

"This chapter is reproduced with permission
from Kluwer Law International BV."

For more information,
please visit: <http://www.kluwerlaw.com/>

Russia

Jonathan Russin, Stanislav Y. Sachnev

Russin & Vecchi, L.L.C. International Legal Counsellors

This Chapter is up to date as of 13 October, 2011

Table of Contents

1. AGENCY	3
1.1. Definition of agency and specific features	3
1.2. Basic aspects of agency agreements under Russian Law and court practice	4
1.2.1. Formalities	4
1.2.2. Exclusivity	4
1.2.3. Consideration of agent (commissions)	4
1.2.4. Reports of the agent	5
1.2.5. Main obligations of principal	5
1.2.6. Main obligations of agent	5
1.2.7. Subagency agreement	5
1.2.8. Duration	5
1.2.9. Termination of the agency agreement	5
1.2.10. Indemnification upon termination	6
1.2.11. Non-competition after termination	6
2. DISTRIBUTION	7
2.1. Definitions of distribution and specific features	7
2.2. Analysis of distribution agreements under Russian jurisprudence	7
2.3. Formalities	9
2.4. Exclusivity	9
2.5. Territory	9
2.6. Obligations of supplier	9
2.7. Obligations of distributor	9
2.8. Term	10
2.9. Indemnification upon termination	10
2.10. Non-competition after termination	10

1. AGENCY

1.1. Definitions of agency and specific features

Agency agreements in Russia are governed by Part II of the RF Civil Code of January 26, 1996 (the “Civil Code”). Article 1005 of the Civil Code provides (in translation)¹

Under an agency agreement, one party (the agent) has the duty for remuneration to take, on delegation from the other party (the principal), legal or other actions in his own name, but at the expense of the principal or in the name and at the expense of the principal.

Based on the above definition agency agreements are commonly divided into two groups: (i) agency agreements where the agent acts in his own name; and (ii) agency agreements where the agent acts in the name of the principal.

Where the agent concludes a transaction with a third person in his own name and at the expense of the principal, the agent acquires rights and becomes obligated even though the principal was named in the transaction or entered into direct relations with the third person for the performance of transaction. Under a transaction performed by the agent with a third person in the name and at the expense of the principal, rights and duties arise directly with the principal.

The Civil Code contains only general provisions regulating agency agreements, and, according to the paragraph 4 of article 1005 of the Code, other laws may regulate specific types of agency agreement. The Code of Merchant Shipping,² for example, provides special features for marine agency agreements. Also the Federal Law “On mortgage securities” of November 11, 2003 No. 152-FZ establishes requirements for mortgage agency agreements, and the Federal Law “On post service” of July 17, 1999 No. 176-FZ contains special provisions for agency agreements concluded by the federal post service. The provisions of these specific laws will take precedence over the more general terms of the Civil Code.

The Civil Code also contains provisions governing two special-use agency agreements: the contract of delegation (Code Article 971) and the commission agency (Code Article 990). The contract of delegation is similar to a power of attorney where the delegate is authorized to act in the name of the delegant, and where the delegant bears exclusive responsibility for the acts of the delegate. In the commission agency the Commission agent has the duty on delegation and with payment from the commission principal to conduct one or more transactions in his own name but at the expense of the commission principal. As distinguished from the delegation agreement the commission agent, by acting in his own name, assumes all benefits and obligations from the transaction.

Both business entities and individuals may act as agents in civil relationships since agency agreements are also generally governed by the contract provisions of the Civil Code.

¹ Translated and edited by Peter B. Maggs and Alexi N. Zhiltsov and published by Infotropic Media, Moscow and Berlin 2010.

² Law dated April 30, 1999 as amended in the edition of July 18, 2011.

1.2. Basic aspects of agency agreements under Russian Law and court practice

1.2.1. Formalities

Russian legislation does not stipulate any requirements as to the form of agency agreement. Therefore the Civil Code provisions regulating contracts in general should be applied to agency agreements. Under the Civil Code, agreements may be concluded in written or oral form. However, in practice, agency agreements are virtually always in written form since (a) they give evidence to all third parties of the authority the agent has to bind the principal, (b) they can include the specific limitations imposed on the agent, for example, to act within a specific territory, and (c) they can define the terms of remuneration, time for performance, termination provisions and other provisions of the agreement between agent and principal.

1.2.2. Exclusivity

Exclusivity provisions are often included into agency agreements. The concept of exclusivity is generally linked to the territory where the agency agreement should be performed. Obligations flowing from exclusivity may bind both the principal and the agent.

Pursuant to the article 1007 of the Civil Code an agency agreement may provide for an obligation of the principal not to make similar agreements with other agents acting in the territory defined in the agreement and requiring the principal to refrain from conducting, on this territory, any independent activity that is similar to the subject of the agency agreement. The agency agreement may similarly restrict the agent from undertaking analogous arrangements with other principals for performance, in whole or in part, on the territory covered by the exclusivity.

At the same time Article 1007, paragraph 3. of the Civil Code contains provisions designed to prohibit the restraint of trade:

Terms of the agency contract, by virtue of which the agent shall have the right to sell goods, perform work, or render services exclusively for a defined category of buyers . . . or exclusively for buyers . . . having a place of location or a place of residence in a territory defined in the contract are void.

1.2.3. Consideration of agent (commissions)

The Civil Code does not define what constitutes an agent's remuneration. Article 1006 of the Code simply states that the principal shall have a duty to pay the agent remuneration in the amount and by the procedure established in the agency agreement. Thus the parties to an agency agreement are free to determine the terms and conditions governing payment. The parties may establish remuneration based on a fixed amount paid periodically, on commissions depending on the number or value of business transactions entered by the agent, on payment for time devoted by the agent to promoting the principal's goods and services, or on other payment formulas.

If the parties have not fixed the amount of the agent's remuneration, and it cannot be determined from the terms of the agreement, remuneration shall be based on the price that usually is taken for analogous goods, works or services under comparable conditions.

In the absence of terms for payment of the agent's remuneration, the principal shall have the duty to pay within one week from the date of presentation to him by the agent of a report for

the prior period (month, quarter), unless another procedure for payment follows from the nature of the agreement or the customs of commerce.

1.2.4. Reports of the agent

Article 1008 of the Civil Code requires the agent to issue periodic reports. These should be presented by the agent to the principal by the procedure and within the time periods established in the agreement. In the absence of such terms in the agreement, the reports shall be presented by the agent in the course of performance of the agreement or at the end of the effectiveness of the agreement. Expenses incurred by the agent should be included, unless other terms are agreed.

.The principal must make timely objections to the agent's reports (not more than 30 days from receipt unless otherwise provided in the contract) if he wishes to challenge any of the content. If no objection is made, the report is deemed to be adopted by the principal.

1.2.5. Main obligations of principal

The principal's main obligation is to remunerate the Agent in accordance with the terms established in the agreement. The principal is also obligated to provide the agent with the funds required for the fulfillment of principal's orders and to reimburse the agent for his expenses.

1.2.6. Main obligations of agent

As provided by Russian law the general obligation of the agent is to take legal or other actions for the benefit of the principal in accordance with the terms of the agency agreement. The following obligations could be indicated among subsidiary duties:

- to provide the principal with reports within the time established in the agency agreement;
- to keep documents confirming the expenses incurred by the agent to perform the principal's orders.

The parties are free to agree on further obligations for the agent.

1.2.7. Subagency agreement

The Civil Code provides that the agent may conclude subagency agreements with another person (or persons) unless otherwise established in the agreement. In addition the agency agreement may directly indicate the concrete terms of subagency agreements that could be concluded by the agent. Under subagency agreements the agent remains liable to the principal for the actions of the subagent.

The Civil Code provides that a subagent does not have the right to make transactions with third persons in the name of the principal under the agency agreement, except where the subagent acts on the basis of redelegation pursuant to a formal power of attorney.

1.2.8. Duration

Duration is not an essential element for agency agreements, so the agreement may be concluded for a defined time period or without an indication of the time period of its effectiveness.

1.2.9. Termination of the agency agreement

Under general provisions of Russian law agency agreements may be terminated in accordance with the rules governing contracts. For example, as a result of fulfillment of its terms, or upon the expiration of the validity period established in the agreement.

In addition Article 1010 of the RF Civil Code establishes several specific grounds for termination of agency agreements: (i) withdrawal of one of the parties from performance of an indefinite term agreement; (ii) upon the death of the agent, or upon court determination of him as lacking dispositive capacity, as being of limited dispositive capacity, or as missing; (iii) upon the insolvency of an agent acting as an individual entrepreneur.

1.2.10. Indemnification upon termination.

There are no provisions in the Civil Code or in other Russian legislation governing indemnification upon termination of the agreement. Therefore the respective terms should be worked out by the parties to the agreement and should be consistent with the general provisions of Russian contract law.

1.2.11. Non-competition after termination.

Russian legislation does not contain direct provisions relating to non-competition obligations. However, in our experience the non-compete clauses that we have examined are unenforceable because they violate one or more of the general principles of civil law such as the principles of “freedom of contract” and “unhindered exercise of civil law rights.” They also pose questions relating to the freedom of competition rules contained in the Anti-Monopoly law.³ While these clauses are generally unenforceable we have seen them included in numerous agreements where the parties wish to memorialize an understanding that they recognize will not withstand judicial scrutiny.

³ Law dated July 26, 2006 as amended in the edition of July 18, 2011.

2. DISTRIBUTION

2.1. Definitions of distribution and specific features

Russian legislation does not contain either the legal definition of distribution agreement or specific regulations applicable to this type of civil agreement.

For the purpose of defining a distribution agreement and its specific features we will use the description of the elements of a model distribution agreement established by the International Chamber of Commerce (“ICC”).⁴The following features are cited by the ICC as distinguishing:

- a distributor organizes placement and (or) promotion of goods purchased from the supplier (usually a manufacturer of goods) on the agreed territory acting as a reseller between a supplier and individuals / business entities willing to buy those goods;
- a distributor acts on his own name with end buyers;
- a distributor acts on a certain territory;
- a supplier provide a distributor with a privileged position on the agreed territory (usually with an exclusive rights to buy the goods from the seller);
- very often a distributor abstains from placement and (or) promotion of goods produced by competitors;
- relations of distribution creates a basis for long-term cooperation instead of ad hoc transactions, so the distribution agreement is usually concluded for a certain period;
- a distributor almost invariably deals with branded goods and a supplier provides a distributor with rights to use some objects of intellectual property.

The ICC also observes that “. . . the distribution agreement serves for regulation of international commercial relations of parties when distributors act as wholesale buyers and importers and organize placement and (or) promotion of goods on the agreed territory of certain markets on the basis of terms agreed by the parties.”⁵

The main purposes of a distribution agreement are to increase the sales of the supplier and to open up new markets. The respective rights and obligations of supplier and distributor under the distribution agreement flow from these objectives.

2.2. Analysis of distribution agreements under Russian jurisprudence

As noted above Russian law does not define or regulate distribution agreements as a specific type of contract. However, Article 421 of the Civil Code establishes the principle of freedom of contract, which allows parties to formulate contracts whether or not the particular type of contract is regulated by the code or other legislation.⁶ So the use of a distribution agreement containing the elements noted by the ICC in its description of the distinguishing features of a distribution agreement would not be prohibited by Russian law. And indeed many companies operate in Russian using typical distributor agreements.

⁴ Guide to Drafting International Distributorship Agreements (ICC publication No. 441).

⁵ The ICC Model Distributorship Contract Sole Importer-Distributor (ICC publication No. 518).

⁶ According to the Recommendations generated by Research Advisory Boards of Federal Arbitration Courts of West-Siberian District and Ural District approved by the Minutes No. 5 dated December 16, 2008 “during the disputes arising from such agreements the general rules of the RF Civil Code on obligations and contracts should be applied as well as regulations of the Chapter IV Part Two of the Civil Code on certain kinds of obligations by analogy.”

In practice, however, Russian courts always analyze contracts to determine whether they meet the definitions of any of the specific types of contract that are defined in the Civil Code and in specific legislation. A typical distribution agreement contains elements found in at least three forms of agreement specifically defined in Russian law: the supply agreement, the agency agreement and the services agreement.

Under the supply agreement the seller and buyer agree on a stream of goods to be sold by the supplier to the buyer, such as the supply of steel sheets to an automobile manufacturer. But there is no obligation of the buyer to increase the sales of the supplier or to open up new markets for the product. So a distribution agreement is something more and different from a supply contract.

Under an agency agreement the agent has the duty to take legal or other actions on behalf of the principle. But in a distribution agreement the distributor has no duty to take such actions. The distributor is not remunerated by the supplier, but buys and resells product at his own risk and expense.

As for service agreements, article 779 of the Civil Code provides that “. . . the performer has the duty at the order of the customer to provide services (to take specific actions or to conduct specific activity) and the customer has the duty to pay for these services.” While the typical distributor provides services in promoting the goods of the supplier, under the distributorship agreement the distributor’s profit comes from the resale of the goods to end buyers, and he is not remunerated by the supplier for his promotional services, although the supplier and distributor often share the costs of advertising and promotional activities.

While the typical distribution agreement does not contain all the legally required elements for either supply, agency or service agreements, it contains a mixture of various of these elements. Russian jurisprudence recognizes the existence of “mixed agreements.”⁷ In this situation the general requirements of Russian contract law as set forth in the Civil Code will be applied as well as the rules on contracts whose elements are contained in the mixed contract unless otherwise follows from an agreement of the parties or the nature of the mixed contract. The mixed nature of the distribution agreement is mentioned in some decisions of Russian arbitration courts.⁸

If a court should find upon examination of a specific distribution agreement that the question presented is not directly regulated by the law or the agreement, it could determine to apply customs of trade.⁹ Some legal commentators in Russia are of the opinion that the Model Distribution Agreement provided by ICC may be considered as exemplifying a custom of trade.

If all else fails, Article 6 of the Civil Code states:

⁷ The item 3 of article 421 of the RF Civil Code establishes the right of parties to conclude a contract that contains elements of various contracts provided for by a statute or other legal acts (a mixed contract).

⁸ For example, Resolutions of the Eleventh Arbitration Appeal Court of June 10, 2010 No. A55-26891/2009, of July 22, 2010 No. A65-32067/2009.

⁹ Pursuant to Article 5 of the RF Civil Code a custom of trade is a rule of conduct that has taken form and is widely applied in any area of entrepreneurial activity and is not provided by legislation, regardless of whether or not it has been fixed in any document. However, customs of trade contradicting provisions of legislation or of the agreement will not be applied.

1. In cases when the relations of [parties] . . . are not directly regulated by legislation or agreement of the parties and there is no custom of commerce applicable to them, then civil legislation regulating similar relations (analogy of statute) shall be applied to such relations if it does not contradict their nature.
2. In cases of impossibility of use of analogy of statute, the rights and duties of the parties shall be determined proceeding from the general principles and sense of civil legislation (analogy of law) and the requirements of good faith, reasonableness and justice.

Therefore, notwithstanding that distribution agreements are not recognized or directly regulated by Russian legislation, their use in Russia is permitted and proper.

2.3. Formalities

Since Russian legislation does not contain any regulations applicable to distribution agreements, it does not impose any formal requirements for their execution beyond the usual requirements applicable to contracts.

2.4. Exclusivity

Since the terms of distributorship agreements are not restricted by Russian legislation, the parties are free to sculpt their obligations so as to meet the individual needs of their relationship, provided that their terms do not conflict with other provisions of Russian law. For example disproportionate damages clauses or indemnification clauses may be found to be unenforceable. Exclusivity clauses could also come into conflict with provisions of the Russian Anti-Monopoly law if they unduly restrict the distributor's freedom of competition.

But the usual provisions providing the distributor with exclusive rights to sell the product or service in a designated territory, and the often complementary obligation of the distributor to refrain from selling competing products or services in the territory, are unlikely to conflict with Russian laws¹⁰. Exclusivity clauses that can be waived if the distributor fails to meet agreed sales levels are also likely to be found enforceable.

2.5. Territory

The concrete territory where the distributor shall organize placement and (or) promotion of goods purchased from the supplier should be established in the distribution agreement. In order to avoid disputes the exact boundaries of the territory should be made as detailed as possible.

2.6. Obligations of supplier

The general obligation of the supplier under the distribution agreement is to sell and deliver the goods to the distributor in accordance with conditions agreed by the parties and specified in the distribution agreement. Other undertakings (such as contribution to advertising and promotion efforts and the right to use objects of intellectual property) follow from this general obligation and have a secondary character.

2.7. Obligations of distributor

¹⁰ This conclusion is supported by Russian court practice, in particular by the Resolution of the Nineteenth Arbitration Appeal Court of July 30, 2010 for the case No. A14-8178/2009/268/29.

The main obligation of the distributor is to organize the sale of goods purchased from the supplier in the agreed market in his own name, and for his own account. The distributor may also be obligated to promote sales by marketing campaigns, advertising and similar measures; however, this obligation is often shared with the supplier.

During the performance of the agreement the distributor must follow the sales rules agreed with the supplier (prices, assortment, discount policy and other conditions) and specified in the agreement. Distribution agreements may contain the obligation of the distributor to reach agreed sales levels within an agreed period of time, and the renewal of the distribution agreement or its early termination may depend on whether the distributor has reached the agreed volume.¹¹

2.8. Term

The distribution agreement may be concluded by the parties for either a definite or an indefinite term.

The nature of distribution activity usually presumes a long-term relationship between the supplier and the distributor in order to achieve reasonable increases of market share, but at the same time the length of the relationship depends on sales results. Therefore many distribution agreements are concluded for a definite term of two to three years with the possibility of renewal if sales targets are met.

2.9. Indemnification upon termination.

Since the terms of indemnification will depend on the provisions negotiated by the parties, and not on general requirements of Russian law, it is advisable to draft in detail the formula by which indemnification, if any, will be calculated.

2.10. Non-competition after termination.

Please see Article 1.2.11 above for a discussion of this topic.

¹¹ For example, distribution contracts with such condition were analyzed by the Federal Arbitration Court of Volgo-Vyatskiy District (Resolution of April 30, 2009 on the case No. A79-5797/2008. The contract provided distributor with the concrete volume of sales to be reached in respective periods and establish a bonus for overfulfilment of the plan.