranties, covenants, duties or obligations hereunder; (ii) any alleged negligence, misrepresentation, other tort, or breach of contract (including breach of warranty) or statutory duty by, Distributor or any of its agents or retailers; (iii) any claims related to purchase of a Product by any person or entity purchasing directly or indirectly through Distributor and not directly relating to a claim of breach of the Limited Warranty; (iv) failure of Distributor to comply with, or any alleged violation of, this Agreement or any applicable law, statute, ordinance, governmental administrative order, rule or regulation, including without limitation the violation of any country's import or export laws or regulations; (v) Distributor terminating or cancelling agreements with the Company's competitors in order to become an authorized Distributor for the Company; and (vi) claims of any of Distributor's retailers or any employees or agents of Distributor or its retailers for compensation and/or damages arising out of the expiration or termination of this Agreement for any reason whatsoever.
- 10.2 In the event of any claim for indemnification by the EchoStar Group under this Section, the EchoStar Group shall be entitled to representation by counsel of its own choosing, at Distributor's sole cost and expense. The EchoStar Group shall have the right to the exclusive conduct of all negotiations, litigation and other proceedings arising from any such claim. The provisions of this Section shall indefinitely survive expiration or termination of this Agreement for any reason whatsoever.
- 11 Intellectual and Industrial Property.
- 11.1 All present and future trademarks and trade names, logos, patents, copyrights, and other identifying material of the Company shall remain the exclusive property of the Company and no rights to such trademarks, trade names, logos, patents, copyrights and other identifying material shall vest in Distributor because of this agreement. Distributor shall cease all use of the Company trademarks, trade names, logos, patents, copyrights and other identifying material promptly upon termination of this agreement, and shall never contest the ownership and the exclusive right of the Company to such use and ownership thereof. All the products sold to Distributor under this agreement shall be resold only in the original packages, and shall not be relabeled or otherwise marked, except to indicate Distributor as the territorial source of the products or as otherwise required by governmental regulations in force in the territory. Distributor shall promptly report to the Company any unauthorized use, duplication, copying or reproduction whatsoever of the Company's name, trade name, trademark, logo, patents, copyrights or any other identifying material by any other person or entity whatsoever.
- 11.2 On expiration or termination of this contract, Distributor agrees to forthwith cease using the trademarks, trade names and copyrights and name of the Company in any way, except that it may continue to sell the equipment, parts and supplies which it then has on hand until they are disposed of and Distributor agrees that it will not thereafter directly or indirectly use said trademarks, trade names, copyrights or in any way use the patents or the products covered by the patents belonging to the Company. Such non-exclusive right of Distributor to use the

trademarks, trade names and copyrights of the Company on and in connection with the sale by Distributor of the products of the Company purchased from the Company under the terms of this agreement shall terminate upon the termination of this agreement, and Distributor hereby disclaims any rights whatsoever in or to the trademarks, trade names or copyrights covered by the terms of this agreement or obtained by Distributor for the Company as hereinbefore set forth, except as otherwise specifically provided in this agreement.

12. Changes in Product. The Company may at its option at any time make such changes in the Products or any of the parts thereof or in any specifications as the Company may desire, and there shall be no obligation on the part of the Company to make these changes in any Product or parts previously purchased by Distributor from the Company. The Company agrees to use reasonable efforts whenever practicable to give Distributor notice of any major changes it intends to make in the Product or the parts thereof. The Company reserves the right in its sole and exclusive discretion to discontinue at any time or from time to time the sale or distribution of any Product.
13. Semi-annual Minimum Sales. Distributor is required to meet semi-annual minimum sales requirements for each half year period (i.e., January 1 to June 30 and July 1 to December 31) during the term of this Agreement (each, a "Semi-annual Minimum"). Semi-annual Minimums are measured by the amount of Product that Distributor purchases from the Company during such period. The first Semi-annual Minimum is set forth on the attached Exhibit B, which is hereby incorporated by reference herein in its entirety. A revised Exhibit B with each new Semi-annual Minimum will be prepared by the Company in consultation with Distributor, and delivered by the Company to Distributor in advance of each period. In no event shall the Semi-annual Minimum for any period be less than 80% of the Semi-annual Minimum for the prior period. In no event shall the ordering or purchase by Distributor of any Product from the Company count toward the Semi-annual Minimum for a particular period unless the Company receives full payment for such Product.
14. Import and Export Matters.
- 14.1 Distributor shall have sole responsibility for ensuring that all applicable import and export laws are met with respect to its purchase, sale, and delivery of Products.
- 14.2 Distributor will execute and regularly update the Company's Denied Persons Form or its equivalent, which lists areas and individuals that U.S. economic and other embargoes prohibit U.S. companies from doing business in or with. Distributor represents, warrants, and covenants to the Company that it will not directly or indirectly sell or otherwise distribute any Products in any such areas or with any such persons.
- 14.3 The Distributor shall ensure that the Products comply with all appropriate regulation (e.g. labelling, testing, etc.) of the various competent bodies in the Territory which may govern the importation, sale or use of the Products.
15. Confidentiality.
- 15.1 Distributor agrees to keep in strict confidence all knowledge and information that may be learned or obtained by Distributor, its agents, servants or employees with respect to the confidential information, conduct and details of the Company's business, including but not limited to, all aspects of the technology for manufacture of any Products, the secret processes, machinery, equipment, and arts of manufacture used by the Company and its designs or methods of manufacture, as well as its trade secrets and customer lists, and Distributor agrees not to disclose any of such information or knowledge to any firm, business, corporation, person or other entity whatsoever at any time hereafter, and further agrees to take adequate measures to ensure that any and all personnel having access to such confidential information shall be bound under a similar written confidentiality obligation.
- 15.2 The Distributor agrees and covenants that for a period of three (3) years after the termination of this Agreement, Distributor will neither directly nor indirectly engage in the manufacture of similar equipment and that this covenant and agreement not to manufacture said equipment or products shall apply to and be binding upon all subsidiaries, affiliates, or other companies directly or indirectly connected with or associated with Distributor.
16. Term and Termination.
- 16.1 This Agreement shall commence on the date first above written and, unless earlier terminated pursuant to this Agreement, remain in full force until it expires on December 31, 2003 (the "Term"). Thereafter, the parties shall execute the Company's then current Authorized Distributor Agreement unless either party gives the other written notice not to renew the distributor relationship at least ninety (90) days before the end of the Term.

- 16.2 If the Distributor has not achieved the Semi-annual Minimum in the preceding period as agreed upon under Article 13 hereof, the Company shall have the right to terminate this agreement during the course of the then current period by notifying the Company thereof in writing with observance of a notice period of one (1) month.
- 16.3 The Company may terminate the Agreement with immediate effect upon the happening of any of the following events:
- (i) If the Distributor becomes subject to involuntary bankruptcy, receivership, or other involuntary proceedings, or either party is nationalized or has its material assets expropriated, or the Distributor or the Company fails to obtain a required governmental license or approval, or the Distributor loses a required governmental license or approval;
 - (ii) Inappropriate or fraudulent conduct of the Distributor, including without limitation violating the non-compete or confidentiality provisions hereof, making false or misleading statements or representations to the Company or third parties, committing an act of fraud or other criminal act, attempting or making an assignment or sale of Distributor's rights and obligations without the Company's prior written consent, selling or transferring an interest in the Distributor's business to a competitor of the Company, or engaging in any conduct that subjects the Company to liability; or
 - (iii) Failure of the Distributor for a period of 45 consecutive days to actively promote the Company's Products.
- 16.4 In addition to the other provisions contained herein, either party shall have the right to terminate this Agreement forthwith by written notice to the other party upon the happening of any of the following events:
- (i) If the other party breaches, defaults, or otherwise fails to perform any of the terms and conditions of this Agreement and fails to remedy such breach within thirty (30) days after written notice from the terminating party to remedy the same, or if such breach or failure is not capable of remedy;
 - (ii) The other party becomes insolvent or an order is made or a resolution is passed for its liquidation, administration, winding down or dissolution;
 - (iii) The other party terminates its business, voluntarily files for bankruptcy or receivership, makes an assignment for the benefit of its creditors; or
 - (iv) If there is any change in the control over the other party or if the other party enters into a legal merger with a third party, and such event harms or may harm the interests of the terminating party to such extent, that the terminating party cannot reasonably be expected to continue this Agreement.
17. Consequences of termination.
- 17.1 Any provision of this Agreement which logically would be expected to survive termination for any reason whatsoever or expiration, shall survive for a reasonable time period under the circumstances, whether or not specifically provided in this Agreement, except as specifically provided to the contrary in this Agreement.
- 17.2 Upon expiration or termination of this Agreement for any reason whatsoever, no member of the EchoStar Group shall have any liability to Distributor. Distributor shall have no right to: require that the Company continue Distributor as a distributor of any Products, any payment for lost business, future profits, loss of goodwill, reimbursement for expenditures or investments made or commitments entered into, creation of clientele, advertising costs, warehousing costs, termination of employees or employees salaries, overhead or facilities incurred or acquired based upon the business derived or anticipated under this Agreement, or for any other damages, including but not limited to exemplary, special or consequential damages, whether foreseeable or not, or for claims under dealer or distributor termination, protection, non-renewal or similar laws, for any cause whatsoever, whether or not caused by the Company's negligence. In no event shall any projections or forecasts by the Company be binding as commitments or promises by the Company. Distributor agrees that in the event of expiration or termination of this Agreement for any reason whatsoever, no amounts spent in its fulfillment will be recoverable from the Company by the Distributor or any other party claiming through Distributor.
- 17.3 Upon termination of this Agreement, Distributor shall, promptly and without charge to the Company:
- (i) Forward all repair warranty inquiries to the Company or its designee;

- (ii) Deliver to the Company or its designee any Products or parts held in trust by Distributor for use under a repair or warranty service program;
 - (iii) Return to the Company, or at the Company's direction destroy, all other items upon which the trademarks or any other trademarks, service marks or trade names of the EchoStar Group appear;
 - (iv) Take all other action reasonably requested by the Company to assist in the orderly transition of sales and service from Distributor to the Company or its designee; and
 - (v) At the Company's option, either return to the other the Company or destroy all confidential information which it has obtained from the Company, whether in paper, computer, or other form, in connection with this Agreement, and all copies thereof.
- 17.4 In the event the Company terminates this Agreement and the Distributor is not in default under this agreement, the Company will, at its option, fulfil the Distributor's unfulfilled contractual obligations, existing at the time of notice of termination for sale of Products to the Distributor's customers.
18. Relationship. The relationship between the Company and Distributor established by this agreement is that of vendor and purchaser, and it is not that of principal and agent. In performance of this Agreement, Distributor shall at all times act as an independent contractor. Distributor is granted no authority to assume or create any obligation of responsibility, expressed or implied, on behalf of or in the name of the Company, or to bind the Company in any manner whatsoever. Distributor agrees it is not authorized to represent Company in any manner or to bind Company in any manner by any promises, representations, warranties, contracts, obligations or undertakings whatsoever, whether express or implied, with respect to the Products or any other matter, thing or undertaking whatsoever.
19. Miscellaneous.
- 19.1 Except as expressly provided by this Agreement, no waiver or modification of any of the terms or conditions of this Agreement shall be effective unless in writing and signed by both parties.
- 19.2 If any provision of this Agreement is held to be invalid, it shall not affect the enforceability of the remaining provisions.
- 19.3 This Agreement sets forth the entire, final and complete understanding between the parties, or their predecessors, successors or assigns hereto relevant to the subject matter of this Agreement, and it supersedes, cancels, and replaces all previous understandings or agreements, written, oral, or implied, relevant to the distribution of the Company's products made or existing before the date of this Agreement.
- 19.4 This Agreement shall not be assigned by the Distributor except with the prior written consent of the Company. The Company may assign this Agreement to any of its affiliates without the consent of the Distributor. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the successors, assigns and legal representatives of the Company.
- 19.5 This Agreement is executed in the English language and interpretation or construction of this Agreement shall be based solely on the English language. Sections and paragraph headings are for convenience of reference only and shall not define or limit the provisions of this Agreement.
- 19.6 The failure or delay of the Company to exercise any right hereunder shall not be deemed to be a waiver of such right, and the delay or failure of the Company to terminate this Agreement for breach or default shall not be deemed to be a waiver of the right to do so for that or any subsequent breach or default or for the persistence in a breach or default of a continuing nature.
- 19.7 All notices with respect to any of the provisions of this Agreement shall be in writing in the English language and may be delivered personally, or may be sent by registered prepaid airmail return receipt requested, or by fax, or other electronic means of written communication, with a confirmatory copy to be dispatched by registered prepaid airmail, return receipt requested, by the close of the next following business day.

- 19.8 It is agreed that the rights and remedies herein provided in case of default or breach by Distributor of this Agreement are cumulative and shall not affect in any manner any other remedies that the Company may have by reason of such default or breach by Distributor. The exercise of any right or remedy herein provided shall be without prejudice to the right to exercise any other right or remedy provided herein, at law, or in equity.
- 19.9 Distributor represents and warrants to the Company that it has full power and authority to enter into this Agreement and perform its obligations hereunder and that its execution of this Agreement and performance of its obligations hereunder does not and will not violate any law or result in a breach of or default under the terms of any contract or agreement by which it is bound.
- 20 Mandatory arbitration and applicable law.
- 20.1 Any and all disputes arising between the parties, including without limitation any and all disputes arising out of, or in connection with, the interpretation, performance or the nonperformance of this Agreement and any and all disputes arising out of, or in connection with, transactions in any way related to this Agreement, including without limitation the relationship between the parties (including but not limited to the termination of this Agreement or the relationship for any reason whatsoever and the parties' rights thereunder), shall be decided exclusively by English language binding arbitration in the London, England metropolitan area, in accordance with the Rules of Conciliation and Arbitration of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The decision of the arbitrators shall be final and binding on the parties. Any award of the arbitrators may be entered in any court having jurisdiction over any of the parties, and the parties each hereby expressly and irrevocably consent and waive any objection to the entry of any award in any such jurisdiction. All costs of any arbitration hereunder, including without limitation the cost of the record or transcripts thereof, if any, administrative fees, travel costs, attorneys' fees and all other fees involved, shall be paid by the losing party, or otherwise allocated in an equitable manner as determined by the arbitrators.
- 20.2 This Agreement as well as all agreements resulting therefrom are governed by and construed in accordance with the laws of the U.S. State of Colorado, without reference to its conflict of laws provisions. The applicability of the United Nations Convention on Contracts for the International Sale of Goods, and any other laws that direct the application of the laws of any other jurisdiction, are expressly excluded.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto in duplicate:

ECHOSTAR INTERNATIONAL CORPORATION

Distributor: _____

 Name:
 Title:
 Date:

 Name:
 Title:
 Date:

EXHIBIT A
TERRITORY

EXHIBIT B

SEMI-ANNUAL MINIMUM SALES

MEMORANDUM ON LIMITATION OF LIABILITY**Purpose:**

Most contracts of US origin are drafted in US law in mind and seek to exclude liability as much as possible. These contracts are often adopted by subsidiaries in other countries and amended to reflect local law requirements. This report highlights some of the main legal provisions UK, Germany, France, Italy and Russia governing limitation of liability, particularly when applied to a standard US limitation of liability provision.

Standard US Clause

1. *Exclusion of Certain Losses:* Company shall not be liable for any special, indirect, incidental, punitive or consequential damages, including loss of profits, arising from or related to the breach of this agreement or the operation or use of the products and services whether or not customer has advance notice of the possibility or such damages.
2. *Maximum Liability:* Company's sole and exclusive maximum liability, whether based in contract, tort, or otherwise, shall not in any event exceed the contract price for the particular products or services.

| US | UK | Germany | France | Italy | Russia |
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| <p><i>Exclusion of Certain Losses:</i> Company shall not be liable for any special, indirect, incidental, punitive or consequential damages, including loss of profits, arising from or related to the breach of this agreement or the operation or use of the products and services whether or not customer has advance notice of the possibility or such damages.</p> | <ul style="list-style-type: none"> • Exclusion clauses subject to reasonableness test under Unfair Contract Terms Act 1977 (UCTA). • A total exclusion of liability for consequential, financial or indirect losses may be held unreasonable. Therefore generally separately each type of economic loss, so that a court may sever reasonable from unreasonable exclusions e.g. loss of profits. • Case law suggests that loss of profits may not be an indirect or consequential loss therefore, loss of profits generally excluded as a direct loss. | <ul style="list-style-type: none"> • Differentiate between standard contract terms and negotiated contract terms. Negotiated limitations of liability can be more comprehensive than standard contract terms. • A total exclusion of liability for consequential, financial or indirect losses or similar will be held not enforceable if it is stated in a standard contract term although this is left in as a basis for a negotiated contract term. • An exclusion and a limitation of liability for gross or intentional negligence is held to be invalid in Germany | <ul style="list-style-type: none"> • The Civil Code states that a party is liable to the other one, up to the amount of the damage. However, the parties, by contract, can agree on the limitation of their contractual liability. • The notion of "special, incidental, punitive or consequential" damages does not exist, only direct and indirect damages. • Cannot limit or exclude liability for personal injury or death under Civil Code. | <ul style="list-style-type: none"> • Under the Civil Code, any provision excluding, or limiting, the liability of a party due to intentional behaviour or negligence, is null and void. • Cannot claim for special or punitive damages but only direct damage. | <ul style="list-style-type: none"> • The Civil Code provides for liability of a party arising from a non-performance or improper performance of obligations. • Compensation of losses may include damages, lost profit and all expenses related if not otherwise provided by a specific law (e.g. Transportation Code) or agreement. • Exclusion of liability for consequential, financial or indirect losses may not be enforceable depending on practise and existence of applicable law. As a matter of practice, exclusion wording retained as a basis for negotiation. |

| <u>US</u> | UK | Germany | France | Italy | Russia |
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| | <ul style="list-style-type: none"> • A term excluding or restricting liability for death or personal injury caused by negligence is wholly ineffective (UCTA). | <p>according to the German Civil Code (GCC).</p> <ul style="list-style-type: none"> • A term excluding or restricting liability for death or personal injury caused by negligence is held to be invalid (GCC). • Liability for negligence can be excluded and limited provided no major contractual duty is affected. • An exclusion or limitation of claims according to the Product Liability Act (which mostly applies to claims of consumers) is also void. • Recent statute created a definition of a "Guarantee". If a supplier guarantees certain features, liability can also not be limited (no case law precedents at this stage). | | | <ul style="list-style-type: none"> • Liability may be excluded to the extent the party has taken all necessary measures (defined by a character of obligation and commercial practice) for a proper execution of obligation. • Exclusion or limitation of liability for personal injury or death is not null and void under the Civil Code. • Cannot exclude or limit liability on certain types of agreements under the Civil Code (e.g. consumer agreements); |
| <p><i>Maximum Liability:</i> Company's sole and exclusive maximum liability, whether based in contract, tort, or otherwise, shall not in any event</p> | <ul style="list-style-type: none"> • A clause which places an upper limit upon liability must be reasonable (UCTA). • Maximum cap is generally accepted although customers | <ul style="list-style-type: none"> • A maximum limitation of liability on a certain amount of monetary damage will also be held invalid if it does not cover all damages typically arising out or foreseeable. | <ul style="list-style-type: none"> • Generally accepted and cap based on value of transaction. | <ul style="list-style-type: none"> • Generally accepted | <ul style="list-style-type: none"> • Generally accepted |

| US | UK | Germany | France | Italy | Russia |
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| exceed the contract price for the particular products or services. | generally request intellectual property rights indemnity and breach of confidentiality to be excluded from cap. | | | | |

Sun Microsystems Limitation of Liability Clause

| US | UK | Germany | France | Italy | Russia |
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| <p>1. No limitation on certain categories of liability. Each party acknowledges the full extent of its own liability to the other, arising from: (a) death or personal injury resulting from negligent acts or omissions; (b) breach of any applicable license grant; or (c) claims for non payment; and the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability) are not affected.</p> <p>2. Limitations on other categories of liability. Subject to 1 above and</p> | <p>1. No limitation on certain categories of liability. Each party acknowledges the full extent of its own liability to the other, arising from: (a) death or personal injury resulting from negligent acts or omissions; (b) breach of any applicable license grant; or (c) claims for non payment; and the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability) are not affected.</p> <p>2. Limitations on other categories of liability. Subject to 1 above and</p> | <p>1. No limitation on certain categories of liability. Each party acknowledges the full extent of its own liability to the other, arising from: (a) death or personal injury; (b) breach of any applicable license grant; or (c) claims for non payment; (d) gross negligence and/or intent; and (e) failure by Sun to provide specific features of a Guarantee; and (f) the Product Liability Act applying.</p> <p>2. Limitations on other categories of liability. Subject to 1 above, Sun will not be liable for damage</p> | <p>1. No limitation on certain categories of liability. Each party acknowledges the full extent of its own liability to the other, arising from: (a) death or personal injury resulting from negligent acts or omissions; (b) breach of any applicable license grant; or (c) claims for non payment; and the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability) are not affected.</p> <p>2. Limitations on other categories of liability. Subject to 1 above and</p> | <p>1. No limitation on certain categories of liability. Each party acknowledges the full extent of its own liability to the other, arising from: (a) death or personal injury resulting from negligent acts or omissions; (b) breach of any applicable license grant; or (c) claims for non payment; and the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability) are not affected.</p> <p>2. Limitations on other categories of liability. Subject to 1 above and to the extent not prohibited by applicable law or for fraud or gross negligence:</p> | <p>1. No limitation on certain categories of liability. Each party acknowledges the full extent of its own liability to the other, arising from: (a) death or personal injury resulting from negligent acts or omissions; (b) breach of any applicable license grant; or (c) claims for non payment; and the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability) are not affected.</p> <p>2. Limitations on other categories of liability.</p> |

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| <p>to the extent not prohibited by applicable law:</p> <p>each party's maximum aggregate liability for all claims relating to any Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million Dollars (US 2,000,000); and</p> <p>neither party will be liable for any indirect, punitive, special, incidental or consequential damages in connection with or arising out of the General Terms or any Agreement (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other economic advantage), however</p> | <p>to the extent not prohibited by applicable law:</p> <p>each party's maximum aggregate liability for all claims relating to any Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million Dollars (US 2,000,000); and</p> <p>neither party will be liable for any, <u>loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, other economic advantage,</u> indirect, punitive, special, incidental or consequential damages in connection with or arising out of the General Terms or any Agreement , however they arise, whether in breach of contract,</p> | <p><u>resulting from slight negligence unless the violation constitutes a breach of major contractual duties, in which case liability will be limited to foreseeable damage.</u></p> | <p>to the extent not prohibited by applicable law:</p> <p>each party's maximum aggregate liability for all claims relating to any Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million Dollars (US 2,000,000); and</p> <p>neither party will be liable for any indirect damages in connection with or arising out of the General Terms or any Agreement (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other economic advantage), however they arise, whether in breach of contract, breach of</p> | <p>each party's maximum aggregate liability for all claims relating to any Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million <u>Euros (Euros 2,000,000)</u> or, in the case of purchases, to the amount paid to the other party during the previous twelve (12) months for the product or service which is the subject matter of the claim up to a maximum of two million Dollars (US2,000,000); and</p> <p>neither party will be liable for any indirect <u>and/</u> or consequential damages in connection with or arising out of the General Terms or any Agreement (including, without limitation, loss of business, revenue, profits, goodwill, use, data,</p> | <p>Subject to 1 above and to the extent not prohibited by applicable law:</p> <p>each party's maximum aggregate liability for all claims relating to any Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million Dollars (US 2,000,000); and</p> <p>neither party will be liable for any indirect, punitive, special, incidental or consequential damages in connection with or arising out of the General Terms or any Agreement (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other</p> |
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| <p>they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages.</p> <p>3. Failure of essential purpose. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.</p> | <p>breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages.</p> <p>3. Failure of essential purpose. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.</p> | | <p>warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages.</p> <p>3. Failure of essential purpose. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.</p> | <p>electronically transmitted orders, or other economic advantage), however they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages.</p> <p>3. Failure of essential purpose. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.</p> | <p>economic advantage), however they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages.</p> <p>3. Failure of essential purpose. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.</p> |
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MEMORANDUM OF UNDERSTANDING

DATE [date]

PARTIES

- (1) **XXXX LIMITED**, a company incorporated under the laws of Ireland with registered number 123456, with its registered office at [Address], Ireland ("**XXX**"); and
- (2) [**OTHER PARTY**], a company incorporated under the laws of England with registered number [No], with its registered office at [Address] (“[OTHER]”).

RECITALS

- a) [BACKGROUND].
- b) The Parties wish to [description of what ultimate aim is] and would like to record their intentions in this Memorandum of Understanding (“**MOU**”).

OPERATIVE PROVISIONS

1. **Objective**

The Parties intend to work together to develop detailed business plans and a definitive agreement(s) (the “Definitive Agreement”) governing their relationship and the basis on which they will co-operate as Strategic Partners.

It is the Parties intent that a Definitive Agreement shall be executed by [DATE]. It is acknowledged that in the Definitive Agreement either party may be replaced by one of that party’s affiliated companies, being a company controlled by, controlling, or under common control with that party.

Each Party shall nominate a senior manager to oversee the Parties progress towards meeting the objectives.

2. **Basis of Strategic Partnership Agreement**

On the basis of discussions and agreements in principle thus far it is envisaged that the Definitive Agreement(s) will be based on the draft summary Strategic Partner Agreement which is the Attachment to this MOU. Each party acknowledges, however, that the final terms of the Definitive Agreements may vary considerably from the Attachment, both as to form and substance.

3. **Responsibilities of the Parties**

To accomplish the objectives of this MOU the Parties shall, subject to any confidentiality restrictions under which the Parties are bound to third parties, exchange all necessary information and agree upon their respective responsibilities.

The Parties shall negotiate the Definitive Agreement(s) referred to above.

The Parties may approach and discuss with their customers and strategic partners (and with the permission of each other with each other's customers and strategic partners) the requirements of such customers and strategic partners in receiving and supporting the type of services to be offered.

4. Costs

Each party will bear the costs of its own representatives involved in the negotiation of this arrangement.

5. Protection of Confidential Information

The Parties have signed a Confidentiality and Non-Disclosure Agreement dated [date] .

6. Withdrawal/Expiry

Either party may at any time prior to the execution of the Definitive Agreement(s) withdraw its participation in any arrangement contemplated in this MOU by giving advance notice in writing to the other party.

This MOU will expire on [date].

7. Adherence to Laws

The Parties shall refrain from conduct that would violate any applicable laws or regulations in England or elsewhere. -

The Parties will be cognisant of regulatory and anti-competitive regulations when preparing the Definitive Agreement(s).

The Definitive Agreement(s) is subject to any approvals that may be required.

8. Non-Binding Agreements/Governing Law

This MOU describes the understanding of the Parties and is not intended to be a contract or have any legally binding effect on the Parties other than as follows:

- (a) Neither Party shall disclose the existence of this MOU or its content to any third party and any press release announcing the existence of this MOU or its content shall be subject to the agreement in writing of both Parties;
- (b) Neither Party shall have any claim to the ownership of any intellectual property rights which belong to the other Party at the date of this MOU, or which the other Party creates or develops pursuant to this MOU prior to the Definitive Agreement(s);
- (c) Each Party acknowledges that it has no authority to bind or commit the other Party to any contractual liability except as may be otherwise agreed in writing. The Parties further understand that there is no intention to form or for the Parties' relationship to be construed as a partnership under English law or the laws of any jurisdiction;
- (d) Neither Party shall apply for any regulatory or anti-competitive related clearances without first informing the other;
- (e) Clauses 8(a) and 8(b) shall survive any termination or expiry for whatever reason, of this Agreement.

This MOU shall be governed by the laws of England and the Parties hereby submit to the non-exclusive jurisdiction of the English Courts.

9. Miscellaneous

Where appropriate words denoting a singular number shall include the plural and vice versa.

DULY SIGNED

XXXX LIMITED

By:

Name:

Title:

[OTHER PARTY]

By:

Name:

Title:

Attachment to Memorandum of Understanding dated [date]

[TITLE]

PARTIES

XXX [subject to tax and regulatory advice]

And

[OTHER PARTY] (“OTHER”)

CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is made the _____ day of _____ 200 ____ (“**Effective Date**”) between

- (1) **XXXXX LIMITED**, a company incorporated in England and Wales (registered number 012345) with its registered office at 123 Road, London WC2 (“**Xxxx**”); and
- (2) **YYYYY**, a company incorporated in [] [(registered number _____) with its registered office at _____)] (“**Yyyy**”).

WHEREAS Xxxx and Yyyy (each a “**Party**” and collectively “**Parties**”) each wish to disclose certain technical and/or commercial information to the others including any directors, officers, employees and consultants, in whatever form including, but not limited to, processes, strategies, data, know-how, trade secrets, designs, photographs, drawings, specifications, technical literature and other tangible and intangible information or material whether in oral, written (including copies), graphic or electromagnetic form on a confidential basis (“**Information**”) in connection with discussions between the Parties on certain matters relating to potential areas of collaboration in respect of the [describe opportunities] (“**Purpose**”).

THE PARTIES AGREE as follows:

1. **Duty.** For Information that is disclosed by one Party (“**Disclosing Party**”) to any of the other Parties (where each such Party who receives Information shall be a “**Receiving Party**”), each Receiving Party shall do the following commencing on the Effective Date:
 - a. keep in strict confidence and in safe custody any Information disclosed to the Receiving Party by the Disclosing Party by exercising the same duty of care used to maintain as confidential the Receiving Party’s own Information and at a minimum a reasonable duty of care;
 - b. not use or exploit any Information other than for the Purpose;
 - c. not copy or reproduce any or all of the Information except as is reasonably necessary for the Purpose; and
 - d. not distribute, disclose or disseminate Information to anyone except persons as referenced in this Agreement who have a need to know such Information for the Purpose.

Persons who have a need to know include persons who are employed by or are directors or consultants of: (i) the Receiving Party; (ii) the Receiving Party’s parent company; or (iii) affiliates or subsidiaries that are under the control of the Receiving Party’s parent company. The Receiving Party shall notify all such persons of the existence of this Agreement at the time the Information is disclosed to them.

2. **Exceptions.** A Receiving Party’s duty to maintain Information as confidential in accordance with the provision of this Agreement shall not apply to Information which a Receiving Party can show to the Disclosing Party’s reasonable satisfaction:
 - a. was known to the Receiving Party (without obligation to keep the same confidential) at the date of disclosure of the Information by the Disclosing Party;
 - b. is after the date of disclosure acquired by the Receiving Party in good faith from an independent third party who is not subject to any obligation of confidentiality in respect of such Information;
 - c. in its entirety was at the time of its disclosure in the public knowledge or has become public knowledge during the term of the Agreement otherwise than by reason of the Receiving Party’s neglect or breach of the restrictions set out in this or any other agreement; or
 - d. is required to be disclosed by law, judicial action, the rules or regulations of a recognised stock exchange or listing authority, government department or agency,

supranational authority or other regulatory authority, in which event the Receiving Party shall take all reasonable steps to consult and take into account the reasonable requirements of the Disclosing Party in relation to such disclosure; and

e. is independently developed by the Receiving Party without access to any or all of the Information.

3. **Termination and Renewal.** This Agreement shall expire on the date which is four (4) years from the Effective Date unless terminated earlier upon written agreement between the Parties. Termination does not affect a Party's accrued rights and liabilities at the date of termination and the obligations of the parties under Clause 1 will survive termination. This Agreement shall not be renewed or extended unless agreed in writing between the Parties.
4. **Return of Information.** On the earlier of either the date of expiration of the term of this Agreement, termination of this Agreement, or a written request of the Disclosing Party, the Receiving Party shall return or destroy (at the Receiving Party's option) any part of the Information that consists of original, and copies of, source material provided by it and still in the Receiving Party's possession and, if requested by the Disclosing Party, shall provide written confirmation to the Disclosing Party to that effect.
5. **Exclusion of Warranties.** The Disclosing Party does not warrant the accuracy or completeness of any Information and all implied warranties or representations to that effect are hereby excluded.
6. **Title.** Nothing in this Agreement shall be construed as granting or conferring any rights in title to or licence in respect of any Information. All Information shall remain at all times the property of the Disclosing Party.
7. **Transactions and Press Releases.** The disclosure of Information by the Disclosing Party will not create an obligation on any Party to enter into any further agreement or to proceed with any possible relationship or other transaction. No Party shall (i) disclose the existence of this Agreement, (ii) disclose that discussions concerning the Purpose are taking place between the Parties, or (iii) issue any press releases relating to the Purpose to any other party without the consent of the other Parties.
8. **No Partnership.** Nothing contained in this Agreement shall be construed as creating a joint venture, power of attorney, partnership or employment relationship between the Parties, it being understood that the Parties are independent contractors vis-à-vis one another. Except as specified herein, no Party shall have the right, power or implied authority to create any obligation or duty, express or implied, on behalf of any other Party hereto.
9. **Waiver.** No delay or omission by any Party in exercising any right, power or remedy provided by law or under this Agreement shall affect that right, power or remedy or operate as a waiver or partial waiver of it.
10. **Notice.** Any notice will be written in English and will be either delivered in person, or sent to the other Parties by (a) postal mail, (b) facsimile (electronically confirmed and followed up immediately by postal mail), or (c) electronic mail (followed up immediately by postal mail). A notice is considered given when it is delivered (which in the case of a facsimile or e-mail shall be when the follow up copy of the facsimile or e-mail sent by postal mail is delivered). For the purposes of this Agreement, the address of each Party shall be:

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| Xxxx: | Attention: General Counsel Tel: +44 (0)20 7 Fax: +44 (0)20 7 | Address: 123 Rd London WC2 United Kingdom |
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| Yyyy: | Attention: Tel: | Address: |
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Fax:
E-mail:

11. **Entire Agreement.** Save in respect of fraudulent misrepresentation by any of the Parties, the Agreement constitutes the entire understanding between the Parties with regard to the disclosure of the Information relating to the Purpose. The Agreement supersedes all oral or written agreements, understandings and representations between the Parties (whether made prior to or at the same time as the Agreement)
12. **Non-Assignment.** No Party may assign or otherwise transfer this Agreement, or any of its rights and obligations hereunder, to any other party, except for purposes of sharing Information on a need to know basis as specified in this Agreement.
13. **Remedy.** Each Party agrees that damages would not be an adequate remedy for any breach of this Agreement and each Party shall be entitled to remedies of injunction, specific performance and other equitable relief for any reasonably threatened or actual breach of this Agreement.
14. **Counterparts.** This Agreement may be executed in any number of counterparts. Each counterpart together shall constitute one and the same instrument.
15. **Governing Law and Jurisdiction.** This Agreement shall be governed by and construed in accordance with English law. The English courts shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement and each party submits to the exclusive jurisdiction of the English courts. Each party waives any objection to the English courts on grounds that they are an inconvenient or inappropriate forum to settle any such dispute.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

COMPARATIVE CONTRACT ANALYSIS**NDA**s

| FRANCE | |
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| 1. Remedy -- Article 13 of Template NDA Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information? | |
| a. Local Law Issues | A party can seek injunctive relief against potential disclosure of information. |
| b. Recommended Redraft | Each Party agrees that damages may not be an adequate remedy for any breach of this Agreement and each Party shall be entitled to remedies of injunction or any other equitable relief for any reasonably threatened or actual breach of this Agreement. |
| 2. Proof of Damages & Other Issues | |
| a. Local Law Issues | |
| b. Recommended Redraft | None. |
| 3. Applicable Law & Courts—Article 15 Any comments on interesting case law in the jurisdiction, as well as advice as to whether arbitration should or should not be considered for confidentiality agreements for the jurisdiction. | |
| a. Local Law Issues | Usually, NDAs governed by French law are submitted to the jurisdiction of French courts. |
| b. Recommended Redraft | None |

| UK | |
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| 1. Remedy -- Article 13 of Template NDA Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information? | |
| a. Local Law Issues | A party can seek an injunction against potential disclosure of confidential information. |
| b. Recommended Redraft | Each Party agrees that damages may not be an adequate remedy for any breach of this Agreement and each Party shall be entitled to seek an injunction and other equitable relief or remedy for any threatened or actual breach of this Agreement. |
| 2. Proof of Damages & Other Issues | |
| a. Local Law Issues | None. |
| b. Recommended Redraft | None. |
| 3. Applicable Law & Courts—Article 15 Any comments on interesting case law in the jurisdiction, as well as advice as to whether arbitration should or should not be considered for confidentiality agreements for the jurisdiction. | |
| a. Local Law Issues | Usually, confidentiality agreements governed by English law will appoint the English courts. |
| b. Recommended Redraft | None. |
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| GERMANY | |
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| 1. Remedy -- Article 13 of Template NDA | |
| Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information? | |
| a. Local Law Issues | German law allows either party to seek injunctive relief (in general also by way of preliminary injunction) against a potential disclosure of confidential information constituting a breach of the NDA. |
| b. Recommended Redraft | No other recommendation, however, it needs to be reconsidered on a case by case basis. |
| 2. Proof of Damages & Other Issues | |
| a. Local Law Issues | As it is hard to evaluate the amount of damages which result out of a breach of the NDA, usually a fixed amount to be paid as penalty for a breach is agreed. |
| b. Recommended Redraft | [x] shall pay to [x] for each case of a violation of this Agreement a penalty in the amount of [x]. If a violation continues for more than [one week], the continuing violation shall be deemed to constitute independent violations from each first day of a following week during which the violation endures. The right of [x] to claim a penalty hereunder shall in no way affect or prejudice any rights or remedies it may have in case of a breach of this Agreement, however, the amount of the penalty payments shall be deducted from a claim for damages (if any). |
| 3. Applicable Law & Courts—Article 15 | |
| Any comments on interesting case law in the jurisdiction, as well as advice as to whether arbitration should or should not be considered for confidentiality agreements for the jurisdiction. | |
| a. Local Law Issues | Arbitration is usually not being considered for confidentiality agreements in Germany. |

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| b. Recommended Redraft | None. |
| NETHERLANDS | |
| 1. Remedy -- Article 13 of Template NDA Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information? | |
| a. Local Law Issues | <p>In addition to a penalty, a party can seek equitable relief, including injunctive relief and specific performance. The claim in such interlocutory proceedings holds an injunction of the (continuing) breach of the confidentiality agreement, under forfeiture of a penalty.</p> <p>Injunctive relief can also be sought for any threatened breach of a confidentiality agreement. Case law determines that it needs to be sufficiently plausible that a future breach of the agreement is to be expected. In that case the Court deems that the plaintiff has sufficient interest with the demanded injunction.</p> |
| b. Recommended Redraft | <p>13. Remedy.</p> <p>Each Party agrees that damages would not be an adequate remedy for any breach of this Agreement since it might be practically impossible to establish or prove the actual damages in the event of a breach. The Receiving Party therefore accepts that in case of a breach of this Agreement, he shall in any event forfeit an immediately payable penalty in the amount of [EUR [] ([] Euro)] to the Disclosing Party, to be increased with an amount of EUR [] ([] Euro) for each day that such breach continues, without prejudice to remedies of injunction, specific performance and other equitable relief for any reasonably threatened or actual breach of this Agreement.”</p> |
| 2. Proof of Damages & Other Issues | |
| a. Local Law Issues | <p>Article 13 of the proposed template determines that “[...] <i>damages would not be an adequate remedy for any breach of this agreement [...]</i>”. Remedy clauses in Dutch confidentiality agreements can stipulate that a penalty has to be paid when any obligation under the agreement is breached. Because it is often practically impossible to establish or prove the actual damages in the event of a breach such a clause determines that – in case of a breach – it shall in any event forfeit an immediately payable penalty X for each time and/or every day that such a breach continues.</p> |

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| | <p>According to article 6:92 Dutch Civil Code a penalty replaces the right to compensatory or punitive damages. However, parties have the right to deviate from this rule and stipulate that the party has a choice between the penalty or punitive damages, or that the penalty can be claimed next to damages.</p> |
| b. Recommended Redraft | None. |
| <p>3. Applicable Law & Courts—Article 15</p> <p>Any comments on interesting case law in the jurisdiction, as well as advice as to whether arbitration should or should not be considered for confidentiality agreements for the jurisdiction.</p> | |
| a. Local Law Issues | <p>In general, Dutch confidentiality agreements determine that the agreement is governed by the laws of the Netherlands and appoint a Dutch Court as the competent Court (for example the District Court of Rotterdam).</p> <p>Article 1056 of the Dutch Civil Code of Procedures (the “<u>CCP</u>”) determines that the arbitral tribunal can also, like a Court, impose a penalty. The same rules of the CCP apply. For example, an exception is that no penalty can be imposed in case of an order of payment of a sum of money.</p> <p>Dutch law also allows for summary arbitral proceedings. In those proceedings a judgement can also be strengthened by a penalty. Whether summary arbitral proceedings are possible however also depends on the arbitral regulations that are applicable.</p> <p>There is no specific Dutch rule or custom that compels parties to either choose Arbitral or Court proceedings. Parties are free to choose either way, the general advantages and disadvantages between Court and Arbitral proceedings apply. Arbitral proceedings tend to be quicker than Court proceedings and as a rule take place in one instance. Further, parties have an influence on the choice of arbitrators, who will often be experts in the respective field. On the other hand, Arbitral proceedings can be costly and will always be subject to judicial control.</p> <p>Arbitration tends to be more confidential. However, to ensure that information is kept confidential - also in proceedings - parties may decide to agree upon a confidentiality clause with respect to the arbitral proceedings</p> |
| b. Recommended Redraft | 15. Governing Law and Jurisdiction. |

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| | <p>"This Agreement shall be governed by and construed in accordance with Dutch law. The competent District Court of [Rotterdam] shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement and each party submits to the exclusive jurisdiction of this court. Each party waives any objection to the competent District Court of [Rotterdam] on grounds that they are an inconvenient or inappropriate forum to settle any such dispute."</p> |
| SPAIN | |
| <p>1. Remedy -- Article 13 of Template NDA</p> <p>Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information?</p> | |
| <p>a. Local Law Issues</p> | <p>Spanish law does not contain a specific regulation of non-disclosure agreements. Nonetheless, there are several regulations that protect confidential information. In particular, the Spanish law on unfair competition considers unfair the disclosure or the use of confidential information obtained under a non-disclosure obligation for the purposes of (i) obtaining a benefit for the party that breached the confidentiality obligation or for a third person or entity, or (ii) causing damage to the owner of the confidential information. The law expressly establishes that, in order to be considered unfair, it is not necessary to use or disclose the information for the purposes of competing in the market with the owner of the information.</p> <p>The law provides several remedies against unfair acts, in particular: (i) judicial declaration of the unfairness of the act, (ii) injunction to cease the unfair act (if it has already been done) or to prohibit it (if the unfair act has not been done but there is a risk that it could be done), (iii) removal of the effects of the unfair act, and (iv) payment of damages.</p> <p>Apart from this, a non-disclosure agreement is a contract that creates a negative obligation (<i>obligación de no hacer</i>). According to the Spanish civil code, if the creditor breaches this kind of contract the debtor can request: (i) the removal of the effects of the breach of the contract and (ii) the payment of damages.</p> <p>These remedies are available under the terms of the law on unfair competition and the civil code irrespective of whether the non-disclosure agreement recognise them or not. In principle, specific performance in these cases is possible as a remedy if the debtor does not fulfil its obligations, unless they were strictly personal (<i>personallsimas</i>).</p> |

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| | <p>According to the above, the clause included in the non-disclosure agreement is valid. Nonetheless, as mentioned above, these remedies would also be available without this clause. The clause as drafted could however be interpreted as a restriction on the use of the legal remedies (damages in particular). For this reason, it is more appropriate to refer to the legal remedies available and to establish that these remedies shall pursue the fulfilment of the agreement (to keep the confidentiality).</p> |
| b. Recommended Redraft | <p>Each Party shall be entitled in its case to the remedies of the law on unfair competition, of the civil code, and of any other equitable relief for any threatened or actual breach of this Agreement. Each Party agrees that the exercise of these remedies shall pursue the fulfilment of the obligations under this Agreement, and accepts the specific performance of its obligations. The parties expressly agree that the damages remedy is not the most adequate for any breach of this agreement.</p> |
| 2. Proof of Damages & Other Issues | |
| a. Local Law Issues | None |
| b. Recommended Redraft | None. |
| 3. Applicable Law & Courts—Article 15 | |
| Any comments on interesting case law in the jurisdiction, as well as advice as to whether arbitration should or should not be considered for confidentiality agreements for the jurisdiction. | |
| a. Local Law Issues | <p>There is no particular reason why arbitration should be avoided in a non-disclosure agreement. The choice between submission to the courts or to arbitration will mainly depend on the circumstances of the case. In general terms, courts are slower when adopting a decision, but they are also usually less expensive than arbitrators. There are also important differences between the arbitration courts that operate in Spain.</p> <p>The possibility to adopt interim measures should not be the main reason to take into account when choosing between one system or the other. This possibility is specially important in case of breach of a non-disclosure agreement in order to avoid or to limit the disclosure of the information. Nonetheless, under the legislation currently in force in Spain, it is possible to adopt interim measures irrespective of whether the parties have submitted to the jurisdiction of the courts or to arbitration. Furthermore, these interim measures can be adopted</p> |

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| | <p>before, simultaneously or after the beginning of the proceeding.</p> <p>In past (and under the former Law on arbitration of 1988 that has been substituted by the current one), some court decisions considered that it was not possible to submit to arbitration the remedies of the law on unfair competition. Nonetheless, a recent court decision has clearly stated that such submission is possible (Decision of the Provincial Court (<i>Audiencia Provincial</i>) of Tarragona of 3 October 2005).</p> |
| b. Recommended Redraft | None. |
| ITALY | |
| <p>1. Remedy -- Article 13 of Template NDA</p> <p>Specifically does local law and courts allow either party to seek injunctive relief against potential disclosure of confidential information?</p> | |
| a. Local Law Issues | Italian courts shall have jurisdiction only in respect to injunctions to be executed in Italy (Art. 10 of Italian Law no. 218/95). Generally, parties may seek an injunction independently from they expressly agreeing to such remedy, provided the conditions provided for by Italian law are met. At most, their consent might be considered as an indication of urgency, which constitutes a pre-requisite of provisional relief (the other being a prima facie case on the merits). |
| b. Recommended Redraft | A paragraph could be added to Art. 15 to the effect that the exclusive jurisdiction of English courts shall not prevent a party from seeking an injunction in Italy. |
| <p>2. Proof of Damages & Other Issues</p> | |
| a. Local Law Issues | Being the NDA subject to the exclusive jurisdiction of English courts, Italian courts are not entitled to rule on damages. |
| b. Recommended Redraft | None. |
| <p>3. Applicable Law & Courts—Article 15</p> <p>Any comments on interesting case law in the jurisdiction, as well as advice as to whether</p> | |

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| arbitration should or should not be considered for confidentiality agreements for the jurisdiction. | |
| a. Local Law Issues | None. The parties' choice of foreign governing law and jurisdiction is fully enforceable under Italian Law, as is the appointment of an arbitration court. |
| b. Recommended Redraft | See above (Art. 13). |

Letters of Intent

| FRANCE | |
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| <p>Duty of good faith</p> <p>Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a claim of damages by the other party?</p> | <p>French law does not provide for an obligation for the parties to enter into negotiations and during the negotiations, each party is entitled to decide whether or not to enter into a contract. Therefore, where negotiations have been initiated and where any agreement does not provide anything to the contrary, either party may terminate the negotiations.</p> <p>In addition, as concerns the conduct of the negotiations, French law provides for an obligation for the parties to act in good faith during such negotiations. More specifically, French law provides for an obligation of loyalty and consideration to the other party's interests.</p> <p>Nevertheless, although the parties are free to terminate the negotiations, a party will have to compensate the other party on the grounds of tortious liability (article 1382 of the Civil Code), if such party terminates the negotiations abruptly or if the termination is deemed abusive. A termination is generally deemed abusive in the event, for example, the terminating party has made the other party confident that he had the intention to enter into the agreement, or where the negotiations stand at a very advanced state and the parties have started to perform the contemplated agreement.</p> |
| <p>Legally Binding Effect-- Article 8 of Template</p> <p>Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?</p> | |

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| Local Law Issues | <p>French law does not provide for an obligation for the parties to enter into negotiations and during the negotiations, each party is entitled to decide whether or not to enter into a contract. Therefore, where negotiations have been initiated and where an agreement does not provide anything to the contrary, either party may terminate the negotiations.</p> <p>In addition, as concern the conduct of the negotiations, French law provides for an obligation for the parties to act in good faith during such negotiations. More specifically, French law provides for an obligation of loyalty and consideration of the other party's interests.</p> <p>Nevertheless, although the parties are free to terminate the negotiations, a party will have to compensate the other party on the grounds of tortious liability (article 1382 of the Civil Code), if such party terminates the negotiations abruptly or if the termination is deemed abusive. A termination is generally deemed abusive in the event, for example, the terminating party has made the other party confident that he had the intention to enter into the agreement, or where the negotiations are stand at a very advanced stage and the parties have started to perform the contemplated agreement.</p> <p>Under French law, an obligation has a legally binding effect if the promisee can be ordered by the courts to perform the promise he has made. The courts generally assess whether a promise is legally binding on the basis of the terminology used and the behaviour of the promisor. If the terms used and the verbs indicate that the promisor is subject to a duty to perform an obligation, the relevant clauses will be legally binding. On the contrary, it has been ruled by the Paris Court of Appeal that a "framework co-operation agreement" whereby the parties provide that the parties are potentially interested in co-operating in order to carry out a project and that the agreement constitutes a legal general framework setting the main aspects of such co-operation is not considered as producing legally binding effects (CA Paris, 26/09/1995)</p> |
| Recommended Redraft | None. |
| UK | |
| <p>Duty of good faith</p> <p>Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum;</p> | <p>English law does not imply a duty of good faith in contractual negotiations. Pre-contractual negotiations are not normally legally binding on the parties and in general either party may terminate negotiations when it chooses, without liability.</p> |

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| failure of which to complete could give rise to a claim of damages by the other party? | |
| | In exceptional circumstances, a party may be able to claim damages if during the course of protracted discussions and negotiations (where both parties had given the impression that a deal would definitely be done) a party had started implementation work for the relevant transaction and the discussions had subsequently been terminated by the other party. However, this has only very rarely been the case in English law and generally there will be no liability for termination of pre-contractual discussions. |
| Legally Binding Effect-- Article 8 of Template Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law? | |
| a. Local Law Issues | For a document to be legally binding in English law it must be sufficiently "certain" (i.e.: clearly set out the agreement between the parties, the object of the transaction and its terms), it must not merely be an "agreement to agree". |
| | Heads of agreement would not normally be legally binding as they would usually not be sufficiently "certain". This is because in general a heads of agreement will not set out in full all terms of the transaction, will state items that require further discussion and will not contain sufficient agreement or precise terms to be considered certain. However, it should be borne in mind that a document which contains extensive detail as to a transaction and its terms may (at least in the absence of specific provisions stating its non-legally binding status) constitute a legally binding agreement. |
| b. Recommended Redraft | 8.1 This MoU describes the understanding of the Parties and is not intended to be a contract or have any legally binding effect on the Parties save that sub-clause (a)-(e) below and sub-clause 8.2 are legally binding. (a) – (e) remain as originally drafted. 8.2. This MoU etc. |
| Duty of good faith Specifically, under what circumstances would a | Generally, there is no duty to continue negotiations and to complete the transaction. Should, however, one party give the other party reason to believe that a contract would come into effect and, |

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| <p>party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a claim of damages by the other party?</p> | <p>even so, break off negotiations without good cause, the former party may be liable for any fruitless expenditure by the other party.</p> |
| <p>Legally Binding Effect-- Article 8 of Template</p> <p>Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?</p> | |
| <p>a. Local Law Issues</p> | <p><u>Binding effect:</u></p> <p>The question whether a Lol is binding or not, needs to be answered against the background of the party's intentions, which is to be analysed on the basis of the wording of the Lol and the context in which the Lol has been signed. From this analysis it needs to be assessed whether the parties intended to create a binding agreement or only wanted to summarise the results of negotiations.</p> <p>A non-binding Lol may contain certain binding clauses, this will not render the other parts of the Lol automatically binding, however, insertion of express statement to this effect is advisable.</p> |
| <p>b. Recommended Redraft</p> | <p>No other recommendation, however, it needs to be reconsidered on a case by case basis.</p> |
| <p>GERMANY</p> | |
| <p>Duty of good faith</p> <p>Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a claim of damages by the other party?</p> | <p>Generally, there is no duty to continue negotiations and to complete the transaction.</p> <p>Should, however, one party give the other party reason to believe that a contract would come into effect and, even so, break off negotiations without good cause, the former party may be liable for any fruitless expenditure by the other party.</p> |

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| <p>Legally Binding Effect-- Article 8 of Template</p> <p>Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?</p> | |
| <p>a. Local Law Issues</p> | <p><u>Binding effect:</u></p> <p>The question whether a Lol is binding or not, needs to be answered against the background of the party's intentions, which is to be analysed on the basis of the wording of the Lol and the context in which the Lol has been signed. From this analysis it needs to be assessed whether the parties intended to create a binding agreement or only wanted to summarise the results of negotiations.</p> <p>A non-binding Lol may contain certain binding clauses, this will not render the other parts of the Lol automatically binding, however, insertion of express statement to this effect is advisable.</p> |
| <p>b. Recommended Redraft</p> | <p>No other recommendation, however, it needs to be reconsidered on a case by case basis.</p> |
| <p>NETHERLANDS</p> | |
| <p>Duty of good faith</p> <p>Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a claim of damages by the other party?</p> | <p>According to Dutch case law, by entering into a negotiation agreement, the parties involved enter into a pre-contractual legal relationship that is governed by the rules of good faith and reasonableness and fairness. As a consequence, in their actions the parties are obliged to take into account the legitimate interests of the other party.</p> <p>This implies that – although a party is generally free to break off negotiations - a party may not be at liberty to break off the negotiations and be liable for damages if breaking off the negotiations would be unacceptable. Although this rule should according to case law, be applied reticently, this may be the case if the other party is entitled to expect that a definitive agreement would eventually be concluded, or if other circumstances so dictate. In assessing this, a judge will have to take into account the extent to which the party breaking off the negotiations has contributed to this other party's expectation of the conclusion of an agreement, but he should also take into account the legitimate interests of the party breaking off the negotiations.</p> |

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| | <p>Given the fact that article 6 of the MoU explicitly gives the parties the right to withdraw their participation in any arrangement contemplated by the MoU, a Dutch court will be extremely reluctant to consider breaking off the negotiations to be unlawful and award damages.</p> |
| <p>Legally Binding Effect-- Article 8 of Template</p> <p>Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?</p> | <p>Heads of agreement which contain details of the principal issues in a transaction may constitute valid and binding agreements not only regarding matters such as confidentiality, exclusivity and procedure, but also regarding the principal terms and conditions of the transaction itself.</p> <p>The fact that a document is called "letter of intent" or "heads of agreement" is in itself not decisive under Dutch law as to whether or not the document contains binding and enforceable commitments. Even remarks in the headings, such as "subject to contract", may be mitigated by the text of the document itself. It is therefore very important to carefully word letters of intent or similar pre-contractual documents so that there can be no misunderstanding about the extent of its desired binding effect.</p> <p>Breach of pre-contractual agreements may result in liability for the defaulting party. In general, damages will be the remedy but actions for annulment or specific performance may also be brought. In some circumstances compensation for "lost opportunity" can be claimed. A pre-contractual agreement may also set out a specific damages basis that will apply (e.g.: liquidated damages).</p> |
| <p>a. Local Law Issues</p> | <p>None.</p> |
| <p>b.</p> | <p>6. "Either party may at any time prior to the execution of the Definitive Agreement(s) immediately withdraw its participation in any arrangement contemplated in this MoU and/or immediately terminate this MoU by giving [] days advance notice in writing to the other party, without being liable for any damages related to the negotiations contemplated in this MoU or the non-conclusion of a definitive Agreement.</p> <p>Without prejudice to the previous paragraph, this MoU will expire on [...]"</p> |
| <p>SPAIN</p> | |
| <p>Duty of good faith</p> <p>Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a</p> | <p>In Spain, parties have a legal obligation to act in good faith when they negotiate an agreement. This obligation exists even if the parties do not sign a MoU. Nonetheless, there is no obligation to negotiate or to continue a negotiation, except if it is expressly agreed in the relevant MoU.</p> <p>If any of the parties do not negotiate in good faith and, due to this lack of good faith, it causes damages to the other party, such party can be obliged to pay compensation to the other party for the damages suffered. The</p> |

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| <p>claim of damages by the other party?</p> | <p>compensation includes expenses (negative interest) but not any benefits that the other party had expected to obtain with the negotiation (positive interest). This liability will appear in particular if any of the parties assumes an obligation in the MoU (i.e. exclusivity) that does not constitute the final agreement but a mean to obtain it and that party does not fulfil it. In the same way, if a party takes investment decisions during the negotiation of an agreement based on representations made by the other party, and finally the agreement is not reached, the latter will be entitled to compensation, provided that its investment decision was taken exclusively on the basis of the representations of the other party.</p> |
| <p>Legally Binding Effect-- Article 8 of Template</p> <p>Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?</p> | |
| <p>a. Local Law Issues</p> | <p>MoU's are not regulated in Spain. In the civil code there is only a brief rule regarding the promise or purchase and sale. Also, the legal nature and the effects of MoUs and of other similar documents that the parties can sign before entering into the final agreement (including promises, pre-contracts, etc.) have been for a long time, and still are, very controversial. These circumstances are also reflected in the Jurisprudence of the Supreme Court that, at the present moment, is very obscure and contradictory, which makes very difficult to establish general principles on the matter. Notwithstanding, there are the following principles</p> <p>A MoU will be binding if the parties want it to be binding. If they include obligations in the MoU, these obligations will be binding. Expressions included in the MoU stating that it is not binding are not definite but they are can be used to determine the real will of the parties.</p> <p>The limits between a non-binding document and a proper contract are not always clear. In principle, if the parties have agreed the essential requisites (i.e. in a purchase and sale the assets and the price) in that moment, there is an agreement that each of the parties can enforce. Nonetheless, the principle that the negotiation does not finish until all conditions have been agreed and that there is not an agreement until everything has been agreed and the parties decide to finish the negotiations with an agreement is also applicable in Spain.</p> |
| <p>b. Recommended Redraft</p> | <p>None.</p> |

| ITALY | |
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| <p>Duty of good faith</p> <p>Specifically, under what circumstances would a party have a duty of good faith to complete negotiations intended under the memorandum; failure of which to complete could give rise to a claim of damages by the other party?</p> | <p>During negotiations each party is free to decide whether to enter into an agreement, but the parties must act in accordance with good faith principles.</p> <p>Conduct will not be in compliance with good faith principles if a party breaks off, without a justifiable reason, negotiations that are in such an advanced state that they give rise to a reasonable expectation by the other party that the deal will be concluded; and if a party in negotiations fails to disclose, or inform the other party of, the existence of matters which would legally constitute reasons of invalidity of the contract.</p> |
| <p>Legally Binding Effect-- Article 8 of Template</p> <p>Under what circumstances could the intentions and understandings set forth in this memorandum give rise to binding obligations to either party under local law?</p> | |
| <p>a. Local Law Issues</p> | <p>Generally, letters of intent under Italian law have legally binding effects only if, and to the extent which, the parties so provide. However, even if Italian courts were found to have jurisdiction, any disputes (including those on the possible binding effect of any Lol provisions) would still be governed by English law, by virtue of par. 9 of the Lol.</p> |
| <p>b. Recommended Remedy</p> | <p>None</p> |

Distribution Agreement

| FRANCE | |
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| 1. Exclusivity - Article 1 Would applicable law in any circumstances require the agreement to be exclusive? | |
| a. Local Law Issues | There is no circumstance under French law which would require a distribution agreement to be exclusive – it is a matter for the parties to agree, subject to competition law requirements. |
| b. Recommended Redraft | None |
| 2. Indirect Solicitation of Orders outside the Territory -- Article 2.2(ii) Is this clause in conformity with European law as applied in the jurisdiction as regards the obligation to allow parallel imports into the Territory? | |
| a. Local Law Issues | There is no circumstance under French law which would require a distribution agreement to be exclusive – it is a matter for the parties to agree, subject to competition law requirements. |
| b. Recommended Redraft | None |
| 3. Article 5.3 – Refer back to previous exercise on limitation of liability | The concept of general, incidental, or consequential damages does not exist under French Law. French law only differentiates between direct and indirect damages. The limitation of liability for indirect and direct damages is admitted under French law except in case of personal injury or death and acts that are considered to be intentional or grossly negligent |
| | Company will use reasonable efforts to make deliveries of Products by the dates specified in Orders accepted from the Distributor. However Company shall have no liability or responsibility to Distributor or to anyone |

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| | claiming through Distributor for any loss or damage (including direct or indirect damages) arising out of any failure or delay in delivery, late delivery, or partial delivery of any Order. |
| 4. Transfer of Title -- Article 6.3 | |
| a. Local Law Issues | This article is compliant with French law. |
| b. Recommended Redraft | None |
| 5. Force Majeure--Article 8 | |
| a. Local Law Issues | <p>Under French law, a debtor who can not perform an agreement as a result of a Force Majeure event can not be considered liable for breach of the agreement. For an event to be deemed a Force Majeure event, such event (1) must not result from the debtor's fault, (2) must not be attributable to the debtor and (3) must be irresistible.</p> <p>However, the parties may freely craft a specific Force Majeure clause, providing for the Force Majeure requirements and effects. Thus, the parties may define the events which are to be considered Force Majeure events. In this case, the occurrence of one of the events listed in the Force Majeure clause will automatically be regarded as a Force Majeure event without the parties or the judge having to assess whether or not such event is irresistible as required by the law.</p> <p>Nevertheless, the parties can not derogate from the statutory rule providing that a Force Majeure event can not be invoked by a debtor if such event is attributable to his fault.</p> <p>Likewise, the parties may waive their rights to invoke Force Majeure in order to be discharged from their obligations.</p> <p>Everything which would not be addressed in the Force Majeure clause would be subject to the statutory provisions and case law.</p> |
| b. Recommended Redraft | None. |
| 6. Limitations of Warranty - Article 9 | |
| Are the limitations of warranty provided in this article valid under local law? | |
| a. Local Law Issues | The professional seller can exclude or limit this warranty vis-à-vis another " <i>professional of the same specialty</i> ". But, this exception is very narrowly interpreted by French courts on a case-by-case basis to apply only to |

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| | professionals whose specialty should have enabled them to detect the defect. Whether or not the courts would consider Company and the Distributor as being of the same specialty will depend on their analysis of the companies' business activities and technical knowledge of the Products. The warranty of merchantability does not exist under French law. However, retaining a reference to such a warranty would not harm the agreement. |
| b. Recommended Redraft | None. |
| 7. Consequences of Termination -Article 17 To what extent does local law limit the ability of the manufacturer to limit its responsibility to the distributor as set forth in this Article? | |
| a. Local Law Issues | <p>French law does not provide for a right for compensation of a distributor agreement (except under certain circumstances on the grounds of sudden breach of the agreement without complying with a prior notice, sudden breach of established business relationships or abusive breach of the agreement). In addition as the clause refers to the event of expiry or termination, it would not apply cover Company's liability damages for breach of contract or statutory obligations. A general limitation of liability clause should be provided in a separate clause.</p> <p><u><i>Specific note on non-renewal of a fixed term agreement</i></u></p> <p>The non-renewal of a fixed-term agreement upon its expiry may result for the terminating party being held liable on the grounds of abuse of rights. Thus, the courts have held that the terminating party has to be deemed liable in the event the termination of the agreement resulted from manoeuvres of the terminating party which constituted an intentional fault. The non-renewal of an agreement is also considered abusive where the terminating party let the other party believe that he intended to renew the contract.</p> <p>Finally, the non-renewal of a contract is also held abusive by the courts where it appears that the terminating party has committed himself to renew the agreement.</p> |
| b. Recommended Redraft | None. |
| 8. Arbitration -Article 20 Would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors? Would a local court enforce an arbitral judgment | |

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| <p>rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?</p> | |
| <p>a. Local Law Issues</p> | <p>The French courts would apply the arbitration provisions. However, the arbitrators would be bound by French mandatory rules.</p> <p>French courts will normally enforce foreign arbitral awards if certain requirements are met. However the courts will refuse to enforce foreign awards in the event that the arbitral award has been set aside by the courts in the country in which it was made and the event that the award violates French public policy rules.</p> |
| <p>b. Recommended Redraft</p> | <p>None.</p> |
| <p>UK</p> | |
| <p>1. Exclusivity - Article 1</p> <p>Would applicable law in any circumstances require the agreement to be exclusive?</p> | |
| <p>a. Local Law Issues</p> | <p>There is no circumstance in English law which would require a distribution agreement to be exclusive – it is a matter for the parties to agree, subject to competition law requirements.</p> |
| <p>b. Recommended Redraft</p> | <p>No modification required.</p> |
| <p>2. Indirect Solicitation of Orders outside the Territory -- Article 2.2(ii)</p> <p>Is this clause in conformity with European law as applied in the jurisdiction as regards the obligation to allow parallel imports into the Territory?</p> | |

a. Local Law Issues

Agreements which restrict or distort competition are prohibited under Article 81(1) EC Treaty but a vertical agreement (such as a distribution agreement) is exempt from the prohibition if it falls within the EC Block Exemption relating to vertical agreements (*Regulation 2790/1999/EC*) (the BER). The BER automatically exempts certain restrictions in vertical agreements between two or more undertakings which are not actual or potential competitors where the relevant market share is below 30% and provided the duration is not more than 5 years or indefinite.

The BER will not apply to so-called hardcore restrictions. **Such restrictions cannot be severable and, if included, the entire agreement will be prohibited.** Article 4 of the BER sets out the hardcore restrictions and these include territorial and customer restrictions imposed on the distributor.

Save in relation to hardcore restrictions there is no presumption of illegality where the BER does not apply. In the event that for example the Company has a market share above 30% or restrictions are to be included with a duration of over 5 years, these will fall for individual examination under Article 81(3) EC Treaty and may be eligible for exemption where they can be objectively justified as being pro-competitive, for example because they deliver technical or economic efficiencies which benefit consumers.

Articles 2.2(i), (ii), (iii) and (vi)

Four exceptions are set out in Article 4(b) of the BER and, of particular relevance to this Agreement, the first of these permits a restriction of active sales to other territories or customers in certain circumstances. However, there must remain the possibility of passive sales into those territories.

The restrictions in Articles 2.2(i), (ii), (iii) and (vi) all restrict the Distributor's ability to make sales outside the appointed Territory. These types of restrictions are described in the Commission's *Guidelines on Vertical Restraints (2000/C 291/01)* and can be divided into restrictions on "active" and "passive" sales. 'Active' sales means actively approaching individual customers or an exclusive customer group inside another distributor's exclusive territory. 'Passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers.

The restriction must only be on active sales into a territory or customer group 'reserved to the supplier or allocated by the supplier to another buyer'. The relevant Company here *must* exclusively reserve a territory or customer group to itself or allocate it to another distributor in order to be able to impose an active sales ban. To the extent that these restrictions purport to be of general application outside the Territory they risk unenforceability and it is likely a competition authority would take a dim view of any active attempt to enforce the provisions.

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| | <p>Similarly the Agreement is itself expressed to appoint the Distributor on a non-exclusive basis. On that basis any restriction on other distributors in other territories from making active sales into the Territory would take that agreement outside the BER.</p> <p>Article 2.2(viii)</p> <p>This is a non-compete obligation as described in Article 1(b) of the BER. The BER provides (Article 5) that such restrictions in vertical agreements can be exempted where the other conditions described above apply.</p> <p>Article 13</p> <p>This is a minimum purchase restriction. Minimum purchase restrictions can amount to a form of non-compete obligation where they result in the Distributor in effect buying the bulk (e.g. 80%) of its purchases from one supplier. Again the BER provides (Article 5) that such restrictions in vertical agreements can be exempted where the other conditions described above apply.</p> |
| <p>b. Recommended Redraft</p> | <p>None.</p> |
| <p>3. Article 5.3 – Refer back to previous exercise on limitation of liability</p> | <p>The article should clearly and expressly refer to the heads of loss that the party is trying to exclude.</p> <p>Modified clause:</p> <p>The Company will use reasonable efforts to make deliveries of Products by the dates specified in Orders accepted from the Distributor. However the company shall not be liable for any loss, damage, claims or expenses whether direct, indirect or consequential (including loss of profits and loss of goodwill) or otherwise suffered or incurred by the distributor as a result of failure to supply any or all of the products within the specified time.</p> <p>No person who is not a party to this agreement shall have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.</p> |
| <p>4. Transfer of Title -- Article 6.3</p> | |
| <p>a. Local Law Issues</p> | <p>The Products are defined as digital satellite receivers, related components and all consumer electronic devices</p> |

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| | <p>sold by the Company to the Distributor. For the purposes of this note, we assume that such Products are unmixed, i.e. remain in the form in which they were sold, or can be separated from other goods without causing damage.</p> <p>Retention of title clauses that retain legal title to goods are effective and do not create a charge (that is void unless registered). It is acceptable to include an “all monies/all account” clause, so that title is retained until all monies due on any account are paid.</p> <p>As this is a distributorship arrangement, it is not commercially viable to expect the Distributor to have no right to re-sell the Products in the ordinary course of business. Where a contract is silent on this point, the right to do so will be implied into the Agreement in order to give business efficacy to the contract.</p> <p>Once the Products are re-sold, Article 6.3 will be of little practical value. Claims to the proceeds of sale may be included in the Agreement but this is likely to be construed as a charge and unless a fiduciary relationship is established, unenforceable unless registered. It is not practicable in an on-going commercial relationship to register each and every charge as it arises.</p> <p>It is advisable to make each part of Article 6.3 severable, so that if one part is unenforceable it will not make the whole article invalid.</p> <p>In practice, retention of title clauses should be viewed as a last resort and commercially, the Company should ensure that it has a proper credit control system and has taken steps to assess the creditworthiness of the Distributor.</p> |
| <p>b. Recommended Redraft</p> | <p>(A) Notwithstanding that delivery has been made, all property in the Products shall not pass from the Company until:</p> <p>(1) the Distributor has paid in full the purchase price of the Products and any related amounts pursuant to Article 4.1, including but not limited to VAT; and</p> <p>(2) no other sums whatsoever shall be due from the Distributor to the Company.</p> <p>(B) Until such time as the property in the Products passes from the Company to the Distributor, the Distributor shall store the Products separately from his or third party goods, stamped with a batch number and/or other identification mark.</p> <p>(C) Notwithstanding that the Products (or any of them) remain the property of the Company, the Distributor may</p> |

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| | <p>sell the Products in the ordinary course of the Distributor's business. Any such sale shall be a sale of the Company's property by the Distributor on the Distributor's own behalf and the Distributor shall deal as principal when making such sales.</p> <p>(D) Until such time as property in the Products passes from the Company to the Distributor, the Company shall upon request deliver up to the Company such of the Products as have not been resold. If the Distributor fails to do so, the Company may enter any premises owned, occupied or controlled by the Distributor where the Products are situated and repossess the Products. On the making of the such a request by the Company, the rights of the Distributor under sub-article 6.3(C) shall cease.</p> <p>(E) The Distributor shall not pledge or in any way charge by way of security for any indebtedness any of the Products which are the property of the Company. Without prejudice to any other rights or remedies of the Company, if the Distributor does so, all sums whatever owing by the Distributor to the Company shall forthwith become due and payable.</p> <p>(F) Each sub-article under this Article 6.3 shall be severable from the remainder of the Article. If a part of this Article 6.3 is found to be invalid under English law, this shall not affect the validity of the remainder of the Article.</p> |
| <p>5. Force Majeure--Article 8</p> | |
| <p>a. Local Law Issues</p> | <p>There is no legal doctrine of "force majeure" in English law. Under English law, if a contract cannot be performed by a party due to circumstances beyond the party's control, the contract may be "frustrated" and come to an end. To avoid this, a clause is included to state that the party so affected is not liable for delays in his performance and the relevant events may be defined as force majeure events (as an non-exhaustive list). If there is any doubt as to whether a particular event is or is not included, it can be expressly dealt with in the definition. For example, industrial relations by the employees and subcontractors of a party (which arguably are within the control of the party, e.g. by accepting employee demands or procuring another subcontractor) may or may not be included in this list of events. Finally, if a force majeure event continues for a certain period, a termination right can be included.</p> <p>In standard form contracts (such as this Agreement), a force majeure clause may be subject to a test of reasonableness under the Unfair Contract Terms Act 1979 (if it applies).</p> <p>By making Article 8 one-way (i.e., so only the Company is entitled to relief from liability as a result of delay), there is a risk that the Distributor, if affected by a force majeure event, could claim that the Agreement is frustrated as a result. Article 8 should be made mutual to avoid this.</p> |

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| <p>b. Recommended Redraft</p> | <p>Other than in relation to any obligation of the Distributor to pay amounts owed when due, neither party shall be deemed to be in breach of this agreement or otherwise liable to the other as a result of any delay or failure in the performance of its obligations under this agreement if and to the extent that such failure is caused by any circumstances not within the reasonable control of the party concerned including (but not limited to) any act of God, local government or government, war, accident, fire, explosion, flood, earthquake or storm, acts of terrorism, explosion, civil commotion or industrial dispute (not affecting the employees or subcontractors of the Distributor) ("Force Majeure Event") and the time for performance of the relevant obligation(s) shall be extended accordingly. If the Force Majeure Event delays or prevents the performance of the obligations of either party for a continuous period in excess of 3 months, the party not so affected shall be entitled to give notice to the affected party to terminate this agreement forthwith.</p> |
| <p>6. Limitations of Warranty - Article 9</p> <p>Are the limitations of warranty provided in this article valid under local law?</p> | |
| <p>a. Local Law Issues</p> | <p>Terms relating to goods/services may be implied by common law and statute. The Sale of Goods Act 1979 ("SOGA 1979") will apply to the Agreement. To the extent the Agreement deals with both supply of goods and provision of services, the Supply of Goods and Services Act 1982 ("SGSA") (which includes similar terms as SOGA on quality and purpose) will apply to the Agreement, and not SOGA 1979.</p> <p>Article 9.2 is an attempt to exclude conditions implied of satisfactory quality and that the Products are reasonably fit for the Distributor's purpose. The common law rules on exclusion clauses will apply. If the Unfair Contract Terms Act (UCTA) applies, these terms can be excluded only insofar as the exclusion satisfies the test of reasonableness. (Article 9.2 cannot however avoid the Company's (strict) liability under the Consumer Protection Act 1987 in relation to damage suffered by consumers caused by a defect in the Product.)</p> <p>Article 9.5 is an attempt to exclude or restrict the Distributor's rights or remedies in respect of the Company's liability under the Limited Warranty. Again, the common law rules on exclusion clauses will apply. If UCTA applies, this condition could only be inserted insofar as it satisfies the test of reasonableness.</p> <p>Article 9.7 appears (although this is not clear) to be an attempt to exclude the Company's liability for the advice/service given. It is not clear whether this specifically relates to advice/service given pursuant to the Limited Warranty or more general advice/service. It is an implied term of common law and the SGSA that services are performed with reasonable care and skill. The basis of liability is negligence. This attempt to exclude liability must expressly refer to negligence to make it clear that negligence is to be excluded. If UCTA</p> |

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| | <p>applies, liability for death/personal injury caused by negligence cannot be excluded, but liability for property damage or other loss can be in so far as the exclusion satisfies the test of reasonableness.</p> |
| <p>b. Recommended Redraft</p> | <p>Article 9.2: all claims for breach of warranty must be received by the company no later than thirty (30) days after the expiration of the limited warranty period for the product. This warranty defines the company's liability in respect of the products. Except as expressly stated in this agreement, all other conditions, warranties or other undertakings concerned with the products whether express or implied by statute, common law, usage, custom or otherwise are excluded from this agreement, including but not limited to all warranties, conditions or undertakings of satisfactory quality, fitness for a particular purpose or use or failure to correspond to any description or sample.</p> <p>Article 9.5: The distributor's remedies under article 9.3 shall be suspended for any period during which the distributor is in full or partial breach or default of this agreement or of any term or condition hereunder. [Article 9.3 should be expressed to be subject to this article 9.5]</p> <p>Article 9.7: The distributor shall support, assist and enable the company upon the company's request to carry out its warranty activities. In the event that the company or its representatives provide any technical advice or service to the distributor, or any other person in connection with the products, the distributor agrees that the company shall not be liable for any damage or loss caused by its negligence as a result of any such advice or service. All other conditions, warranties or other undertakings in relation to such services whether express or implied by statute, common law, usage, custom or otherwise are excluded from this agreement [amend by making capitalised.]</p> |
| <p>7. Consequences of Termination -Article 17</p> <p>To what extent does local law limit the ability of the manufacturer to limit its responsibility to the distributor as set forth in this Article?</p> | |
| <p>a. Local Law Issues</p> | <p>Under English law, there is no right for compensation of a distributor in the event of termination of a distributorship agreement. Attempts to limit or exclude liability on termination will be subject to the common law rules and possibly UCTA.</p> <p>Article 17.2 only deals with liability on expiry/termination – it will not apply to exclude heads of loss for any claim under breach of contract, tort (negligence) or statutory duty. If a more general exclusion/limitation of liability is desired by the Company, this should be expressly stated in a separate clause.</p> |
| <p>b. Recommended Redraft</p> | <p>Article 17.2: Upon expiration or termination of this agreement for any reason whatsoever, the Company and no member of the EchoStar Group shall have any liability to Distributor for loss of business, loss of profits, loss of</p> |

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| | <p>goodwill, reimbursement for expenditures or investments made or commitments entered into, creation of clientele, advertising costs, warehousing costs, termination of employees or employees salaries, overhead or facilities incurred or acquired based upon the business derived or anticipated under this agreement, or for any other damages, including but not limited to special or consequential damages, whether foreseeable or not, or for claims under dealer or distributor termination, protection, non-renewal or similar laws, for any cause whatsoever, whether or not caused by the company's negligence. Distributor agrees that in the event of expiration or termination of this agreement for any reason whatsoever, no amounts spent in its fulfilment will be recoverable from the Company by the Distributor.</p> <p>In no event shall any projections or forecasts by the Company be binding as commitments or promises by the Company. [Make separate clause]</p> |
| <p>8. Arbitration -Article 20</p> <p>Would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors?</p> <p>Would a local court enforce an arbitral judgment rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?</p> | |
| <p>a. Local Law Issues</p> | <p>Yes, the English courts would apply the arbitration provisions in the Agreement. In relation to the second query, there is no mandatory English law protecting distributors. In any event, where a party, in opposition to the arbitration provisions, commences litigation, the English court has the power (if requested by the other party) pursuant to the Arbitration Act 1996 ("Arbitration Act") to stay any such court action.</p> <p>Yes, the English courts will enforce arbitral judgements. In relation to the second query, a party may apply to set aside an award on only three limited grounds under the Arbitration Act (that the tribunal lacked substantive jurisdiction; serious irregularity; or error of law (note that if the parties wish to permit appeals on a point of law, under English law this must be expressly stated in the Agreement, as the institutional rules of the LCIA exclude this). The Arbitration Act does preserve the common law rule of law of refusal to recognise or enforce an award</p> |

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| | on the grounds of public policy, however as stated above there is no mandatory law protecting a distributor and arguments of public policy are very rare. |
| b. Recommended Redraft | Any and all disputes arising between the parties, including without limitation any and all disputes arising out of, or in connection with, the interpretation, validity, performance or the non-performance of this Agreement or this Article (including any tortious or statutory claims) and any and all disputes arising out of, or in connection with, transactions in any way related to this Agreement, including without limitation the relationship between the parties (including but not limited to the termination of this Agreement or the relationship for any reason whatsoever and the parties' rights thereunder), shall be referred to and finally resolved by arbitration in London, England, in accordance with the Rules of Conciliation and Arbitration of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this Article. The place of arbitration shall be London, England. The arbitration proceedings shall be conducted in the English language and the award shall be in English. The decision of the arbitrators shall be final and binding on the parties. Any award of the arbitrators may be entered in any court having jurisdiction over any of the parties, and the parties each hereby expressly and irrevocably consent and waive any objection to the entry of any award in any such jurisdiction. All costs of any arbitration hereunder, including without limitation the cost of the record or transcripts thereof, if any, administrative fees, travel costs, attorneys' fees and all other fees involved, shall be paid by the losing party, or otherwise allocated in an equitable manner as determined by the arbitrators. |
| GERMANY | |
| 1. Exclusivity - Article 1 Would applicable law in any circumstances require the agreement to be exclusive? | |
| a. Local Law Issues | Under German law, Authorised Distributor Agreements do not have to be exclusive. |
| b. Recommended Redraft | No other recommendation |
| 2. Indirect Solicitation of Orders outside the Territory -- Article 2.2(ii) Is this clause in conformity with European law as applied in the jurisdiction as regards the | |

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| obligation to allow parallel imports into the Territory? | |
| a. Local Law Issues | <p>The wording of Article 2.2 (ii) bears the risk of infringing competition law.</p> <p>However, the EU Block Exemption Regulation no. 2790 of 1999 may provide for a safe harbour provided that certain requirements set out in the regulation are met (e.g. pursuant to its Article 4b).</p> |
| b. Recommended Redraft | A general draft recommendation cannot be rendered but must be drafted on a case by case basis. |
| 3. Article 5.3 – Refer back to previous exercise on limitation of liability | <p>In general, one has to differentiate between standard contract terms and negotiated contract terms. Negotiated limitations of liability can be more comprehensive than standard contract terms.</p> <p>A total exclusion of liability for consequential, financial or indirect losses or similar will be held not enforceable if it is stated in a standard contract term.</p> <p>An exclusion and a limitation of liability for gross or intentional negligence is held to be invalid in Germany according to the German Civil Code (<i>BGB</i>).</p> <p>A term excluding or restricting liability for death or personal injury caused by negligence is held to be invalid.</p> <p>Liability for negligence can be excluded and limited provided no major contractual duty is affected.</p> <p>An exclusion or limitation of claims according to the Product Liability Act (which mostly applies to claims of consumers) is also void.</p> |
| 4. Transfer of Title -- Article 6.3 | |

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| <p>a. Local Law Issues</p> | <p>In Germany, a retention of title</p> <p>is often agreed between companies such as the Company and the Distributor. They are in general legally effective, irrespective of whether they have been agreed in individual or in standard agreements.</p> <p>Article 6.3 contains an extended retention of title (<i>erweiterter Eigentumsvorbehalt</i>), i.e. that the title will only be transferred until the Distributor has paid all that it is owing to the Company, also based on other agreements. In case of standard terms, such provision is only valid, if the Distributor is protected from unreasonable over-collateralisation. Therefore, a respective clause has to be drafted reflecting such protection.</p> <p>In Germany, a prolonged retention of title (<i>verlängerter Eigentumsvorbehalt</i>) is often agreed, which means that the Distributor may sell and transfer a Product even if it was subject to a retention of title. In turn, the consideration of a customer for such Product will replace the Product which was subject to retention.</p> |
| <p>b. Recommended Redraft</p> | <p>A general draft recommendation cannot be rendered as such draft has to take into consideration the specifics of each single case.</p> |
| <p>5. Force Majeure--Article 8</p> | |
| <p>a. Local Law Issues</p> | <p>Under German law force majeure is defined as an extraneous, unforeseeable and extreme event which even under utmost diligence cannot be avoided. Examples of force majeure are war, natural disasters, strikes etc. It is highly doubtful whether a German court would regard a general delay in the provision to the Company of parts, goods or services ordered from third parties as force majeure.</p> |
| <p>b. Recommended Redraft</p> | <p>In general, in case of individual agreements, if a part of a clause is null and void, the remaining clause may remain effective, however, in case of standard terms, the whole clause would deemed to be null and void.</p> <p>Therefore, for standard terms, at least the part of the definition of force majeure “general delay in the provision to the Company of parts, goods or services ordered from third parties” should be deleted.</p> <p>In an individual agreement, one could use Article 8, even though there is a risk that a German court would not accept certain definitions.</p> |
| <p>6. Limitations of Warranty - Article 9</p> <p>Are the limitations of warranty provided in this</p> | |

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| article valid under local law? | |
| a. Local Law Issues | <p>It needs to be noted that the Distributor may under certain circumstances be liable vis-à-vis its customers for warranty claims for a longer term than 12/18 months.</p> <p>However, in case the customer is a <i>consumer</i>, the Distributor may have a respective (recourse) claim against the Company irrespective of the agreed liability term of 12/18 months (Section 478 German Civil Code (<i>BGB</i>)).</p> <p>At least in case of standard terms, Article 9.6 may be held invalid by a German court due to an unreasonable disadvantage of the Distributor.</p> |
| b. Recommended Redraft | <p>General recommended redraft cannot be given - to be drafted on a case by case basis.</p> <p>In detail, it should be considered how to reflect the effect of Section 478 BGB as mentioned above. For example, one could agree the 12/18 month term but would then have to provide the Distributor with an adequate compensation for claims pursuant to Section 478 in connection with the other relevant Sections of the BGB.</p> <p>Deletion of Article 9.6. should be considered.</p> |
| 7. Consequences of Termination -Article 17 To what extent does local law limit the ability of the manufacturer to limit its responsibility to the distributor as set forth in this Article? | |
| a. Local Law Issues | <p>At least in case of standard terms, Article 17.1 may be held invalid by a German court as it is not specified enough.</p> <p>Article 17.2 may be invalid, as the Distributor may under certain circumstances be entitled to a compensation under Section 89b German Commercial Code (<i>HGB</i>) following termination, which could not be excluded. Whether or not such compensation is to be granted needs to be analysed on a case by case basis.</p> <p>If a compensation would need to be paid, note that according to a decision of the European Court of Justice (C-381/98) such a claim for compensation cannot be excluded by way of choosing foreign law if the Distributor acts in a European country.</p> <p>Furthermore, the limitation of liability of the Company following termination cannot comprise claims which are (or</p> |

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| | <p>the basis of which is) already existing prior to termination.</p> <p>Article 17.4 would need to be reconsidered, as it is qualified either as takeover of the agreement between the Distributor and the customer or a transfer of the Distributor's obligations vis-à-vis its customer, respectively, both of which are only possible with the customer's consent.</p> |
| <p>b. Recommended Redraft</p> | <p>A general draft recommendation cannot be rendered but must be considered on a case by case basis.</p> |
| <p>8. Arbitration -Article 20</p> <p>Would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors?</p> <p>Would a local court enforce an arbitral judgment rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?</p> | |
| <p>a. Local Law Issues</p> | <p><u>Application of local law:</u></p> <p>As agreed between the parties, the Agreement is subject to specific arbitration proceedings. These proceedings replace the competence of German courts (except for preliminary injunction measures).</p> <p>Further, the Agreement is subject to the laws of the State of Colorado. Therefore, German law is generally not applicable (see exceptions below).</p> <p><u>Enforcement of foreign arbitral judgement:</u></p> <p>Foreign binding arbitral judgements are in general enforceable in Germany; the enforcement is regulated in, inter alia, the German code of civil procedure (ZPO) and - by reference in the ZPO - in the provisions of the</p> <p>United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention also sets out circumstances under which arbitral judgements are <i>not</i> enforceable. Inter alia, arbitral judgements are</p> |

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| | <p>not enforceable if they do breach the <i>ordre public</i>.</p> <p>As mentioned above, according to a decision of the European Court of Justice (C-381/98), a claim for compensation of the Distributor following termination of the Agreement cannot be excluded by way of choosing foreign law, as such compensation payments (the legal ground of which is based on an EU directive) are of a fundamentally nature in the European Union.</p> <p>Therefore, a German court may follow the Distributor's argument that in case an arbitral judgement rejected its claim for compensation, this constitutes a breach of the <i>ordre public</i> with the consequence that the judgement may not be enforceable in Germany.</p> |
| b. Recommended | No other recommendation. |
| NETHERLANDS | |
| <p>1. Exclusivity - Article 1</p> <p>Would applicable law in any circumstances require the agreement to be exclusive?</p> | |
| a. Local Law Issues | There are no rules under Dutch law that would require the agreement to be exclusive. |
| b. Recommended Redraft | No recommendations |
| <p>2. Indirect Solicitation of Orders outside the Territory -- Article 2.2(ii)</p> <p>Is this clause in conformity with European law as applied in the jurisdiction as regards the obligation to allow parallel imports into the Territory?</p> | |
| a. Local Law Issues | Dutch competition law is modelled on EC competition law and will not be applied more or less strictly than EC competition law. |

The answer is given under the following assumptions:

- The distributor and the supplier are assumed not to be actual or potential competitors.
- The distribution agreement does not concern a selective distribution system.

This clause may have as its object or effect the restriction of sales by the Distributor to customers outside the territory. If the market shares of both the distributor and the supplier are below 15% on the relevant product markets, then the clause will not be capable of appreciably restricting competition by effect.

If the market share of either the supplier or the distributor however exceeds 15%, and the clause has an effect on trade between the Member States of the European Union, it may infringe Article 81(1) EC. If this clause has an effect on a market in the Netherlands, it may infringe Article 6(1) of the Dutch Competition Act.

Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices offers a presumption of legality for distribution agreements depending on the market share of the supplier and the clauses at issue. The market share of the supplier on the market where he sells the contract goods or services is decisive. The market share has to be below 30% to benefit from the safe harbour Regulation 2790/1999 offers.

However, Regulation 2790/1999 will only be available if the agreement restricts only active sales to customers outside the allocated territory and only if the supplier has allocated the 'outside' territories concerned to other distributors or to himself. Active sales means actively approaching individual customers outside the distributor's allocated territory, for instance by direct mail or visits or through advertisement in media or other promotions specifically targeted at customers outside the allocated territory, or establishing a warehouse or distribution outlet in another distributor's exclusive territory.

The distributor must be allowed to passively sell the products, also if orders come in from customers residing outside the allocated territory. Passive sales are general advertising or promotion in media or on the internet that reaches customers in other distributors' exclusive territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance, to reach customer groups in non-exclusive territories or in one's own territory.

Currently, it is not clear to what extent the clause permits passive sales from taking place. If passive sales are indeed not permitted, then the clause may violate Article 6(1) of the Dutch Competition Act and Article 81(1) of the EC Treaty, depending on the markets and market shares concerned.

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| <p>b. Recommended Redraft</p> | <p>"2.2 The Distributor hereby represents, warrants, and covenants to the Company that it will not:</p> <p>(ii) Actively solicit orders for the Products from any person or entity residing or carrying business outside the Territory, to the extent that such territories have been reserved by the Company for itself or have been allocated exclusively to other distributors, as [listed in schedule [...]] or [as communicated by the Company to the Distributor from time to time]"</p> |
| <p>3. Article 5.3 – Refer back to previous exercise on limitation of liability</p> | <p>This article is acceptable under Dutch law. The Company can exclude liability for late deliveries provided that wilful misconduct or gross negligence cannot be excluded by contract.</p> |
| <p>4. Transfer of Title -- Article 6.3</p> | |
| <p>a. Local Law Issues</p> | <p>In case of default by the buyer, the seller may reclaim the unpaid goods or the portion to which he is entitled. When the buyer does not return the reclaimed goods voluntarily, court action will be necessary. Swift action is advisable, since the seller's position may be weakened by the buyer's actions, such as (i) the resale or (ii) commingling (<i>natrekking</i>). That the retention of title ("ROT") terminates in case of a resale of the product by the buyer is generally accepted.</p> <p>Goods not designed for immediate resale, e.g. raw materials or auxiliary goods, will – sometimes after a period of storage – be processed, adhered to or commingled with other goods.</p> <p>The main problem arising from such activities is whether a new object has originated and, if so, who will be the owner of it. Situations like these have to be dealt with on a case by case basis. The following general rules apply:</p> <p>(A) If one object adheres to another one which can be considered to be the principal one, legal title shall be vested in the latter (section 5:14 Dutch Civil Code "DCC") and a retained title in the less important object will lose its effect;</p> <p>(B) If none of the objects, adhered together inseparably and thus forming a new object, may be considered to be the main object, co-ownership between the original owners will be the consequence. The same occurs in the event two or more materials are commingled (section 5:15 DCC);</p> <p>(C) If the economic value of the processing in terms of labour or added materials is of little importance in comparison with the value of the good delivered under ROT, the original identity of the good may remain unchanged;</p> |

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| | <p>(D) If someone for his own account makes a new object from materials which did not belong to him, he will become the owner of the newly formed goods (section 5:16 DCC) and a retained title will become void. When he did so as an employer or representative or in a relationship of trust, ownership of the new good will remain with the owner of the original good. However, it is doubtful whether a retained title can be extended into a newly formed object by constructing a relationship of this kind;</p> <p>(E) Whether or not a new object originated from the processing or commingling will have to be judged on the basis of general business understanding</p> <p>Due to the aforementioned risks of termination of the ROT a seller should consider vesting additional security rights, instead of solely relying on an ROT.</p> |
| <p>b. Recommended Redraft</p> | <p>"6.3. All Products delivered by the Company remain the property of the Company until such time as the Distributor has paid in full all that which is owed to the Company including damages (including but not limited to all depreciations of the delivered products), costs and interest. The Distributor has no right of retention with respect to these Products."</p> |
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| <p>5. Force Majeure--Article 8</p> | |
| <p>a. Local Law Issues</p> | <p>According to the Dutch Civil Code a failure in performance cannot be attributed to the obligor (force majeure) if it is neither due to his fault nor for his account pursuant to the law, a juridical (<i>legal</i>) act or generally accepted principles. The facts of the matter at hand therefore play an important role. Every failure in performance could be deemed not attributable to the obligor. The criterion therefore is not that the failure in performance is the result of circumstances beyond the reasonable control of the obligor but whether the failure in performance is neither due to his fault nor for his account pursuant to the law, a juridical (<i>legal</i>) act or generally accepted principles. Under Dutch law an obligor can invoke force majeure even if the contract does not contain a force majeure clause.</p> <p>The provisions in the Dutch Civil Code with respect to force majeure are <i>directory</i> and not <i>mandatory</i> law. Parties can therefore by contract extend or limit the scope of force majeure. Exclusions of liability due to willful acts or gross negligence are void under Dutch law. Exclusions of liability due to willful acts or gross negligence of auxiliary persons (such as employees) are however allowed.</p> |
| <p>b. Recommended Redraft</p> | <p>"8. <u>Force Majeure</u>. The Company is entitled to invoke force majeure if the implementation of the agreement is, in whole or in part, temporarily or not, prevented or impeded by circumstances out of its control or if the</p> |

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| | <p>circumstances cannot be attributed to the Company nor are for its account pursuant to the law, a juridical (<i>legal</i>) act or generally accepted principles. The circumstances include but are not limited to site or building blockades, strikes, war, embargoes, specific work interruptions or slowdowns or lockouts, delay in the provision to the Company of parts, goods or services ordered from third parties, accidents, interruptions of business operations, and acts of God. In the case of force majeure on the part of the Company, its obligations are suspended. If the force majeure lasts longer than three months, the Company and the Distributor are each authorised to rescind the non-feasible parts of the agreement by a written declaration. The parties agree that the Force Majeure provisions of this paragraph are not applicable to the payment of any amounts owed when due.”</p> |
| <p>6. Limitations of Warranty - Article 9</p> <p>Are the limitations of warranty provided in this article valid under local law?</p> | |
| <p>a. Local Law Issues</p> | <p>Subject to certain exceptions, the limitations of warranty in this Distribution Agreement are valid. The limitation of warranty, however, cannot be maintained against the Distributor in situations in which the Distributor seeks recourse for a consumer's claim, as set out below, and in case of wilful misconduct or gross negligence of the Company, or if maintaining the limitation of warranty would be unacceptable in the light of the rules of reasonableness and fairness (article 6:248 Dutch Civil Code). In a professional relationship as is the case with the Distribution Agreement, and given the nature of the limitation of warranty clauses, the latter situation will seldom apply.</p> |
| <p>b. Recommended Redraft</p> | <p>None</p> |
| <p>7. Consequences of Termination -Article 17</p> <p>To what extent does local law limit the ability of the manufacturer to limit its responsibility to the distributor as set forth in this Article?</p> | |
| <p>a. Local Law Issues</p> | <p>According to Dutch law, all contracts are subject to the rules of reasonableness and fairness. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.</p> <p>Naturally, this rule also applies to the termination of the distribution agreement without paying any compensation to the distributor, if the circumstances so dictate. The same goes for the term of notice that may have to be</p> |

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| | <p>regarded.</p> <p>However, [in our opinion] the provisions of article 17 of the Distribution Agreement are acceptable.</p> |
| b. Recommended Redraft | None |
| <p>8. Arbitration -Article 20</p> <p>Would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors?</p> <p>Would a local court enforce an arbitral judgment rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?</p> | |
| a. Local Law Issues | <p>According to Dutch law, the arbitration provision is valid. Local law would take no jurisdiction. Any Dutch court, confronted with objections as to its jurisdiction, would have to refer the case to arbitration in London.</p> <p>However, in an injunction procedure a Dutch judge may consider himself competent to assess a claim. This may depend on several circumstances, <i>inter alia</i> the urgency of the matter, whether the arbitration rules provide for arbitral injunctive proceedings. This is at the judge's discretion. If one of the parties should take conservatory measures in the Netherlands (such as seizures or attachments of properties), a Dutch judge will be competent to assess a request for the cancellation of such measures.</p> <p>An arbitral award rendered in London would be enforceable through a local Dutch court, unless the award itself (material issues) or the arbitral proceedings (formal issues) would be contrary to Dutch public order (public policy). Contradiction of an arbitral award with material Dutch mandatory law does not necessarily indicate that the award is contrary to Dutch public order. Mandatory law cannot by definition be considered to be of public order; we assume that mandatory law protecting the distributor would generally not qualify as "rules of public order".</p> |
| b. Recommended Redraft | None. |

| SPAIN | |
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| 1. Exclusivity - Article 1 Would applicable law in any circumstances require the agreement to be exclusive? | |
| a. Local Law Issues | Neither under Spanish competition law nor under EU competition law is there an existing obligation requiring a particular agreement to be exclusive. |
| b. Recommended Redraft | None |
| 2. Indirect Solicitation of Orders outside the Territory -- Article 2.2(ii) Is this clause in conformity with European law as applied in the jurisdiction as regards the obligation to allow parallel imports into the Territory? | |
| a. Local Law Issues | <p>Article 81 of the EC Treaty applies to agreements that may affect trade between Member States and which prevent, restrict or distort competition. The first condition for Article 81 to apply is that the agreements in question are capable of having an appreciable effect on trade between Member States. Where the first condition is met, Article 81(1) prohibits agreements which appreciably restrict or distort competition. Article 81(3) renders this prohibition inapplicable for those agreements which create sufficient benefits to outweigh the anti-competitive effects. Such agreements are said to be exempted under Article 81(3).</p> <p>Vertical agreements are agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain. Vertical agreements which simply determine the price and quantity for a specific sale and purchase transaction do not normally restrict competition. However, a restriction of competition may occur if the agreement contains restraints on the supplier or on the buyer.</p> |

Whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will often depend on the market structure. In principle, this requires an individual assessment. The Commission has adopted Regulation (EC) No 2790/1999, "the Block Exemption Regulation", which provides a safe harbour for most vertical agreements. Regulation (EC) No 2790/1999 renders by block exemption the prohibition of Article 81(1) inapplicable to vertical agreements entered into by companies with market shares not exceeding 30 % in the absence of hardcore restrictions such as resale price maintenance, restrictions concerning the territory into which or the customers to whom the buyer may sell in some circumstances, customer allocation etc...

There are three main types of distribution agreements, exclusive, non-exclusive and selective agreements. The Agreement concerned is a non-exclusive agreement.

As far as exclusive distribution agreements are concerned the supplier agrees to sell its products only to one distributor for resale in a particular territory or for resale to a particular class of customers. In those agreements, the distributor is usually also limited in its active selling into other exclusively allocated territories or classes of customers. The above does not apply to non-exclusive agreements.

Selective distribution agreements, like exclusive distribution agreements, restrict on the one hand the number of authorised distributors and on the other the possibilities of resale. The difference with exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorised distributors leaving only appointed dealers and final customers as possible buyers.

Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation up to 30 % market share, even if combined with other non hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. Therefore the authorised distributors are restricted in their sales possibilities, as they are not allowed to sell to non-authorised distributors, leaving them only free to sell to other authorised distributors and final customers.

As regards clause 2.2 (ii) of the Non-exclusive Distribution Agreement, the distributor should not be limited in his active selling into other exclusively allocated territories or classes of customers as it is based on a non-exclusive basis. However in order to have a final opinion on whether the distribution contract concerned, and in particular Clause 2.2 (ii) is in breach of EU Competition Law, further information would be necessary such as whether the companies involved enjoy a market share above 30%, whether there is an existing price fixing policy, (i.e. resale price maintenance), and in general terms, a detailed economic analysis of the market structure.

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| | Therefore, based on the above, clause 2.2 (ii) of the Non-exclusive Distribution Agreement might indeed breach EU and Spanish competition rules. |
| b. Recommended Redraft | None. |
| 3. Article 5.3 – Refer back to previous exercise on limitation of liability | <p>The Spanish civil code authorises the limitation of the contractual liability of the parties in case of negligence (<i>culpa</i>) but prohibits it in case of fraud (<i>dolo</i>) or gross negligence (<i>culpa grave</i>). The civil code expressly states that any limitation of liability in case of fraud or gross negligence is null and void.</p> <p>The civil code also authorises the parties to establish the level or standard that they have to follow in the fulfilment of their contractual obligations. (The agreement states one of these standards of diligence when it states that the company will use its "reasonable efforts").</p> <p>In this sense the limitation of contractual liability included in the agreement is valid. Nonetheless, as mentioned above, it would not be applicable in cases of fraud or gross negligence. For this reason, we suggest as modifying the clause as follows:</p> <p>“Company will use reasonable efforts to make deliveries of Products by the dates specified in Orders accepted from the Distributor. However, company shall have no liability or responsibility to distributor or anyone claiming through the distributor for any loss or damage (including, general, direct, indirect, exemplary, incidental, special and consequential damages) arising out of any failure or delay in delivery, late delivery, or partial delivery of any order. Nothing in this clause shall be interpreted or construed as a limitation of liability of Company in case of fraud or gross negligence.”</p> |
| 4. Transfer of Title -- Article 6.3 | |
| a. Local Law Issues | The postponement of the transfer of title until the full payment of the purchase price and, in general, until the fulfilment of certain conditions precedent is valid under Spanish law. The clause included in the agreement is in accordance with Spanish law. |
| b. Recommended Redraft | None. |
| 5. Force Majeure--Article 8 | |
| a. Local Law Issues | According to the Spanish civil code, the debtor is not liable to the creditor if he fails to fulfil his contractual obligations due to an event that he cannot foresee or due to an event that, even he had foreseen it, he could not |

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| | <p>prevent it. Traditionally, the events that cannot be foreseen are called fortuitous events (<i>caso fortuito</i>) and the event that cannot be prevented, force majeure (<i>fuera mayor</i>). The rationale of this rule is to establish the cases in which the fulfilment of the agreement is beyond the level of diligence requested to the debtor, by the law or by agreement. In these cases, the debtor, in principle, cannot be considered responsible for the breach of the agreement.</p> <p>The Spanish civil code authorises the parties to modify this rule and to make the debtor liable also in case of fortuitous event or force majeure. Nonetheless, this possibility has to be used in good faith and with a proper justification, avoiding the abuse of the relevant position of the Company. For this reason clauses stating that only the Company and not the Distributor can invoke the force majeure should be avoided unless there is a clear reason to include them.</p> <p>It is also possible to define the fortuitous events or the force majeure in order to include certain events. Nonetheless, if these definitions result in an extension of the limitation of the liability of the debtor, then, in such cases, the rules regarding the limitation of liability mentioned above would be applicable.</p> <p>It would be convenient to modify the clause included in the distribution agreement in order to: (i) establish clearly that it includes both the fortuitous event and the force majeure, (ii) to apply the clause to both parties, and to expand the significance of the force majeure and fortuitous events, including in particular the listed events.</p> |
| <p>b. Recommended Redraft</p> | <p>“Fortuitous event and force majeure. Each Party is entitled to suspend the fulfilment of its obligations under this agreement if they are, in whole or in part, temporally or not, prevented or impeded by circumstances constituting fortuitous event or force majeure. If the force majeure lasts longer than three months, the Company and the Distributor are each authorised to rescind the non-feasible parts of the agreement by a written declaration. The parties agree that the fortuitous event and force majeure provisions of this paragraph are not applicable to the payments of any amounts owed when due.</p> <p>Without limitation to any circumstance or event constituting fortuitous events or force majeure, the following circumstances shall be considered force majeure: site or building blockades, strikes, war, embargoes, specific work interruptions or slowdowns or lockouts, delay in the provision to the Company of parts, goods or services ordered from third parties, accidents, interruptions of business operations, and acts of God.”</p> |
| <p>6. Limitations of Warranty - Article 9</p> <p>Are the limitations of warranty provided in this article valid under local law?</p> | |

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| <p>a. Local Law Issues</p> | <p>The general term of warranty in case of product defects (vicios ocultos) provided by the Spanish Civil Code is six months. Nonetheless, this term does not apply in certain cases, in particular in case of consumer goods.</p> <p>The recently enacted Law on warranty on the sale of consumer goods, that implements Directive 1999/44/EC, states the principle that consumer goods must be in conformity with the contract of sale and provides certain rules that the consumer goods have to fulfil in order to be in conformity with the contract (these are basically the same rules included in art. 2.2 of the Directive). The Law considers the lack of conformity a fraud and states that the seller must repair or replace the product or, in certain cases, reduce its price or accept the termination of the contract.</p> <p>In principle, this regulation applies to the parties of the contracts of sale, that is, to the seller and to the consumer. Nonetheless, the producer of the goods will also be responsible in the following cases: (i) generally, when the lack of conformity results from the origin, identity or suitability of the goods, in accordance with their nature and their purposes, and to the rules regulating the goods; and (ii) in case it were impossible or excessively burdensome for the consumer to pursue remedies against the seller. According to the Law, the producer is the manufacturer, the person or entity that imports the goods to the EU, or any other person or entity appearing as such in the goods with its logo or other distinctive sign.</p> <p>The term of warranty provided by the Law on warranty on the sale of consumer goods is two years from the date of delivery to the consumer for new consumer goods and one year for used goods. The consumer shall inform the seller or the producer of the lack of conformity within the term of two months from the date on which he detected such lack of conformity. The law presumes that the consumer has notified the lack of conformity within this two months period. Any remedy against the seller or the producer for lack of conformity of the goods have to be exercised within the term of three years from the date of the delivery of the good.</p> <p>The above will apply, even if the parties have chosen a different law, if (i) the goods are to be used within the EU, (ii) the contract is signed inside the EU, (iii) one of the parties of the contract is a citizen of a EU Member State, or (iv) the contract has any other analogous connection with the territory of the EU.</p> <p>The above does not include the liability of the Company (in cases where it is the manufacturer or the importer of the goods into the EU) for damages to property or personal injury caused to the final user of the goods. This product liability can last up to ten years and it cannot be contractually limited.</p> <p>If the products are consumer goods and the international private law rules mentioned above are applicable, the clause included in the distribution agreement is not valid.</p> |
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| <p>b. Recommended Redraft</p> | <p>If the clause is not valid (as described above) it should be modified as follows:</p> <p>“Company warrants that each Product will be free from defects in material and workmanship (the "Limited Warranty") for a period of two years from the date the product is delivered to a consumer. The materials portion of the Limited Warranty shall not apply to any Product which the Company determines: (i) has been abused, damaged by external causes, or altered or misused; (ii) has been damaged by improper installation or use; or (iii) has had its warranty seal broken, indicating an unauthorised repair has been attempted by anyone other than the Company, or one of the Company's Authorised Service Center.”</p> <p>The existence of the defect has to be notified to the company no later than two months after the date on which it becomes apparent. All claims for breach of warranty must be received by the company no later than one (1) year after the expiration of the limited warranty period for the product. This limited warranty is the only warranty given by the company. The company makes, and distributor receives, no other warranty either express or implied. All warranties of merchantability or fitness for a particular purpose or use (other than the normal purpose or use of the products or of other goods of the same type) are expressly disclaimed and excluded herefrom.</p> |
| <p>7. Consequences of Termination -Article 17</p> <p>To what extent does local law limit the ability of the manufacturer to limit its responsibility to the distributor as set forth in this Article?</p> | |
| <p>a. Local Law Issues</p> | <p>In principle, a distribution agreement will terminate for the causes and with the consequences provided in the relevant agreement. In particular, there is no mandatory legislation stating a right of the Distributor to a monetary compensation or to an indemnity for damages. Nonetheless, there have often been attempts to apply by analogy the indemnity provisions set out in the Law on Agency Agreement, which makes it mandatory for the principal to indemnify the Agent for the termination of the Agreement. The Spanish Supreme Court has repeatedly stressed that this Law is not mandatorily applicable to distribution agreements, that they are subject to the agreement reached by the parties, although, in some occasions, it has admitted some type of analogous application. In any case, the Jurisprudence of the Supreme Court in this matter is not always as clear as it should be and it is possible to find contradictory decisions.</p> <p>In this sense, subject to the comments below, a clause in the distribution agreement that does not provide compensation for the distributor in case of a regular termination of the contract, should in principle be considered legal and acceptable. Notwithstanding that the right of the Company to terminate the agreement has to be exercised in good faith, avoiding any abuse of the rights or of the prevalent position of the Company. If the</p> |

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| | <p>Company does not act in this way, it could be obliged to compensate the Distributor for any damages suffered.</p> <p>There are some differences between agreements entered for an specific or for an unlimited period of time. In principle, distribution agreements with a term (with or without renewals for successive periods) have to be terminated in accordance with the terms of the agreement, whereas, in agreements with unlimited duration, any of the parties have the right to put an end to it at any moment by means of an unilateral declaration of termination.</p> <p>In this sense, in order to terminate a distribution agreement with unlimited duration, the Spanish Supreme Courts requires the Company to give notice of the termination of the agreement to the Distributor with some anticipation. The absence of a period of notice will not prevent the agreement from being terminated, but the breaching party will have to compensate the other for damages, as in other cases when the termination is unfair or abusive. There is no specific rule stating the duration of the notice. The Law on agency agreements provides that such notice should be one-month for each year of the duration of the Agreement with a maximum of 6 months. Likewise, the Law on unfair competition requires a notice of six month to terminate commercial relations. In this sense, it seems appropriate to provide a notice of at least six month to terminate these agreements. Finally, this notice should also be given in those agreements entered for a limited period of time that are automatically renewed unless any of the parties gives the other notice not to renew it (as occurs in this case) as, materially, their effects are very similar to an indefinite agreement.</p> |
| <p>b. Recommended Redraft</p> | <p>None.</p> |
| <p>8. Arbitration -Article 20</p> <p>Would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors?</p> <p>Would a local court enforce an arbitral judgment rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?</p> | |
| <p>a. Local Law Issues</p> | <p>The arbitration clause is in accordance with Spanish law. There is no reason to consider that controversies</p> |

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| | <p>arising from a distribution agreement cannot be submitted to arbitration.</p> <p>In principle, the award should be enforced. As mentioned above, distribution agreements are not subject to a specific mandatory legislation, that only exist in the case of the agency agreement.</p> <p>Nonetheless, in order to avoid the enforcement of the award, the parties can legally invoke public order on arguments of violation of other public policy rules in accordance with the Treaty of New York of 1958 (if the arbitration is international) or in accordance with the Spanish Arbitration Act (in case of internal arbitration).</p> |
| b. Recommended Redraft | None. |
| ITALY | |
| <p>1. Exclusivity - Article 1</p> <p>Would applicable law in any circumstances require the agreement to be exclusive?</p> | |
| a. Local Law Issues | None. Italian law does not require the appointment of the distributor to be exclusive. |
| b. Recommended Redraft | None. |
| <p>2. Indirect Solicitation of Orders outside the Territory -- Article 2.2(ii)</p> <p>Is this clause in conformity with European law as applied in the jurisdiction as regards the obligation to allow parallel imports into the Territory?</p> | |
| a. Local Law Issues | None. It is generally accepted that vertical restraints in Italy should be assessed in light of general EU law principles (even if some argue that in fact enforcement in Italy is more lenient). It appears safe to consider the indirect solicitation limitation as not having the effect of an import ban or a prohibition on passive sales (in the meaning of EC Regulation no. 2790/99). |

| | |
|--|---|
| b. Recommended Redraft | None. |
| 3. Article 5.3 – Refer back to previous exercise on limitation of liability | |
| 4. Transfer of Title -- Article 6.3 | |
| a. Local Law Issues | None. Transfer of title provisions are compatible with Italian law |
| b. Recommended Redraft | None. |
| 5. Force Majeure--Article 8 | |
| a. Local Law Issues | None. Force majeure provisions are generally accepted also under Italian law. |
| b. Recommended Redraft | None. |
| 6. Limitations of Warranty - Article 9 Are the limitations of warranty provided in this article valid under local law? | |
| a. Local Law Issues | None. Being the distribution agreement subject to foreign law, an issue might arise only insofar as the warranty limitations are found to be in contrast with international public order (e.g. by an Italian court enforcing the arbitration award rendered in accordance with Art. 20.1). This should not be the case of Art. 9. |
| b. Recommended Redraft | None. |
| 7. Consequences of Termination -Article 17 To what extent does local law limit the ability of the manufacturer to limit its responsibility to the distributor as set forth in this Article? | |

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| | |
|---|--|
| <p>a. Local Law Issues</p> | <p>Same as above. A possible Italian court's assessment of compliance with international public order might be affected by the Italian Civil Code provision stating that any limitation of liability due to intentional behaviour or gross negligence is null and void (Art. 17.2 excludes any liability on the part of the Company upon termination). However, Italian courts have recently shown reluctance to resort to international public order arguments.</p> |
| <p>b. Recommended Redraft</p> | <p>Art. 17.2: "Upon expiration or termination of this Agreement for any reasons whatsoever, no member of the EchoStar Group shall have any liability to Distributor, <i>except for fraud or gross negligence</i>"</p> |
| <p>8. Arbitration -Article 20</p> <p>Would local law apply the arbitration provisions stated here, or would they take jurisdiction in order to apply local law protecting distributors?</p> <p>Would a local court enforce an arbitral judgment rendered in such a case; or would they accept arguments from a defendant of violation of public policy if the distributor argued that mandatory law protecting the distributor had not been applied?</p> | |
| <p>a. Local Law Issues</p> | <p>None. Generally, the choice of foreign governing law and/or jurisdiction does not exempt from compliance of any agreements affecting the Italian market (such as the distribution agreement at issue) with Italian and EU competition rules.</p> |
| <p>b. Recommended Redraft</p> | <p>None.</p> |



Differences in Civil & Common Law: Contracts

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Overview

- Introduction to civil vs common law debate
- Introduction to comparative analysis exercise
- NDAs or Confidentiality Agreements
- MoUs or Letters of Intent
- Distribution Agreements
- Key differences
- Key similarities
- Key practical considerations



Civil vs Common Law - Introduction

- Overview and history
- Fundamental distinctions
- Drafting approaches
- Economic implications

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Civil vs Common Law - Fundamental Distinctions

- Methodology: codification vs reasoning by analogy and precedent
- Legal approach: (1) statutes (2) case law (3) jurisprudence
- Court proceedings practised: inquisitorial vs adversarial



Civil vs Common Law - Drafting Approaches

- Civil law style
 - heavy reliance and reference to Code
 - practical approach
- Common law
 - heavy reliance on terms of the contract
 - contract is a standalone document



Comparative Analysis Exercise - Introduction

- Presumption for this the exercise - template contract is common law style
- Goal of the exercise - to highlight practical differences for in-house counsel to consider in particular re:
 - drafting style
 - choice of law
 - forum for dispute resolution
- Looking beyond limitation of liability in the contracts



Comparative Analysis Exercise - Choice of “Contracts”

- NDAs or Confidentiality Agreements
- MoUs or Letters of Intent
- Distribution Agreements

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Comparative Analysis Exercise - Choice of Jurisdictions

- UK
- Netherlands
- Germany
- Spain
- Italy
- France

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NDAs

- Injunctive relief - only in [Xanadu?] do civil law tribunals not grant injunctive relief
- Would have expected a different result in civil law countries which allow for injunctive relief
- Is there any practical reason to refuse choice of law if injunctive relief is allowed?
- Burden of proof - does the NDA shift the burden of proof?



NDA's

- Confidentiality is protected “by law” in Italy under some specific circumstances
- Beside these cases, it is advisable to provide expressly for protection of confidential information with an “ad-hoc” contractual arrangement
- What the law considers “confidential” is different from what a party may want to qualify (and protect) as such!
- Art. 622 e 623 Italian Criminal Code punish illicit behaviour consisting of breach of industrial/professional/business secrets
- Employees bound by confidentiality towards employers under Article 2105 of the Italian Civil Code for duration of the contract - such obligation may last beyond termination of employment



NDA's

- Under the TRIPS 1995 Agreement protection of business information/secrets has been included in the discipline of unfair competition (TRIPS led to introduction in Italy of Article 6 - bis in the law on patents, later replaced by provisions of the new Code for the protection of IPRs which entered in force in January 2005)
- In order for the confidential information and related intellectual property to qualify for protection under the IP Protection Code in Italy, the information must:



NDA's

- be secret - the same must not be known or available, as a whole or in the precise combination of their constitutive elements, to the experts or the operators of the specific market/sector to which they refer
 - have an economic value as secrets
 - be subject to an effective control
- THIS DOES NOT ALWAYS COVER WHAT A COMPANY CONSIDERS “CONFIDENTIAL” WHILE ENTERING NEGOTIATIONS



NDA's

- Injunctive relief - do civil law tribunals grant injunctive relief?
 - *ITALY: by virtue of Art. 10 of Law 218/95 ("Riforma del diritto internazionale privato"), Italian courts have jurisdiction in respect of injunctive relief to be executed in Italy or concerning assets located in Italy even if the NDA is subject to foreign jurisdiction*
 - *the Rome Tribunal (ruling of 22/01/98) granted provisional seizure of the Italian assets of a Luxembourg company that had entered into a contract governed by foreign law with a German counterpart*



NDA's

- Is there any practical reason to refuse choice of Italian law if injunctive relief is allowed?
 - If agreement subject to foreign law, Italian courts have jurisdiction only for interim measures and if they are to be executed in Italy or if assets are located there. → No jurisdiction for damages
 - Italian courts will decline jurisdiction on the merits unless all parties agree to this effect, even if provisional relief had previously been granted to an Italian judge
 - Because damages for breach of contract is still the only actual compensation for the owner of information being illicitly disclosed, it is advisable when there is a “link” with Italy (execution or assets present) to subject an NDA to Italian law in order to “tie-in” jurisdiction of local courts



NDA's

- *Example: Milan Tribunal - ruling of 21/11/2000 - judge refused to rule on liquidation damages provided for in a contract not governed by Italian law, even though these would have to be paid at the Italian branch of the foreign creditor. The tribunal also noted that not even provisional relief could be granted, being the debtor's assets located abroad*



NDA's

- Burden of Proof - does the NDA shift the burden of proof?
 - *Under Italian law, a party seeking provisional relief bears the burden of proof that defendant has disclosed and/or used the confidential information*
 - *General rule to prove the breach, not so much NDA-specific*
 - *Applicant must prove (i) urgency and (ii) a prima facie case on the merits*
- Good faith obligation also enforceable for this type of contract



NDA's - Case Study

- *You are an in-house counsel for a UK company. You have sent the company's standard NDA to a French company which is considering a commercial partnership with your company. Their in-house lawyer accepts your NDA but insists on changing the applicable law to that of France*
 - Do you accept?



MoUs - Key Legal Issues

- Is there a duty on parties who are in negotiations to continue to negotiate?
- Is there an implied duty of good faith?
- Are heads of agreement legally binding?



MoUs - Negotiations

- Common law jurisdictions - parties generally not subject to an obligation to continue to negotiate (or to an obligation of good faith while doing so)
- Civil law jurisdictions - parties generally subject to certain duties vis-à-vis negotiation which can limit freedom to cease negotiations
- Impact in practice on conduct of negotiations?
- The Netherlands - a different approach



MoUs - Duty of Good Faith

- Common law jurisdictions - in general, parties not subject to any duty to negotiate in good faith. Negotiations can be terminated at will, at any time, without liability
 - Damages claim in UK?
- Civil jurisdictions - may impose duty of good faith on negotiating parties in relation to the negotiations
 - Damages claim



MoUs - Binding?

- “Subject to contract” - is this sufficient?
- Form vs substance
- “Agreements to agree”
- Certainty of terms
- Intention of parties



MoUs - Practical Considerations

- Specific incorporation of good faith? When?
- Choice of law to avoid good faith obligations?
- Manner of conduct of negotiations



MoUs - Case Study

☛ *You have been handed this letter by your CEO who tells you he is about to send it to the Chairman of Company B. He says he assumes you have no comments but wanted you to give it a quick(!) check. Do you have any comments?*

☛ From: Company A plc, London, UK ("A")
☛ To: Company B Ltd, Paris, France ("B")

☛ Subject to Contract

☛ Dear [-]
☛ Further to our meeting today, which we found constructive and helpful, I wanted to confirm the matters we discussed and agreed in principle:

- ☛ - A acquires the B Brands Division at €100m
- ☛ - This will exclude the IPR connected with the "B" name.
- ☛ - We propose this is done by way of a business transfer.
- ☛ - The agreement will contain the usual set of warranties.

☛ The transaction will be subject to due diligence.

☛ Yours sincerely
☛
☛ CEO, A plc

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Distribution Agreements

- Exclusivity issues and parallel imports - governed by EU law
- Limitation of liability - refer to last year's exercise
- *Force majeure*
 - compared with “forces outside reasonable control”
 - note: drafting solutions



Distribution Agreements

- Warranty issues
 - consumer-protection law that can apply as a matter of public policy (irrespective of choice of law)
- Transfer of title issues
- Liability for termination
 - manufacturer liability for compensation for damages due to termination can be substantial
 - note: practical advantage of establishing a fixed term (especially under Spanish law)
 - notions of reasonableness and abusive termination



Distribution Agreements

- Arbitration
 - refusal to enforce arbitral awards is generally limited to violations of international public policy
 - may create an escape hatch for certain unfavourable local laws
 - arbitration may therefore allow for application of one law for all commercial contracts across EU, subject only to international public policy
 - if so, look at UK model clause



Key Differences

- Implied confidentiality obligations - even split
- Unilateral termination of negotiations - need for good reason
- Warranty limitations - express or implied



Key Similarities

- Injunctive relief for NDAs
- Good faith obligation to negotiate (UK exception)
- EU competition law
- Recognition of arbitral awards (UN Convention)



Key Practical Considerations

- Avoid refusing choice of law just because of ignorance of substantive differences (or lack thereof!)
- Be sensitive to key drafting considerations especially re force majeure and limitation of liability
- Consider strategic choice of law clause together with international commercial arbitration clause