



International Distribution Institute

## Panel 5

# Managing the Relationship Between the Framework Distribution Agreement and the Contracts of Sale

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# Application of CISG to Distributorship Agreements: US Perspective

- “There is very little case law on the applicability of the CISG to distributorship agreements.”
- “However, all courts that have considered the question have either held or suggested the CISG does not govern distributorship agreements, which entail much more than the simple sale of goods.” (cases cited).

*Adonia Holding GmbH v. Adonia Organics LLC* (D. Ariz. 2014)

## *Adonia Holding GmbH v. Adonia Organics LLC*

- Eastern European Reseller Agreement
  - Exclusivity
  - Order requirement: 39,500 units ordered 21 days after product registrations obtained
  - Dispute over “roll out” - order requirement not met
  - Claims: breach of contract, breach of duty of good faith and fair dealing, unjust enrichment, fraudulent misrepresentation, and fraud

- “At the very least . . . an agreement must specify the price or types of goods to be sold before the CISG will apply.” (citing *Helen Kaminski Pty., Ltd. v. Mktg. Australian Products, Inc.* (S.D.N.Y 1997))
- But why is this necessary?
- Do US courts have this correct?

## *Adonia Court*

- Although agreement contains minimum order requirement, the agreement does not specify price or types of goods to be sold
- CISG does not apply “[b]ecause the Agreement is not a contract for the sale of goods as envisioned by the CISG, the CISG does not apply.”
- Arizona law applies and most jurisdictions find ***UCC is applicable to distributorship agreements***

# Application of CISG to Distributorship Agreements: EU Perspective

- Very, very little case law on the applicability of the CISG to distributorship agreements
- No homogenous rationale behind the application of the CISG
- German and Italian precedents tend to the applicability of the CISG to distribution agreements

## *Imperial Bathroom Company v. Sanitari Possi S.p.A.*

- *«It must also always pay attention to identifying forums intended for solutions to the art. 57 of the Vienna Convention of 11 April 1980 [...]»*
- *«In light of the principles set out in relation to the present controversy as governed by [...] art. 57 of the Vienna Convention, the jurisdiction of the Italian judge must be established. »*

*Cit. Italian Supreme Court, August 7 1998 n. 7759*

## Some conclusion, ...

- CISG is applicable to individual sales contracts and, at least in the US, to the framework distribution agreement if certain conditions are met.
- Is CISG really fit for the purpose of applying to framework distribution agreement?
  - CISG (probably) does not contain the rules adequate for the rights and obligations of the parties arising strictly from the distributorship (e.g. goods' promotion/advertising/merchandising, management of trademarks/brand name, guarantee/spare parts etc.);
  - CISG does not take into consideration the specific characteristics of the distribution relation (e.g., *intuitu personae*, economic objectives to be achieved).



## **... some critical issues to discuss...**

- Supplier's discretion to accept distributor's orders and its limits: balancing the distributor's interest to obtain supplies and the supplier's one to manage amount of supplies and risks;
- Managing warranty, stock of spare parts and technical assistance through the distributor; and
- More favourable payment conditions with protection of the supplier's credit through bank guarantees or similar means.



## ... and some brainstorming

The application of CISG to framework distribution agreement by Judge/Arbitrator is **uncertainty**

Even so, if the dispute is related strictly to the distributorship, the application of the CISG could be inappropriate.

Thus, in order to avoid uncertainty, the parties should:



**precisely solve the question of applicable law to the framework contract as well  
as to the individual sale contracts**

**by choice of law clause**

[...]

Be aware, on top, of the EU Reg. 593/2008, Rome I, article 4 paragraph 1 letter A and F  
about the “*Applicable law in absence of a choice*”



**under the framework agreement, carefully govern peculiar terms and conditions of the distributorship**

**e.g. confirmation (or not) of the orders and obligations of the supplier to deliver**

[...]



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**under the framework agreement, carefully govern peculiar terms and conditions of the distributorship**

**e.g. warranty/spare parts**

[...]