

LATIN LAWYER REFERENCE DISTRIBUTION LAW 2019

Chile

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1 Does the law in your jurisdiction require that distributors or commercial agents for foreign manufacturers or suppliers be owned by a national of your jurisdiction?

Chilean Law does not provide for a special Law for ruling distribution agreements. Therefore, according to what is established in the Chilean Civil Code (article 1545), the will of the parties will govern their relationship and the contract existing between the parties will act as the law.

In addition, the Commercial Code and the Civil Code will apply. The same can be said for the “general principles of Law”.

Having said that, according to the Constitution of Chile and the economic system in place since the mid-1970s, practically no differences are made between Chilean nationals and foreigners, as far as economic activity is concerned, and their freedom to operate in Chile.

Therefore, distributors or commercial agents in Chile can be foreigners (individuals) or companies owned by foreigners. Needless to say, those persons will need to comply with the local rules, such as work permits, payment of taxes, compliance with labour law at the time of hiring people, etc.

2 Are oral agreements for distribution or a commercial sales agency enforceable or must they be in writing to be enforceable?

Oral agreements are enforceable in Chile. However, the enforcement of such agreements may be more complicated than the enforcement of written agreements. In fact, the plaintiff will first need to prove that the commercial relationship he or she has or had with the defendant was a distribution agreement or a commercial agency agreement, and not simply one or more isolated sales. In addition, he or she will need to prove the agreement is still in force. Thereafter, he or she will be able to enter into the main claim referring to one specific breach of the contract, once he or she has been able to prove that the contract is still valid or in force. In other words, the agreement will be enforceable, provided the plaintiff is able to prove first, the existence of the agreement, second the contents of same and third the breach of the complete agreement or of part of it.

3 Is an agreement for an agency or distributorship invalid if it is written in a foreign language?

Agreements in foreign language are accepted and enforceable in Chile. Needless to say, the latter applies, provided that the parties understood what they executed or signed.

Still regarding language, for the sake of order, it is to be said that if two parties decide to grant a contract by means of a Chilean public deed, that document will have to be in Spanish, since the notary public cannot produce public deeds in a language other than Spanish. It is common practice to add or insert to the public deed a translation of the contract agreed by the parties. In that case, the translation of the document will be kept in the books of the notary public, together with the original document.

4 Must the foreign manufacturer's or supplier's contract with the distributor or commercial agent be registered with a local governmental agency? If so, please identify the agency; briefly describe the registration process and what is required to register including any fees or other amounts to be paid; and describe the consequences of not registering the agreement.

Distribution agreements do not need to be registered in Chile. However, practice indicates that many distribution agreements contain additional contracts among their exhibits or annexes, which are considered as part of the distribution agreement. This is the case for instance of “trademark licence agreements”, “patent licence agreements”, “contract providing for the right for the distributor to pack the goods in situ” or to “produce goods or part of the goods in situ”, etc. Using these examples, it should be noted that “the trademark licence” will need to be registered with the Chilean Trademark and Patent Office, in order to be enforceable against third parties; “the right of the local distributor to produce part or the complete cosmetic product”, using the material sent to him by his principal, will force the distributor to obtain a permit from the Chilean Health Authority, etc.

5 Does the law permit the appointment of a distributor or commercial agent to be non-exclusive?

Yes. In fact, the principal could appoint several distributors for the same territory, knowing that they will compete.

In this respect, it is also interesting to note, in connection with this point, that “parallel imports” are permitted and especially provided for by Chilean industrial property law. Therefore, if two or more non-exclusive distributors are designated for

the complete territory of Chile or for part of it, they may have to compete also with a third party who may decide to import into Chile legitimate goods produced by the principal, and that a third party may decide to buy abroad.

In addition, practice indicates that several distributors do compete with a subsidiary of the principal established in the country. In a case like this, the contract between principal and distributor will, in all probability, make reference to the fact that the principal has or will have the right to sell goods in the territory, through or by means of a subsidiary.

Finally, the strength of electronic commerce worldwide and also in Chile, has made the parties (distributor and principal) to decide the inclusion in their Contracts of one or more clauses regarding a possible compensation for the distributor in view of “the natural competition arising between the distributor and the sales on the internet made by the principal directly or by intermediate parties located abroad”.

6 Please identify any laws in your jurisdiction that are designed specifically for the protection of distributors or agents of foreign manufacturers or suppliers. Please briefly describe the concept of each such law.

Generally, no. However, the “freedom of contract” will be limited by the rules on “public order”, “security”, “the principle of good faith” and “rules on fair competition”. In addition, the existing contract between the parties will be the “law of the contract” for the parties. The latter offer one explanation for why the distribution contracts in Chile are rather long and detailed.

It is to be noted, however, that Chilean case law (civil courts and arbitration bodies) has settled some principles or rules that are generally accepted or requested at the time of the termination of a distribution agreement. In some cases such principles of case law could override the clauses of a contract. However, it is necessary in this respect to mention that the case law does not make difference due to the origin of the supplier or manufacturer (Chilean or foreign), and possible case law rules will be applicable to any manufacturer or supplier. In addition, most of those case law rules refer to:

- minimum time for termination notice;
- time during which the contract has been developed and in force;
- investments made by the distributor to carry on his task;
- weight of the business with the principal in the distributor’s financial portfolio;
- pending contracts or commitments of the distributor with third parties; and
- existing stocks in situ; etc.

7 Are the laws in your jurisdiction related to the protection of distributors or agents of foreign manufacturers or suppliers restricted or overridden by any international law obligations (such as DR-CAFTA)?

Since, as indicated above, there is no law on distribution, such a distinction will be made by the court if needed. In other words, independently of the title the parties may give to their contract, the court will look into the provisions of the contract and into the facts that took place during the relationship, in order to determine what the real nature of such a contract is. The title will not be sufficient to qualify a commercial or legal relationship between the parties.

In the case of non-written agreements, the facts and the declarations of the parties will be key elements for a court to determine the exact nature of the contract. Existing correspondence (such as letters and emails) exchanged by the parties during the course of “what appears to be or to have been a distribution contract” will doubtless be the essence of the discussion.

8 Does the law distinguish between a distribution and a sales representation or agent relationship, and if so: how does the law define a distributor; how does the law define an agent or representative; and will the courts look to the facts and nature of the parties’ relationship as opposed to what the parties called the relationship in their agreement in determining whether the relationship is within the scope of the law?

As mentioned in question 1, Chilean Law’s do not provide for a special law on distribution. Therefore the meaning of the expressions “manufacturer” and “supplier” will be the normal meaning given by language/dictionary. Such a meaning could be defined by the parties.

9 Please describe what qualifies as a “manufacturer” or “supplier” within the meaning of the law.

Taking into consideration the answer to question 7, it is, however, important to note that Chilean Law does not make differences between Chilean nationals and foreigners, who are equal before the Law. This is applicable to individuals and to corporations.

10 Does the law apply to domestic as well as foreign manufacturers and suppliers? If not, please describe the differences in the law's application.

Not applicable.

11 When was the law enacted?

Not applicable.

12 Does the law apply to agreements entered into before the law's enactment?

Not applicable.

13 Can the protections of the law be waived in the distributorship or sales agreement or otherwise before a dispute arises?

As indicated above, the local legal system does not provide for a law on distribution. However, the case law is rather uniform in the request for the principal to comply with some prior notice for termination. In addition, the criteria commented under question 21, can be found in an important number of decisions.

14 Describe briefly the law's regulation of the termination of a distributorship or agency. Does the law impose any consequences or liability upon a manufacturer or supplier who terminates a distributor or agent even if the termination is in accordance with the terms of the parties' contract?

The strict answer is no, provided, however, that the manners or forms established in the contract concerning the prior advice of the will not to renew are met.

In addition, it is to be said that local practice indicates that it is fairly common for distributors to sue the principal for termination, in spite of the contractually agreed term. In those cases, many distributors claim the investment they have done to spur the business forward and also the fact that the brand they distributed has a place in the local market, due to the distributor's efforts. In other words, these distributors attempt to claim some reward for the goodwill they have included in the brand while distributing in Chile the branded products.

15 Does the law impose any consequences or liability upon a manufacturer or supplier who, upon the expiration of contractually agreed term of the distributorship or agency, simply elects not to renew the distributorship or agency?

Not applicable.

16 Does the law protect an agent or distributor who is terminated for cause?

Not applicable, in view of the lack of Law. If the case is brought to court or taken to arbitration, the judge or arbitrator will need to determine if the termination was fair and if some criteria of fairness were taken into consideration. See question 21, since those mentions will be taken into account by the court/arbitrator.

17 If the law distinguishes between terminations for cause and terminations not for cause, please specify: how the law define "just cause" or "for cause"; and can the parties define what constitutes "just cause" or "for cause" in their agreement for purposes of the law's protections?

Not applicable. However, it must be said that in case a distributor is to claim damages, he or she will need, according to the general principles of civil law, to prove such damages in order to have a possibility to be favoured with a decision that may force the principal to pay damages.

18 What are the remedies accorded to a distributor or agent in the event of a termination protected by the law? Are the remedies afforded by the law exclusive and exhaustive? Are moral damages recoverable for wrongful termination of a distributorship or agency?

The general rules concerning the statute of limitations will apply. A detail of each particular situation will need to be examined in order to be in a position to state the exact amount of time. In fact, at reviewing the Chilean Civil Code, in its chapter concerning the statute of limitations, it is said:

“The statute of limitations that extinguishes actions (right to bring an action) and the rights of third parties, will occur only when during a determined amount of time, the actions have not been put forward. The term will be counted since the day on which the obligation could have been claimed” (article 2514 Chilean Civil Code). “The term is normally of three years for the executive actions (summary proceedings) and of five years for the rest of the actions [...]” (article 2525 Chilean Civil Code) “The action of the merchants, suppliers, [...] will be the subject of a term of statute of limitations of one year” (article 2522 Chilean Civil Code).

19 If parties decide to settle a dispute over an agency or distributorship agreement, are there any special requirements as to form or otherwise for the agent's or distributor's waiver of rights under the local law to be effective?

No.

20 What is the statute of limitations by which a claim must be filed by the distributor or agent for recovery under that law, and as of when does the period of limitations begin to run?

Regarding applicable law, according to Chilean Law the parties are allowed to choose or establish a foreign law as the applicable law for their distribution agreement. However, this law will be applicable to the extent that there is no conflict with Chilean public order.

Taking into consideration the foregoing, there are some topics in which the applicable law will be Chilean law, even if the signing parties have agreed something different. For example, for properties (real estate) located in Chile, the applicable law to their sales, transactions, etc, will be always Chilean law. Chilean labour law and Chilean tax law shall also prevail, even if the applicable law agreed in the corresponding contract was another one.

21 Must issues that arise under agency or distributor agreements be governed by local law, or can the parties agree that their relationship and agreement will be governed by foreign law?

Strictly speaking, yes. In fact, if the parties have agreed on foreign law, local law will not apply for “protection to the distributor or agent”. However, in this respect, if foreign law is chosen by Chilean local courts as designated by the parties, the distributor will in all probability make the maximum effort to try to open a discussion on this point regarding his or her “rights to be protected” due to the efforts made locally.

22 If the parties are allowed to contract for the application of foreign law in their agreement, does that pre-empt (exclude) the application of the local law providing protections to the distributor or agent, or does the local law override any conflicting provisions of the foreign law?

Chilean Law gives total freedom to the parties on this point. Therefore, it is possible to state:

- the parties can validly agree that all disputes will be submitted to international arbitration, and therefore the seat of arbitration can be abroad;
- the parties can validly agree that all disputes will be submitted to local courts; and
- the parties can validly agree that all disputes will be submitted to local arbitration. In this respect, it is useful to mention that the Chamber of Commerce of the city of Santiago (Chile), has a very prestigious Arbitration Center. The latter is ruled by a special ruling. It has a list of very prestigious lawyers who act as arbitrators. Finally, it is also a “siège” for international arbitration.

23 If the distributorship or agency agreement provides that all disputes must be submitted to international arbitration, is such a requirement valid, or does local law require that disputes be submitted exclusively to local courts or local administrative bodies? If arbitration is allowed as a method of resolving distributorship or agency disputes, must the arbitration take place in the country of the distributor or agent or can the seat of the arbitration be in another country?

Typical questions ruled by the local courts and that in consequence permit consistent jurisprudence are the following subject matters: “early termination of a distribution contract”, “compensation to which the distributor will be entitled once the contract has terminated”, “reasonable time notice for termination”, “was the decision not to renew a distribution contract made in good faith by the principal?”, “was the decision not to renew the distribution contract abusive towards the distributor?”, “lack of written contract”, “was the decision not to renew a distribution contract taken in view of the intention of the principal to establish a local subsidiary in Chile and therefore start operating directly in Chile?”, “will the termination of the distribution agreement affect the relationship of the distributor with his clients?”, “how will the stocks be treated at the time of the termination?”, “how will the brands be treated at the time of the termination, or in other words how IP assets will be taken care of or protected?” .

For “early termination” and “reasonable time notice for termination” cited in the former paragraph, it is common to see the following criteria commented and followed by our local courts (and by local Chilean arbitrators) in their judgments:

- total duration of the contract;
- remaining time to expiration;
- volume of sales and amount of the business/transactions;
- investments made by the distributor and time needed to recover such investments;
- pending contracts with third parties that will suffer from the earlier termination;
- minimum or “reasonable” time for termination notice; and
- weight of the business with the principal in the distributor’s financial portfolio, etc.

In connection with the rather typical claim put forward by the distributor for “goodwill compensation”, we can inform that sometimes these claims are argued alone, but in most of the cases, as part of a broader legal action which pretends to cover and solve all the existing pending issues and questions between the parties.

We have been able to see in the past and also recently, Chilean distributors suing their principal and requesting a “goodwill compensation” solely due to the fact that a contract was not renewed, in spite of the fact that a letter informing of such a situation was sent several months before the termination would take place.

Jurisprudence indicates that at the time of determining if distributor will or will not have the right to obtain “goodwill compensation”, a Chilean Court will mainly take into account the following issues:

- law of the contract;
- notice of termination, time of advance in the sending of same and formalities used by supplier to serve notice;
- percentage represented by the supplier’s goods in the “chiffre d’affaire of the distributor”;
- investments made by the distributor trusting in a renewal of his contract, and in consequence in the hope of having more time to recover the expenses made;
- existence of an agreement regarding “repurchase of the stocks”;
- existence of long term contracts between distributor and third parties.

24 If there are no laws specifically designed to protect distributors or agents in your jurisdiction, is there any jurisprudence established by the courts in your jurisdiction specially or uniquely for the protection of distributors or agents? If so, please provide a brief overview of such special rules.

There are no special rules applicable to distributors. However, general competition rules and case law on this subject matter are to be taken into account at the time of drafting a distribution agreement. In fact, the competition issue has gained importance and strength in all commercial relationships.

In fact, some matters that were not a trend in the recent past are now to be reviewed carefully from a competition point of view. In this manner, for example:

- “Territorial exclusivity” could be considered by Case Law as an infringement to the rules referring to free trade.
- The existence of “one sole distributor” could be considered in some cases as an infringement to the rules of free trade, since the offer will be concentrate in a single distributor. The designation of a distributor for the territory of Chile or for part of same does not need to be followed by the designation of a second or third distributor – with the intention to have a situation of competition within the same territory. However, according to the rules referring to free trade (and antitrust),

there would be an obligation of the principal to sell his goods to a person who intends to be a distributor and who complies with the same requirements and capacities of the ones met by the “exclusive distributor”.

- The principal could prevent the distributor to sell goods of competing goods (manufactured) by competitors in the same territory.
- The case law generally gives authorisation to the distributor to sell goods of other brands, in parallel to the goods of the principal. However, if the goods resold by the Distributor are in direct competition with the goods of a company that is directly competing with the goods of the principal, the latter could impose an obligation not to compete on his distributor and in other words prohibit to his distributor to sell goods that are directly competing with his.
- The parties can agree for the day the contract will terminate, to be ruled by a clause of non-competition. However, jurisprudence indicates that same will be limited in time.

25 Are there competition laws or regulations designed to cover specifically distributor or agency relationships? If so, please briefly describe.

Not applicable.

26 Describe one or two examples of significant judicial decisions with respect to international distribution agreements or agencies that could provide a sense to the courts' approach.

Not applicable.

** This information is accurate as at April 2018.

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Practice areas

- Intellectual and industrial property;
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Born in Geneva, Switzerland. Primary and secondary school, the Institut Florimont (Geneva, Switzerland). French Baccalauréat in 1986. Studied law at the Catholic University of Chile in Santiago, between 1987 and 1992. Graduated in 1993. Admitted to practise in 1994. Specialised course in intellectual property at Franklin Pierce University in Concord, New Hampshire, USA, in 1996. Professional practice at the law firm of Knobbe, Martens, Olson & Bear in Newport Beach, California. Joined Porzio, Ríos & Asociados in 1993 and has been a partner of the firm since 2002.

He advises local and foreign clients in matters related to patents, trademarks and technology transfer. He also practises in the areas of distribution and franchises.

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The law firm PORZIO · RÍOS · GARCÍA was founded, in 1993, as Porzio, Ríos & Asociados, beginning its activities mainly in the intellectual property field.

Due to the increasing need of its Chilean and foreign clients, and in order to provide a full range of legal services based on the highest quality standards, the firm developed new practice areas in different fields of company and business law.

PORZIO · RÍOS · GARCÍA consists of a team of lawyers who graduated from the most prestigious universities in the country, many of whom have completed graduate degrees in foreign universities with a comprehensive management of different languages. Many of them also act as arbitrators in domestic and international procedures. Most of its lawyers teach at the main law schools in the country and are widely recognised leaders in their areas of practice.

The team is completed by an entrenched group of paralegal and administrative staff with extensive experience, and also by scientists in the fields of engineering, chemistry, pharmacy, biochemistry, biotechnology and design who work closely with our team of lawyers.

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