# ARBITRATION AND INTERNATIONAL DISTRIBUTORSHIP AGREEMENTS

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## I. INTRODUCTION

1. As a professor in Poznan and Philadelphia, as well as a member of the UNIDROIT Council, Stanislaw Soltysinski has long been aware of the foremost importance of the international arbitral practice in transnational transactions. As a spokesman for a Group of countries within the UNCTAD, he has felt the need to strike an equitable balance between the interests of developing and developed countries. As a distinguished scholar holding courses at The Hague Academy on International Private Law regarding Choice of Law and Choice of Forum in Transnational Transfer of Technology Transactions, he has underlined the prominence of conflict of law rules in international contracts. And now, as a practitioner, he may find therefore some interest in the following review of arbitral awards dealing with distributorship agreements, which I am happy to present as a tribute to his wealth of knowledge and his old friendship.

## II. EXTENT OF THE ARBITRAL PRACTICE FOR DISTRIBUTORSHIP AGREEMENTS

2. Distributorship Agreements are the subject matter of approximately one tenth of all matters that are arbitrated under the aegis of the International Chamber of Commerce in Paris, be it on average around 50 matters out of over 500 a year[1]. Interestingly, only a quarter of these cases are concluded by an award, which means a settlement rate of 75%, that is a rate which is higher for distributorship litigations than ordinary arbitral cases[2].

3. There is no possibility to inquire in detail about the grounds why settlements appear to be more frequent for distributorship agreements than for sale or construction contracts, the two most important categories of matter litigated before ICC arbitral tribunals. A few observations may be ventured on a very tentative basis.

4. First and foremost, distributorship agreements very often include an arbitration provision. Often, however, the amounts of dispute may be comparatively small[3] in comparison with litigations arising out of construction contracts, joint venture, strategic alliances, company law and partnership agreements, or intellectual property transactions, to name but a few frequently arbitrated subject matter (amounts in litigation for sales may be important or not so important). Thus, the appropriateness of pursuing until an award the claims resulting from the unsatisfactory performance or the premature termination of a distributorship agreement will be more closely examined by the Parties. The distributor may prefer to gear its organization's human and financial resources to the new lines of products that the termination of the agreement has made necessary for him to handle, rather than to invest them in arbitral proceedings.

5. The uncertainty is conducive to settlement, as in well known. Now, the uncertainties abound in disputes related to distributorship agreements. Which law is applicable? Will protective measures of the distributor's own country be really applied against the clear

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1 See Cam Quyen Corinne Truong, Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI, thesis, Paris II, Paris 2002, 11 and 330-331 (figures relating to 1984-2000).

2 C. Truong, p. 331: settlement rate overall 47%.

3 42% are inferior to 1 mio USD, while 52% are between 1 and 10 mio USD (C. Truong at 332).

choice of law provisions in favor of the principal's law which are encountered in a majority of distributorship contracts[4]? More specifically, will the arbitral tribunal consider the agreement as a sales agency with a corresponding indemnification after termination, or as a distributorship agreement proper, with no such indemnification? This indemnity seems to be an overriding concern of both parties when litigating such cases.

6. A definitive answer cannot be given as to the ways and means to limit such uncertainty. However, if we accept as a premise that the system of law as applied to transnational commerce should diminish the uncertainty surrounding the business people in order to spurn transborder cooperation, it may be worth inquiring into choice of law rules and the arbitral practice concerning:

- ordinary termination;
- termination for cause;
- compensation and damages.

Those are the different headings under which we will hereafter examine some 30 arbitral awards.

## III. APPLICABLE LAW

### A. Choice by the Parties

7. 5 out 6 arbitrated contracts for distribution operations contain an express choice of law clause[5]. This proportion is very high indeed. 30 years ago, it was submitted that one out of two to three international contracts contained a choice of law[6]. The explanation might be that counsel proposing to their clients the ICC Arbitration Provision are more sophisticated than the persons in charge of concluding commercial agreements generally.

### B. Principal's Law Most Often Chosen

8. It is worth noting that the foreign manufacturer's law has been chosen in 52% of the ICC arbitration matters[7]. This preference for the principal's law can be explained by the more general preference for the licensor's law which is noticeable since 20 years at least[8]. One of the reasons for that preference is that contracting under its own law heightens the trust that the manufacturer can put into the distributor abiding by the terms of the contract, or being otherwise at risk to lose an arbitral proceeding. The arbitral practice clearly departs from some opinions in the commentary to the effect that the distributor's country would be more closely connected to the contract because the distributor would be active on its national market[9]. It rather shows that in the opinion of

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4 See below fn. 7.

5 120 cases out of 141 (see C. Truong, 129).

6 See our study Transfer of Technology Under UNCTAD and EEC Draft Codifications, 12 Journal of International Law and Economics (1977), 4-5 with cit. fn.10 and 11.

7 C. Truong at 135.

8 See e.g. Art. 122 of the Swiss Act on International Private Law (hereafter: SPIL).

9 See e.g. Keller/Kren Kostkiewicz, Zürcher Kommentar, Zürich 2004, No 190 ad Art. 117 SPIL.

the Parties, the principal assumes the main obligations of providing a product free of defect and with merchantability grade, a set of intangible values such as trademark and embodiment of an up-to-date technology, as well as back-up services for smaller distributors which do not set up maintenance departments of their own.

9. More generally, the research and development going into the products would suffice to characterize the activities of the principal as the most characteristic ones. The commercial activities of the distributor could be similar for almost all products of a comparable line of business. To the contrary, the principal's products are often unique especially when they are protected by a patent for invention and/or trade secrets.

10. The arbitral practice should help the commentators to revise their outdated notions about the closest connection being between the contract and the distributor's country. It does not suffice to explain away the majority choice of law provision in favor of the manufacturer's country by the more settled financial situation of the manufacturer in comparison to the distributor. In fact, the good will of the foreign manufacturer and its know-how are the prevailing motivation for the local distributor to accept the terms and conditions of the principal[10].

### C. Law Applicable in the Absence of a Choice of Law

11. If the Parties did not choose the applicable law, either explicitly or impliedly, the arbitral tribunal is going to select it. We first examine the choice of the rule of conflict before turning to the determination of the applicable law.

#### 1. Rule of Conflict

12. Few arbitral tribunals have followed the classical method of selecting the rule of conflict of their seat to determine the applicable law, although it is the litterature's most frequently mentioned solution[11]. This approach has been applied in 5 cases at least[12]. For example, in the ICC Case No 5460 of 1987, the seat of the arbitral tribunal was in England; it applied English law of conflicts to determine which law was applicable to the substance of the dispute between an Australian principal and a South-African distributor. Thus, it decided that South-African law would be most closely connected to the contract, and it considered that this law would be identical with substantive English law[13]. Of course, this last reasoning may apply with some other Commonwealth countries, but it is certainly not true for all former English colonies and possessions. Besides, it is only in consideration of the facts of that case that the country most closely connected to the contract could appear to be South Africa. A more modern view, taking into account the Rome Convention of 1980 on the Law Applicable to Contractual Obligations, might lead to the reverse conclusion that the principal's law applies, as law

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10 See however C. Truong, 135: The author stresses that the financial power of the principal also plays a role.

11 Fouchard/Gaillard/Goldman, Traité de l'arbitrage commercial international, Paris 1996, No 1541; M. de Boisséson, Le droit français de l'arbitrage interne et international, Paris 1990, No 652 ff.

12 Two of which are cited by C. Truong, 159-160.

13 ICC Case No 5460, *in* A. J. van der Berg (ed.), XIII Yearbook of Commercial Arbitration (1988), p. 104 ff : "failing evidence to the contrary, English private international law compels me to assume that any foreign law is the same as English domestic law."

of the seat or main business establishment of the debtor of the characteristic obligation (see above No 8).

13. In a ICC case No 4996 of 1985 between an Italian manufacturer and a French distributor, the arbitral tribunal has examined both the Italian and the French law on conflicts. This reference to the Parties' own law may be seen as a token of the arbitrator's willingness to go along with the application of any rule of conflict which counsel for Parties deem to be applicable. It may also be seen as witnessing the need to persuade the losing party that the application of the rules of its own law (at least those on conflicts) would not lead to a different result. One of the main aims of writing a reasoned award is to try and convince the losing party of the justification for the dispositive part.

14. Having examined both Italian and French rules of conflicts, the arbitrators found that they were then (before the coming into force of the Rome Convention) quite contradictory. The arbitrators proceeded to look for the rule more fitting to the circumstances taking into account comparative law, and found that the French rule of conflicts, referring to the place of performance of the main obligations, was more appropriate. By application of that rule, it then applied French law.

15. Although somewhat sophisticated, this approach shows that the arbitral tribunals do at times apply the distributor's law on the substance of the litigation[14].

16. A third approach is to involve general principles of the law on conflicts, such as the center of gravity and the concept of characteristic performance. Sometimes, the arbitrators take the pain to state that such notions are common to most national laws on conflicts[15], sometimes they just apply the said concepts ("the most significant relationship to the transaction"[16], "the system of law with the most substantial and real connection to the transaction"[17], etc.).

17. Finally, some arbitrators dispense altogether with the determination of the applicable law. They apply transnational rules, be they "general principles of international commerce" or "trade usages"[18]. Of course, in all areas including distribution approximately 66 awards have applied the UNIDROIT Principles on International Commercial Contracts in ten years (1994-2003). This shows that conflicts of law may be navigated around by skilled arbitrators desirous to avoid both the pitfalls of *lex mercatoria* and the draw-backs of the traditional conflictualist approach – the main disadvantage of the conflictualist approach being its inability to render applicable the law of a third, neutral country (absent a choice of law provision). However, to choose the law of one party's country over the law of the other one is to some extent unfortunate, especially at the onset of the litigation. Therefore, it would appear preferable to induce parties willingly to subject the dispute to the UNIDROIT Principles, as this writer has attempted with success in a number of cases.

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14 See Award ICC No 7250 and 8451, C. Truong, 162-163.
15 ICC Case No 8195 (Partial Award), C. Truong 165-166.
16 ICC Case No 7987, C. Truong 167 fn. 261.
17 ICC Case No 8405, C. Truong 167 fn. 263.
18 Both found in ICC Case No 5881, III/2 CCI Bull. (1992), 54 (French ed.).

2. Law Applicable to Procedure

18. Of course, the Parties can choose the law applicable to the arbitral proceeding. Very often, they refer to a national law on arbitration, most often to the law at the seat of the arbitral tribunal, with or without variation. A frequent variation is to declare applicable (or inapplicable) the rules on evidence of some other jurisdiction, e.g. the English or U.S. Federal Rules on evidence. They sometimes provide for the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration to apply, with the effect that precise provisions will rule the request for production of documents, the witness statement and testimonies, as well as the party-appointed and tribunal-appointed experts.

19. A difficult question is raised by some arbitration provisions or further arrangements between the Parties, whereby they purport to exclude the application of the national law on arbitration at the seat of the arbitral tribunal. For example, a provision of the agreement between two non-Swiss companies will provide for an arbitration in the following terms:

> "… The place of arbitration shall be Geneva. The language of arbitration shall be English. The arbitration shall be carried out in accordance with the Rules of Conciliation and Arbitration of the ICC[19] as then in force. Besides, and only supplementary to the provisions of the present contract, the applicable law shall be the Swiss substantive law, with the exception of the Swiss Federal Law on the Private International Law of 1st October 1987[20]".

20. To the extent that the *renvoi* is hereby prohibited, this provision is valid. However, if the chapter XII of the SPIL should be deemed to fall under that opting-out provision, it would be incompatible with the mandatory rules of chapter XII, for example on due process and equal treatment (Art. 182 par. 3 SPIL) and appeal (Art. 190 SPIL). In Switzerland, it is generally considered that no arbitration can take place outside the ambit of some State law, most commonly the law on arbitration at the place of arbitration. There is no "arbitration unbound" taking place in Switzerland[21].

21. There may be exceptions to that conception, which however should rarely apply in the case of distributorship agreements. One such exception is the case of an arbitration involving foreign State or international organization enjoying privileges and immunities. It can choose not to fall under any Swiss legislation. Then the other Party may well wish to enjoy the same immunity due to equal treatment considerations. In the end, there would be no appeal to the Federal Tribunal, which exclusion is possible under Art. 192 SPIL: even if the organization has its seat in Switzerland, it is to be deemed a non-Swiss resident for the purpose of applying the opting-out of appeal under that provision.

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19 This would now read as "the Rules of Arbitration of the ICC".

20 This would read "18 December 1987".

21 See F. Vischer, Zürcher Kommentar, No 8 ad Art. 176 SPIL (2004).

### 3. Law Applicable to the Merits

22. It is common for the arbitral tribunal to apply the law of the place of performance of the distributorship agreement when the distributor is active only in one country[22]. Thus, the "law of the market"[23] will apply to the contractual relationship as well as to the intellectual property assets (trademarks, patents, possibly copyright on maintenance manuals etc.). Some awards stress that the foreign manufacturer is subject to the law of the market not only in a conflict of law approach, but also in an economic approach. In other words, the products manufactured abroad must comply with the standards set up in the market where the distributor is active[24]. This follows from the guarantee of merchantability which is known for example under the U.S. Uniform Commercial Code See. 2-314 (2) (c) and Art. 35 Vienna Convention on Contracts for the International Sale of Goods.

23. The solution is more complex when the distribution takes place in two or more countries. Then, the reasonable solution would appear to apply the law of the seat of the main business establishment of the distributor[25], even if the distributor mainly exports the goods to third countries. Arbitrators have sometimes to deal with distribution agreements covering from ten or twelve countries[26] up to 120 countries, where pharmaceutical products are concerned. The Schnitzer's doctrine of characteristic performance[27] renders the law of the establishment of the debtor of the characteristic performance applicable in such a case, even if this debtor is located on a small market, from which it is servicing a huge one (e.g. products distributed to Germany from the Czech Republic). Hence, the protective measures that the big market's law may provide for the distributor shall not apply. One recalls that Schnitzer's doctrine aims at equating the law of the seat of this debtor and the law of the contractual relationship, so that its liability and its assets answering for any award of damages be subject to the same legal status. Therefore, the place of performing the characteristic obligation is less relevant than the seat of main business establishment of the debtor.

24. In all cases, this system runs contrary to the practice of a majority of contracting Parties, which is to adopt the law of the manufacturer, or neutral law, as we have seen above. The arbitral tribunals at times refrain to go against that experience of the practice and, while deciding to subject the contractual relationship to the distributor's law, do not apply the protective measures that are provided under that law for domestic situations[28]. They will then consider that the distributorship is different from an ordinary dealership or sales agent relationship. This, however, will shortly leads us into the substantive aspects of that inquiry about the arbitral practice and the distribution agreements. As concerns conflicts of laws, let us note that a combination of distributorship and agency

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22 See e.g. ICC case No 7250 *in* VII/1 CCI Bull. (1996), 93 ff. 7359 and 8451, C. Truong 163. See however ICC Case No 4995 (law of the manufacturer) (cf. C. Truong 170-172).

23 See ICC case No 4451, C. Truong, 169.

24 See e.g. ICC case No 2129 *in* P. Sanders (ed.), III Yearbook of Commercial Arbitration (1978), 219.

25 See ICC case No 7189, C. Truong 167, fn 264.

26 For the facts of an ad hoc arbitral case, see Bull. Swiss Arbitration Association 2003, 384 ff.

27 A. Schnitzer, Handbuch des internationalen Privatrechts, 4th ed., Basel 1958; *idem*, La loi applicable aux contrats, Rev. crit. DIP, 1955, 475 ff; *idem*, Les contrats internationaux en droit international privé suisse, RCADI 1968 I (vol. 124), 571 ff.

28 See ICC Case No 6379, VII/1 CCI Bull. (1996) 84 ff.

is conceivable. In two cases, for example, the arbitral tribunals had to deal with the situation where the distributorship was foreseen for one country, but sales took place from that country towards other countries. In ICC case No 5080[29], for instance, the award found that the Parties had varied the original agreement and that the remuneration convened for the original market would apply to sales on the third country market too. However, in an unpublished ICC case more recently decided, the arbitral tribunal took into consideration the argument that maintenance services would not be provided on the third country market, although it did not enforce the reduction of the remuneration of the distributor which had been unilaterally decided by the manufacturer on this ground. The compensation could be made as under the contract or as under the law of the third country[30].

25. There is no doubt that third country sales can be taken into consideration when deciding about compensation for the termination of the agreement. This is not related to any conflict of law issue but to the correct application of the contract or of the law otherwise applicable, which will allow to take into consideration as a *fact* the sales occurring on third markets.

## IV. TERMINATION

26. Turning now to substantial issue, we shall deal only with termination. Termination is most often at the core of the litigation between manufacturer and distributor. It should be seldom that a distributorship agreement continues while the Parties are arbitrating their dispute. Termination can be an ordinary one, under the terms of the contract or an extraordinary one, for cause.

### A. Ordinary Termination

27. An ordinary end to the contract can derive from the lapsing of time. For example, an award dealt with the distribution of goods under a contract made for two years, renewable[31]. The manufacturer informed the distributor that it was reviewing the terms and conditions of the contract and provisionally extended the duration of the contract, but it served a notice of termination then attempted to cancel this notice. It was held that no retractation of that notice could validly be alleged by the manufacturer, so that it had to pay damages for the losses borne by the distributor due to the serving of the notice of termination.

### B. Termination for Cause

28. Of course, when the contract has been concluded for a long period of time, the distribution cannot be interrupted if the other Party has not given rise to a good cause for termination. For example, where a distribution and know-how licensing agreement had been entered into for 15 years, the arbitral tribunal rejected the plea that the contract had been validly terminated after 5 years[32]. The true reason was perhaps that this agreement granted to the distributor/licensee the biggest market in the world for this

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29 A. J. van der Berg (ed.), XII Yearbook of Commercial Arbitration (1987), 124 ff.
30 ICC case No 4451, C. Truong, 169.
31 ICC case No 5073, *in* A.J. van den Berg (ed.), XIII Yearbook of Commercial Arbitration (1988) 53 ff.
32 Unpublished ICC case.

product, and that after a few years business consultants had advised the licensor to exploit it himself, so as to maximize its return on operations. The alleged causes for early termination of the agreement were not found to be substantiated by the evidence, at least to the point where the breaches would justify the termination. For instance, in a different case, the delay in paying a relatively small amount has been deemed not to give rise to a termination of the agreement[33].

29. In some cases, it has been found that the breach cannot be invoked if the other party did not send a notice setting the facts and giving out sufficient time to remedy it[34].

30 In cases where the breach is material and severe, other tribunals have found that the immediate termination was warranted, because the breach shed a very different light on the behaviour of the breaching Party, and negated any mutual confidence, which is seen as a necessary basis for any long-term relationship. Such has been the case when a car dealer forged immatriculation papers, a popular make of car being changed into a luxury one on official papers in order to get a premium and a bonus connected to the sale of the luxury automobile[35]. It could be said that the notice to remedy is necessary whenever remedying an alleged breach is possible, but that it is not when all decisive acts or omissions were in the past and could not be remedied anymore. Remedying is possible for example where some sums of money have not been paid when due; a notice can request more respect for the contractual accounting and payment periods of time. Remedying is also possible where quality control is the issue.

C. Damages

31. In case of unjustified termination, the claimant usually seeks recovery of its financial losses. It is most often lost profits on the years for which the contract would have otherwise lasted and performed at satisfaction.

32. In some contracts being made for 30 years, the lost profits may be both speculative and of a formidable impact on the debtor's present financial status. This calls for differenciated considerations.

33. First of all, the parties have the obligation to mitigate the losses, so when a different partner may be found to operate the distribution or to provide a similar range of products. Arbitral tribunals also find other ways of restricting the impact of an award of lost profits. For example, the arbitral tribunal may apply the UNIDROIT Principles 2004 (Art. 7.4.3 (2)) on the certainty of harm : "Compensation may be due for the loss of a chance in proportion to the probability of its occurrence". This will allow for a reduction of the remuneration expected in years farther away, without rebutting the claims that a remuneration would be proper even in those years. In other words, this Principle allows for a graduation of the financial remedies.

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33 See case of the Italian Arbitration Association 57/94 as published *in* XXII Yearbook of Commercial Arbitration (1997) 182 ff.

34 ICC case No 4496, as cited *in* S. Jarvin, Arbitrating International Disputes, 23 LES Nouvelles (1988), 23.

35 ICC case No 11856 (unpublished).

34. A different approach could limit the extension of the financial remedy until distant years. As was noted in an ad hoc award[36], the distributors having signed an *intuitu personae* distribution agreement coupled with a Research & Development joint venture could not reasonably expect the contract to last the full term of 30 years, since they were already advanced in years when executing the agreement. By application of a Swiss Federal Tribunal ruling in a distributorship situation[37], the arbitrators decided that 8 years would be taken into consideration, that is 3 years for recouping investments, and 5 years for reaping some commercial profits. It will be seen that although there is no "*justum pretium*" for the remuneration of distributors, there may be a "just duration" for contracts that have been concluded for an unreasonable period of time.

35. Finally, no further indemnity should be awarded for the time when the contractual relationship has ended. The sales agent or dealer is entitled to an indemnity for the customers who were his and now benefit the manufacturer or the new agent. However, the sales agent has been seen by most legislatures as dependent from the manufacturer to the point where he loses his customers when he loses his dealership. The indemnity amounting to one year (under Swiss law) or two years (under French law) profits do not accrue to an independent distributor, who is not solely remunerated by one partner and usually keeps most of his clients even when the litigated contract is terminated. However, some arbitral tribunals have been amenable to the view that a compensation for loss of customers is not excluded when the turnover of the distributor on a given line of products is annihilated by a termination which was not caused by the distributor's conduct. A practical way of explaining those benevolent awards might be to admit that the same two Parties can be bound in a dual way, to wit by a distributorship agreement on the main, and by a sales agency agreement for other products or other territories[38].

36. Astute counsel have pleaded that an accounting for profits could be ordered by the arbitral tribunal in the following case : the manufacturer terminated a contract with its long time distributor and immediately entered into a similar agreement with a new distributor. The termination was not justified. Could the former distributor obtain from the manufacturer either the profits made by the new distributor during the period of time when the original contract should have been performed, or at least the increased profits made by the manufacturer because the new distributor reaches a higher turnover?

37. Accounting for profits is but a variety of unjust enrichment. As such, it is in our view not subject to a requirement of intentional harm or negligence. Thus, if this plea were to be followed, profits made after the unjustified termination of a contract would most of the time be returned to the former party to these ongoing commercial operations. It would function as a kind of strict liability, as least in those countries which do not request bad faith for ordering accounting for profits[39].

38. As a matter of principle, however, accounting for profits aims not at remedying the breach of contract or its unjustified termination but at reapportioning the profits in favor of these persons or legal entities to which the law of property or the laws of intellectual property gave them in the first place. These traditional areas are complemented by some

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36 See for the facts Bull. Swiss Arbitration Association 2003, 384 ff.

37 Arrêt du Tribunal fédéral [ATF] 107 II 216.

38 E.g. the unpublished ICC case mentioned above No 24.

39 As is now required by the Swiss Federal Tribunal under Art. 423 CO, see ATF 126 III 69.

quasi-contractual hypotheticals, such as the violation of trade secrets, the protection of which may be based in some jurisdictions on an implied fiduciary relationship. However, where there is no property interest or institution akin to a property interest as in the law of trade secrets, there is no basis for taking into consideration the profits of a third Party (the new distributor) when computing the loss of the former distributor under the terminated contract[40]. Further, there is no sufficient causation : the profits of the new distributor are mainly due to its own organization and sales acumen and bear no relationship whatsoever with the profits that the former distributor could have done with its own salespeople. Besides, when a distributorship agreement has been prematurely terminated by the manufacturer, it is often because the former distributor was not efficient enough in the judgment of the principal. It would be paradoxical if the former inefficient claimant would get by reason of the efforts and exertion of the new distributor what he was not able to get himself.

39. A more difficult issue resides in the accounting for profits which would be claimed for the profits made by the manufacturer which would have terminated the contract without cause. The accounting for profits does not figure among the remedies for breach of contracts, at least in the continental tradition. There is no correspondance between the loss due to the breach of the contract and the profits made by the party breaching it. Our civil law does not want to prevent breach by confiscating the profits by the Party in breach. Continental civil law does not accept punitive damages, even for intentional harm. *A fortiori*, it should not be accepted by way of accounting with a businessman's profits when this businessman has breached a contract.

40. Finally, it should be noted that both the definition of the grounds for termination and the applicable procedure, as well as the financial consequences of an irregular termination may be provided in specific terms in the contract. If the accounting for profits were to be foreseen by the common will and intent of the Parties at the time, there would be no reason to reject it. Specific circumstances could also justify it, for example where there is both a breach of contract and a violation of some property interest.

D. Interim Measures

41. A decisive advantage of arbitration in the area of distribution could result from the possibility for the arbitrators to order interim measures. Those measures are subject to the general requirements that a damage difficult to remedy be otherwise committed and that the requesting party be likely to win the case eventually. Some arbitrators have been requested to order by way of interim measures the provisional continuation of the distribution operations until a final award is rendered. It is a kind of "specific performance" limited in time.

42. Objections could be made against this extension of the duration of the contract whenever this contract is premised on a tight mutual confidence, for example because of technical specifications and confidential secrets, the exchange of which would appear necessary for maintenance works or securing new orders.

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[40] The recent case law in Switzerland is, however, to the effect that interference with a contractual relationship might be considered as impingement on one's patrimonial rights, thus opening the door for accounting. See case cited fn. 39 above.

43. Further, the condition of a harm difficult to make good later will preclude a too expansive use of that interim measures. The main hypothetical of harm difficult to redress by means of an award of damages is the loss to commercial credit and good will of the distributor when the termination is unjustified. The circumstances in each case will dictate whether this scenario is fulfilled. Otherwise, most losses of the distributor will be indemnified by the final award.

44. The reverse scenario might be conceivable. If the distributor is losing interest in the marketing of the product because of an unjustified termination on his part, the manufacturer's product may be evinced from the market altogether. The loss may be more important than the turnover, for example if an official authorization is lost because time has elapsed without working the patent, without using the trademark, or without renewing a State's license for marketing a food product or pharmaceutical product. However, the manufacturer may usually obviate those rare but severe losses of right through direct marketing or the choice of a new distributor, so that the provisional discharge of the former distributor's obligation should seldom if ever be ordered.

## V. CONCLUSION

45. S. Soltysinski may read the preceding remarks with benevolent irony. He knows that arbitral awards are not precedent in the Anglo-American stare decisis sense. Assuredly, the arbitrators reason as do judges in State courts. They do insist in international matters on the proper application of rules on conflict of law. They are not overprotective of the distributors. They try as State courts also do to distinguish facts and law, truth and unsupported allegations.

46. There is however this difference : arbitrators never have to worry about the effect of their ruling in other, subsequent litigations between different parties. They are free from the burden of "legislating" for the future, as they are reasonably free to adhere to a line of cases of the past. Thus, arbitral tribunals being more free and more discrete, there is no specific ground for studying their practice.

47. Yet, the solutions of the arbitral practice cannot be indifferent at the time when counsel assist Parties in drafting the agreements. When a general trend emerges, counsel know that they need a specific provision to depart from the consensus. Such an example is given by the frequent application of the law of the country of the distributor on the absence of a provision to a different effect. As I gladly remember the fondness with which Prof. Soltysinski envisaged the application of the neutral law in transfer of technology transaction (!), I cannot but recommend here to draft precise provisions in this regard, as well as concerning the various other issues which are rather uncertain if Parties do not provide for a clear solution, as has been evidenced by the review of those awards.

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