**ICC Model Selective Distribution Contract**

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**Foreword**

Selective distribution agreements allow the exporter better control over the way its products are marketed by creating a direct link between the exporter and the retailers who sell its products to the final consumer.  This ICC model contract provides a sound legal basis upon which parties can quickly establish an even-handed agreement acceptable to both sides.

In order to assist businesspeople engaged in international trade (and the lawyers aiding them in drafting and negotiating contracts), ICC has prepared this model form of international selective distributorship contract.

The model contract has now been revised for a second time, taking account of recent developments in the laws affecting distribution and also to ensure that the contract is in harmony with the other ICC model contracts.

Revision of this model contract was under the auspices of the ICC Commission on Commercial Law and Practice, led by Commission Chair Ercüment Erdem (Turkey). [Ed Note: Acknowledgments to come.]

As always, the ICC national committees around the world were instrumental in circulating drafts of this contract to their trading communities for comment. ICC Secretariat direction was provided by ICC Director of Trade + Investment, Emily O’Connor (France).

**PART I – INTRODUCTION**

1. Selective distribution: what is it?

The contracts most commonly used by exporters who wish to organise the distribution of their products in a foreign country are commercial agency[[1]](#footnote-2) and distributorship contracts[[2]](#footnote-3) (normally entered into with a sole importer, responsible for one or more countries). Agents and distributors will normally act on the wholesale level by promoting contracts of sale (in the case of agents) or by reselling the products (in the case of distributors) to wholesalers or retailers within their territory.

In some cases, however, the exporter may wish to establish a **direct link with the retailers**, who sell its products to the final consumer in order to be able to control the way in which its products are marketed until the end user.

The reasons for this are normally the need of warranting a certain **level (and uniformity) of the sales service** given to the consumer[[3]](#footnote-4). So, for instance, for technically sophisticated products sold on the consumer market, the producer may wish to have them marketed only by retailers who are able to give competent technical advice to the prospective purchaser. For products with an exclusive and high-level image, it is in the interest of the producer (and of the existing network) that such products are obtainable only in shops having certain exclusive characteristics (as to their location, furniture, etc.).

Of course the above can be warranted only if the products are sold **only by retailers who fulfil the selection criteria.** This necessarily implies that all the members of the network (as well as the producer itself, of course) must be prevented from supplying resellers who are not part of the network. Consequently, selective distribution **necessarily implies a closed network**, which result is obtained by imposing on all its members the **prohibition to sell to non-authorised resellers**[[4]](#footnote-5).

It is therefore appropriate to have recourse to selective distribution only if it appears possible to actually enforce (possibly on a world-wide basis) the obligation not to sell outside the network. If resellers not belonging to the network (and consequently free not to respect the quality standards imposed by the manufacturer) can obtain (and consequently market) the products, the selective distribution system cannot work properly.

Selective distribution contracts are one of the possible means for reaching the above result, i.e. to have the products marketed through a network of qualified resellers. Also franchising contracts can be used for the purpose of obtaining control over the retail distribution, although they imply further requirements, such as the existence of commercial know-how[[5]](#footnote-6).

The members of a selective distribution network will almost always be left **free to sell competing products**. In other words, retailers of a selective distribution network normally offer their customers a variety of competing products, the only limit being that the supplier will prevent the distributor from selling products that could adversely affect the image of its own[[6]](#footnote-7).

Finally, it should be considered that within a selective distribution system the supplier is expected to warrant uniform conditions to all members of the network. Of course, this does not exclude that different conditions may (and will) be granted in the presence of different situations (e.g. the producer may grant a higher discount for the distributor who purchases higher quantities, or it may reduce supplies when it does not have enough products to cover the market), but as a general rule each retailer will be treated in the same way as the other members of the network.

Article 1 (g) of Commission Regulation (EU) 2022/720 defines a selective distribution system as “a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system”.

2. The type of selection considered in the model

The Supplier will decide from case to case the criteria for selecting the «authorised dealers».

It may in particular admit into the network:

(a) all distributors that comply with certain objective minimum qualitative requirements, as to the characteristics of the shop and/or the qualifications of the personnel (the so called **qualitative selection**), or

(b) distributors that comply with the above requirements and which in addition are willing to accept certain promotional obligations as, for instance, to carry a full range of products, to purchase minimum amounts, etc. (**qualitative selection with promotional obligations**), or

(c) only a specified number of distributors, thus limiting the global number of distributors selling its products (**quantitative selection**).

When drafting this model contract, we have mainly considered the second option, i.e. we have assumed that the supplier would admit into the distribution network all distributors complying with the selection criteria and willing to accept the promotional obligations foreseen in the contract. This means that parties wishing a «stronger» type of selection (such as the quantitative selection) should check whether the model fully conforms to such situation and make the necessary modifications.

3. Selective distribution and international trade

The establishment of a network of retailers bound to the producer (such as a selective distribution or a franchising network) is traditionally made at a national level. Companies wishing to operate a selec­tive distribution network in several countries will often establish a subsidiary in each country, which will directly manage the network and the contracts with its members.

However, it has become more frequent in recent years to organise selective distribution across borders, i.e. between two parties of different countries[[7]](#footnote-8).

This model is meant for the second situation, i.e. that **where the supplier is established in a country other than that of the distributor**.

However, it can be used as well (provided the clauses implying the international character of the agree­ment are appropriately modified) for domestic contracts, particularly when parties wish to work out a standard contract applicable to several countries (and consequently less influenced by the peculiarities of each national law).

4. A fair and balanced model

In preparing this model form, ICC has sought to strike a fair balance be­tween the interests of the sup­plier and those of the dis­tribu­tor. In other words, this model form **does not favour the position of one of the parties,** but aims at protecting and balancing the legitimate interests of both.

For this reason, parties looking for stronger protection of their interests should use models prepared for the constituencies to which they belong (i.e. producers or, respectively, distributors-retailers).

5. Individual contract for a specific point of sale

A selective distribution agreement has inevitably a close link to the authorised point of sale. It is with respect to the characteristics of a specific outlet (location, furniture, specialisation of the personnel) that the parties agree to enter into the contract.

This does not exclude that the distributor may manage several shops, each of which con­forms to the selection criteria established by the supplier. However, in order to avoid unnecessary complications the Task Force has decided to work out a model for one single point of sale. If parties are interested to cover more shops they may conclude several contracts (each for a separate shop), which solution moreover corresponds to the prevailing practice, or – if they really need one single contract – they can make the necessary adaptations to the model.

6. The applicable law

This model form has been based on the assumption that it will **not be governed by a specific national law**, but only by the provisions of the contract it­self and the principles of law generally recognised in international trade as ap­pli­cable to distribution contracts (also called «lex mercatoria»). The purpose of this solution is that the rules of this model form can be applied in a uniform way to suppliers and dis­tributors of dif­ferent countries, without giving one party the advantage, and the other party the disadvantage, of applying one party's national law.

The Task Force is of the opinion that the possible disadvantages resulting from the application of rather flexible and general rules is counterbalanced by the greater certainty of a uniform set of contractual rules and by the reference to a set of rules on contracts, such as the *Unidroit Principles of International Commercial Contracts*[[8]](#footnote-9), which offer a reasonably foreseeable legal framework for most issues which may arise[[9]](#footnote-10).

With regard to the Unidroit Principles, it should be borne in mind that according to Article 23.1 A they apply only to the extent they do not conflict with general principles and trade usages, since Article 23.1 A puts the various sources incorporated by reference in the following hierarchical order: contract clauses, general principles, trade usages, Unidroit Principles[[10]](#footnote-11).

This also implies that, even when the Unidroit Principles provide that certain of its rules are man­da­tory, such rules will not prevail over the contractual clauses, general principles or trade usages in case of inconsistency between them.

In any case, if the parties wish to have their contract governed by a specific **national law,** they may use the alternative set forth in Article 23.1 B. In such case they should check carefully whether any provisions of the model form violate mandatory provisions of the national law they have chosen[[11]](#footnote-12). The choice of submitting the contract to a national law is preferable if parties submit the contract to the jurisdiction of ordinary courts instead of arbitration, since it is highly unlikely that national courts would accept to consider general principles, "lex mercatoria" and the like as the governing law of the contract.

7. The need to respect certain domestic rules of the distributor’s country

Although the contract governing the reciprocal rights and obligations of the parties may be governed by general principles of law or by the domestic law of a country other than the distributor's, there are specific provisions of the distributor's country which must be respected in any case.

This is particularly the case with respect to domestic rules governing the **establishment and ma­nagement of a sales outlet**. Consequently, the supplier should accurately verify if the exercise of the sale at the retail level requires permits, authorisations, etc. and, in the latter case, if the distributor complies with such rules.

8. The need to comply with antitrust rules

Distribution contracts normally contain clauses which may restrict competition, such as in particular the obligation not to sell the products to non-members of the selective distribution network, resale price maintenance, etc., and which may consequently conflict with antitrust rules. It is therefore recommended to check whether all clauses are in accordance with such rules. Since it is impossible to consider the provisions contained in the various national antitrust laws, we will mainly consider the rules of the European Union.

**8.1. EU Rules: Article 101 TFEU and Regulation 720/2022**

**The special rules regarding selective distribution**

Selective distribution is typically used in the European Union where special rules governing such distribution system have been developed. This is why it has been considered appropriate to describe in some detail the European antitrust rules applicable to these agreements.

At present the EU rules regarding selective distribution are mainly contained in Regulation n. 720/2022[[12]](#footnote-13) which exempts certain vertical agreements from the prohibition of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

It should be noted that according to Regulation 720/2022 selective distribution contracts must comply with the following rules:

* Supplier may prohibit its selective distributors and their customers to sell to unauthorized distributors (that are not members of the selective distributors network) that are located within the territories where the supplier operates a selective distributor system (Article 4(c)(i)(2)[[13]](#footnote-14).

~~Regulation 720/2022 expressly authorizes, in Article 4(c)(i)(2),~~

~~« ... the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised distributors located within the territory where the selective distribution system is operated;»[[14]](#footnote-15)[[15]](#footnote-16).~~

~~Moreover, Regulation 720/2022 contains the following additional requirements which must be respec­ted within a selective distribution network:~~

- the members of a selective distribution network must remain free to sell to unauthorized dealers in territories where the supplier does not operate a selective distribution system.

- distributors belonging to the selective distribution network operating at the retail and wholesale level must be free to make active and passive sales to end-users, wherever the end users are established. (Article 4(c)(i)(4) and (Art. 4(c)(iii);

- cross-supplies between distributors within a selective distribution network, including those between distributors operating at different levels of trade, must remain free (Art. 4(c)(ii));

- the parties may not agree upon any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers (Art. 5.1(c).

This model form is in accordance with the above provisions.

Furthermore, selective distributors operating at the retail level may be prohibited from operating out of an unauthorized place of business (Article 4(c)(i)(3), or from making active sales into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors (article 4(iii)). This model form does not provide for such possibility.

It should finally be noted that the block exemption under Regulation 720/2022 does not apply **if the supplier has a market share over 30%** or the agreement contains hardcore restrictions[[16]](#footnote-17). In this case parties should seek expert advice.

Furthermore, it should be noted that, in particular cases, where the supplier sells the **contract goods** at the downstream level in competition with its distributors (so called dual distribution), the contract can benefit of the block exemption, but with a substantial exception: the block exemption does not apply « ... to the exchange of information between the supplier and the buyer that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services , or which fulfils neither of these two conditions» (Article 2(5), Regulation 720/2022). In this case parties should seek expert advice[[17]](#footnote-18).

It should also be noted that purely qualitative selective distribution may fall outside the scope of Article 101(1) of the Treaty provided that the three conditions laid down by the Court of Justice of the European Union in the Metro judgment[[18]](#footnote-19) (‘Metro criteria’) are fulfilled, because it can then be assumed that the restriction of intra-brand competition associated with selective distribution is offset by an improvement in inter-brand quality competition. The three Metro criteria can be summarised as follows:

(i) The nature of the goods or services in question must necessitate a selective distribution system. This means that, having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use (for instance, the use of selective distribution may be legitimate for high-quality or high-technology products or for luxury goods).

(ii) Resellers must be chosen on the basis of objective qualitative criteria, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner.

(iii) The criteria laid down must not go beyond what is necessary.

**Sales on the Internet by members of the network**

Members of a selective distribution network must remain free to sell on the internet. An absolute ban of the selective distributor to sell on the internet is therefore not compliant with antitrust law. However, restrictions of the selective distributor’s right to sell on the internet are possible provided that these restrictions do not lead to preventing the selective distributor from making an effective use of the internet to sell the contract goods. It is therefore possible to impose on the selective distributor, within certain limits, other restrictions on online sales or restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel (Article 4 (e)). In order to decide which restrictions are admissible and which are not, expert advice should be requested.

It is in the supplier's interest to prevent the members of the network to sell through online marketplaces where this might endanger the selective distribution system, by not respecting the selection criteria required for the retail shops. In principle, the restriction to use third parties marketplaces can benefit from the block exemption provided by Art. 2, §1 of Regulation 720/2022 - in fact, such restriction should not prevent a selective distributor from using the internet to sell its products, for example by selling from its own website. The supplier may therefore impose certain limitations on the members of the network, e.g. by accepting only those online marketplaces allowing the members of the network to create their own brand shop within the marketplace.

It is furthermore possible for the supplier to exert more control over the manner in which the products are sold on the internet, by: (i) establishing quality or presentation requirements of the selective distributor’s internet website; (ii) establishing requirements on how the contractual products should be displayed online by the selective distributor. Such conditions may be justified by the need to preserve the image of the supplier on the market but must not lead to prohibiting the selective distributor from making an effective use of internet. When imposing such conditions on the selective distributor, the supplier so should take expert advice, in order comply with the antitrust rules.

This model form is in accordance with the above provisions.

In principle it is also possible for the supplier to impose the selective distributor to operate one or more off line stores in order to become a member of the selective distributor system, as well as to sell offline a minimum absolute amount of contractual products to ensure an efficient operation of the offline store. The present model form, however, does not contemplate such options.

**Territorial restrictions**

Regulation n. 720/2022 deals with the relation between the selective distributor system and other possible sales channels of the supplier and the possible interactions between there different sales channels. In particular, supplier may restrict active sales by the members of the selective distribution system and their direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors (Art. 4(c)(i)(1).Other restrictions can be imposed upon the suppliers’ exclusive distributor’s and their direct customers as well as upon distributors and their customers. The present model form does not contemplate such restrictions. If the supplier intends to impose such these restriction, expert advice should be requested.

**8.2. National legislation**

It is likely that any clause whereby the distributor is to respect the resale prices fixed by the supplier is prohibited under most national antitrust laws.

As to the compliance with national legislation of the other clauses it is impossible to give general indications, since the solutions may vary from country to country.

8BIS The need to consider sanctions and trade restrictions

International conflicts have resulted in a variety of sanctions which are not internationally aligned and can have a broad application. While a Seller often ignores the final destination of its goods, under such sanctions, any involvement even involuntary of a Seller in a transaction subject to sanctions performed by their Distributor can create a risk for the Seller. This situation has created increased obligations of diligence for a Seller. It seems reasonable to ICC to protect sellers of goods against such involuntary participation in sanction violations or circumvention by their Distributors. To this purpose the model contract adds a corresponding Sanctions and Trade Restrictions clause.

9. Recourse to international arbitration

Since the model form is a set of uniform contractual rules, avoiding (as far as possible) the direct application of conflicting domestic legislation, it is appro­priate that possible disputes be solved by a uniform resolution system organised on an international level.

From this point of view the best solution appears to be international com­mercial arbitra­tion (see particularly Article 24.2.A), which permits a truly international (neutral) ap­proach and avoids the risk of differentiation which would arise in the case of recourse to domestic courts.

10. Precautions for use of the model form

Any model contract should, to the extent possible, be adapted to the cir­cum­stances of a specific case.

Of course, in theory the best so­lution con­sists of drafting an individual con­tract based on existing model forms in order to take account of all the spe­cific re­quirements of the parties.

However, the parties are often not in a position to prepare a spe­cific con­tract and prefer to have recourse to a ready-to-use balanced model form: in this case they will ask for a model which can be used as it stands, with­out any need to make modifications or additions.

The present model is an attempt to achieve a balance between these two possibilities.

ICC has tried to work out a sin­gle solution on every issue. However, where this has not been possible (see e.g. Articles 18, 23.1 and 24.2), al­terna­tives have been suggested.

Such alternative solutions have been presented side-by-side under the let­ters A and B, in order to point out that only one of them can ap­ply.

Therefore, before signing the contract, the parties must decide **which of the alter­native solutions they choose,** and then cancel the al­ternative they do not want to apply.

In any event, the model form provides (Article 25.1) that, if the parties do not make a choice by cancelling one alternative, one of them will **automat­ically ap­ply**.

There are also a number of points where the parties must insert their re­quire­ments: def­ini­tion of the **territory** and the **products**, minimum quantities to be purchased by the distributor, etc. All such points have been incorporated in the Annexes to this document, so that the parties can complete and (where necessary), by mutual agreement modify such annexes during the life of the con­tract, with­out making changes to the basic text of the agreement.

Before signing the contract the parties should **complete the An­nexes** and, if appropri­ate, delete the parts they do not need.

In order to avoid misunderstandings the parties should, when signing the contract, put their initials on each page, in order to check and make completely clear which amend­ments they have agreed upon or which alternative solutions they have chosen.

The Annexes have been construed throughout so that even when the par­ties do not fill in some parts, a solution can be found within the contract.

**PART II - ICC MODEL SELECTIVE DISTRIBUTION CONTRACT (WITH COMMENTARY)**

**BETWEEN**

…………………………………………………………………………………...................(Company)

having its registered office at ……………………………………………………………..................

hereby represented by ……………………………………………………………………................

hereinafter referred to as the “Supplier”

**AND**

…………………………………………………………………………………....................(Company)

having its registered office at ……………………………………………………………....................

hereby represented by ……………………………………………………………………...................

hereinafter referred to as the “Distributor”

## PREAMBLE[[19]](#footnote-21)

WHEREAS the Supplier manufactures and/or markets products whose marketing requires specific conditions of sale as well as individualised advice and services provided to customers.

WHEREAS the Distributor fulfils the selection criteria defined in this Contract (Annex 2) which are necessary for marketing these products correctly**.**

|  |
| --- |
| WHEREAS accordingly, the parties have agreed to enter into the present selective distribution contract (hereinafter referred to as “the Contract”). |

**THE PARTIES AGREE AS FOLLOWS**

ARTICLE 1
SCOPE OF THE CONTRACT

The Supplier grants by means of the present Contract to the Distributor[[20]](#footnote-22) the right to market the products listed in Annex 1-A including the corresponding accessories and spare parts, if any, (hereinafter collectively referred to as the “Products”), in the sales outlet indicated in Annex 1-B, that fulfils the requirements defined in Annex 2.

|  |
| --- |
|  |

ARTICLE 2
GOOD FAITH AND FAIR DEALING

2.1 In carrying out their obligations under this Contract the parties will act in accordance with good faith and fair dealing.

2.2 The provisions of this Contract, as well as any statements made by the parties in connection with it, shall be interpreted in good faith.

ARTICLE 3
MODIFICATION OF THE RANGE OF PRODUCTS

3.1 Any new product added hereafter by the parties to the range of the Supplier’s Products shall be deemed a Product covered by the Contract.

3.2 The Supplier may withdraw from the list of Products any Product that it no longer wishes to include in its range. The Supplier shall, however, inform the Distributor of such decision 30 days in advance.

ARTICLE 4
 LEGAL STATUS OF THE DISTRIBUTOR

4.1 The Distributor shall conduct its activities as an independent business operator in its own name and on its own account. The Distributor is neither an employee, agent, sales representative, nor a partner of the Supplier.

4.2 The Distributor shall not hold itself out as having any power or authority to enter into contracts in the name of the Supplier, to commit the Supplier in any way towards third parties or to incur any obligation on behalf of the Supplier.

4.3 The Distributor shall act in compliance with all applicable laws and regulations and shall apply for, obtain and have renewed all permits, authorizations and licenses required for its activity at its own expense[[21]](#footnote-23).

ARTICLE 5
DISTRIBUTOR’S OBLIGATION TO PURCHASE

5.1 The Distributor undertakes to purchase from the Supplier the quantities of Products provided in Annex 3[[22]](#footnote-24) during each period indicated therein. For successive periods not considered in the above Annex parties will agree in good faith, taking into account the market conditions, upon reasonable minimum quantities. In case of disagreement, the quantities applicable to the previous period will apply.

5.2 In the event the Distributor fails to fulfil the obligation to purchase set forth in the preceding paragraph, the Supplier may, at its sole discretion, terminate the Contract, giving 30 days prior written notice thereof. Such right must be exercised within 90 days from the end of the period of time to which the minimum turnover refers. Unless the non-attainment of the minimum quantities implies the breach of other contract obligations, the Supplier’s right to terminate the Contract will be the only consequence of not fulfilling the obligation under Article 5.2[[23]](#footnote-25) .

ARTICLE 6
CONDITIONS OF SUPPLY - PRICES

6.1 The Supplier shall accept all normal orders of Products received from the Distributor[[24]](#footnote-26), subject to their availability, and provided payment of the Products is adequately warranted. The Supplier may not unreasonably reject orders received from the Distributor; in particular, a repeated refusal of orders contrary to good faith (e.g. if made for the purpose of hindering the Distributor's activity) shall be considered as a breach of contract by the Supplier.

6.2 The Supplier agrees to make its best efforts to fulfil the orders it has accepted.

6.3. Sales of the Products to the Distributor shall be governed by the Supplier's general conditions of sale, as in force from time to time, the currently applicable version of which is attached to this Contract (Annex 4)[[25]](#footnote-27). In case of conflict between such general condi­tions and the terms of this Contract, the latter shall prevail.

6.4. The Distributor agrees to comply, with the utmost care, with the terms of payment agreed upon between the parties.

6.5. It is agreed that the Products delivered remain the Supplier's prop­erty until the Supplier has received payment in full.[[26]](#footnote-28)

ARTICLE 7
INFORMATION[[27]](#footnote-29)

7.1 The Distributor shall, at the request of the Supplier, provide information concerning:

(a) the sales of the Products and the total turnover inclusive of VAT, as well as a physical inventory of the Products; and

(b) the invoices regarding resale of the Products to other distributors, if there are clear and serious indications of the resale of Products to non-selected distributors.

7.2 The Distributor shall furthermore, of its own initiative, inform the Supplier about:

(a) difficulties encountered, in particular regarding requirements of the customers and the market situation;

(b) requests by customers for delivery of goods of which one may presume that they are likely to be resold; and

(c) modifications that have arisen or could arise in the Distributor's company that could affect the normal continuation of their relations.

ARTICLE 8
MARKETING OF THE PRODUCTS

8.1 The Distributor shall observe the Supplier’s marketing standards with respect to the following matters:

8.1.1 **Installation of the sales outlet**

 The setting of the sales outlet shall not tarnish the brand image of the Products and shall correspond to the good standing of such image; the Distributor may not offer at the sales outlet products or services whose marketing could adversely affect the image of the Supplier's brand.

 The area devoted to the sale of the Products shall be adequate to the importance of the Supplier's trademark and shall conform to the standards indicated by the Supplier.

 Storage of the Products shall take place in suitable conditions with regard to their nature and fully conform to the Supplier's specifications regarding their preservation[[28]](#footnote-30).

8.1.2 **Advice and demonstration**

 Advice regarding and demonstration of the Products shall be offered to anyone who requests it, in accordance with the guidelines, recommendations and sales arguments given by the Supplier and/or provided during training courses organised by the Supplier.

 The Distributor shall make available a sufficient number of qualified employees, taking into account the area of sales outlet the opening time and the number of Products marketed.

8.1.3 **Sales promotion**

 The Distributor shall make every effort to apply in the sales outlet sales promotions organised on a national basis by the Supplier, it being understood that this obligation shall not prevent the Distributor from freely establishing resale prices.

ARTICLE 9
RESALE OF THE PRODUCTS[[29]](#footnote-31)

9.1 The Distributor and its direct customers may resell the Products only to consumers or authorised distributors which are established within the territory where the selective distribution network operates. The Distributor is in principle free to sell to non-members of the network established outside the territory where the selective system operates, but agrees not to sell to buyers who the Distributor knows (or should know) intend to actively sell the Products to unauthorized distributors or to customers in the territory where the system operates. The Distributor shall take all possible precautions to ensure that Products delivered in such manner do not leave the network of selected distributors and shall retain a copy of the invoices pertaining to such sales for one year and shall forward these to the Supplier if an inspection seems necessary.

9.2 The Distributor is free to fix the resale prices of the Products. However, the Supplier may require the observance of maximum prices[[30]](#footnote-32) and may indicate "non-binding" resale prices, provided this in no way limits the Distributor's right to grant lower prices. The Distributor shall in any case take into account the need to preserve the image of the brand and the Products.

9.3 The Distributor is authorized to sell and advertise the Products on the internet in compliance with Supplier’s internet requirements set forth in **Annex 7**. Distributor shall inform in advance the Supplier, so that the latter can verify that such sale and advertising complies with the requirements set forth in **Annex 7**.

ARTICLE 9BIS
SANCTIONS AND TRADE RESTRICTIONS

The products, materials and related services and information covered by this agreement may be subject to trade restrictions, notably export or import controls. The Distributor shall not knowingly sell, export, import transfer or dispose of, whether directly or indirectly, the products, materials, and related services and information covered by this agreement to countries, destinations, or end users that are prohibited under national or international sanctions. Further, the Distributor shall not perform any order placed by or for any individual or entity which is disallowed under such sanctions. Any orders originating from, or which will result in delivery to, prohibited individuals or entities located within or controlled by any country subject to trade restrictions and export/import control laws, may not be performed without the prior confirmation to the Supplier that there is no reasonable cause to suspect a sanction violation.

ARTICLE 10
ASSISTANCE AND TRAINING

10.1 To the extent needed for the correct marketing of the Products the Supplier shall provide technical assistance to the Distributor and its personnel, in particular through the training of such personnel, in order to provide the end user with the services necessary to ensure the correct choice and the correct use of the Products.

10.2 The travel and lodging expenses of the Supplier’s employees involved in the above shall be paid by the Supplier. The Distributor shall attend and shall have the relevant personnel attend the training courses provided by the Supplier. The travel and lodging expenses of the Distributor’s employees shall be paid by the Distributor.

ARTICLE 11
AFTER-SALES SERVICE[[31]](#footnote-33)

11.1 The Distributor and its personnel shall provide after-sales service, i.e. the maintenance, repair and warranty of all Products sold through the selective distribution system, in compliance with the Supplier’s standards and in a manner consistent with the brand image of the Products.

11.2 The characteristics of the service as well as the allocation of cost of such after-sales service (particularly for repairs made during the warranty period) are set out in Annex 5.

ARTICLE 12
STOCK OF PRODUCTS

12.1 The Distributor shall continuously maintain a stock of the Products, in accordance with the provisions of Annex 6, in order to fulfil the customers’ requirements in the most satisfactory manner.

12.2 If Annex 6 has not been completed, the Distributor shall continuously maintain an adequate stock of the Products to supply the market normally.

ARTICLE 13
PRESENTATION OF THE PRODUCTS[[32]](#footnote-34)

The Distributor may not, without the consent of the Supplier, change or alter, in any manner whatsoever, the Product, its packaging or any information thereon, except as required by the law.

ARTICLE 14
INTELLECTUAL PROPERTY RIGHTS

14.1 The Distributor shall use the Supplier's trade­­marks, trade names or any other symbols on a non-exclusive basis. However, the Distributor may do so only for the purpose of identifying and adver­tising the Products within the scope of this Contract and in the Supplier's sole interest.[[33]](#footnote-35)

14.2 Any use of the Supplier’s trademarks or other trade names or symbols shall be submitted for prior approval to the Supplier, who will check if such use conforms to its image and marketing strategies.

14.3 The Distributor's right to use the Supplier's trade­marks, trade names or sym­bols, as provided for under the first paragraph of this Article, shall cease im­medi­ately upon the expiration or termination, for any reason, of the pre­sent contract. This does not preclude the Distributor's right to sell the Products in stock at the date of expiration of the Contract which bear the Supplier's trade­marks.

14.4 The Distributor shall notify the Supplier of any infringement of the Supplier's trade­marks, trade names or sym­bols, or other indus­trial property rights, that comes to its attention.

ARTICLE 15
INSPECTIONS

15.1 The Distributor shall grant the Supplier access to its sales outlet in order to inspect from time to time whether the standards stipulated by the Contract are being observed.

15.2 For such purposes, the Supplier may have recourse to the services of representatives or specialists (accountants, technicians, lawyers, etc.).

15.3 Such inspections, however, may take place only during normal business hours, and following at least 7 days written notice before the date desired.

ARTICLE 16
CONFIDENTIALITY

Each party agrees not to disclose to third parties any confidential information disclosed to it by the other party in the context of this Contract in conformity with the ICC Model Confidentiality Clause at Annex 8. This Article 16 survives the termination of this Contract.

ARTICLE 17
ASSIGNMENT AND TRANSFER OF THE CONTRACT

17.1 The Distributor shall request the Supplier´s written authorization before assigning its position in this Contract to a third party which fulfils the selection criteria established by the Supplier.[[34]](#footnote-36)

17.2 The Supplier shall notify its acceptance or rejection within a maximum period of 30 days, by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier); lack of response within such period shall be deemed to be an acceptance.

17.3 Any assignment without the Supplier's authorization shall entitle the Supplier to terminate this Contract with immediate effect in conformity with Article 19.

ARTICLE 18 - DURATION

|  |  |
| --- | --- |
| A. | B. |
| 18.1. This Contract is concluded for an indefinite period and enters into force on the date of signature.  | 18.1. This Contract enters into force on the date of signature and shall remain in force for a period of one year. |
| 18.2. This Contract may be terminated by either party by notice given in writing by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier), not less than 4 months in advance. The parties may agree in writing on longer periods of notice. | 18.2. This Contract shall be automatically renewed for successive periods of one year, unless terminated by either party by notice given in writing by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier), not less than 2 months before the date of expiry. The parties may agree in writing on longer periods of notice. |

ARTICLE 19
EARLIER TERMINATION

19.1 Each party may terminate this Contract with immediate effect, by notice given in writing by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier), in case of a substantial breach by the other party of the obligations arising out of the Contract, or in case of exceptional circumstances justifying the earlier termination.

19.2 Any failure by a party to carry out all or part of its obligations under the Contract resulting in such detriment to the other party as to substantially deprive it of what it is entitled to expect under the Contract, shall be considered as a substantial breach for the purpose of Article 19.1. above. Circumstances in which it would be unreasonable to require the terminating party to continue to be bound by this contract, shall be considered as exceptional circumstances for the purpose of Article 19.1. above.

19.3 The parties hereby agree that the violation of the provisions under Articles ..................[[35]](#footnote-37) of the present Contract is to be considered in principle, unless the contrary is proved, as a substantial breach of the Contract. Moreover, any violation of the contractual obligations may be considered as a substantial breach, if such violation is repeated notwithstanding a request by the other party to fulfil the contract obligations.

19.4 The Supplier may furthermore terminate the Contract with immediate effect if the Distributor no longer fulfils, for any reason whatsoever, the selection criteria set forth in Annex 2 or commits a breach of Contract that severely compromises the brand image of the Products, in particular:

- the failure to provide adequate services to customers,

- the incompetence, absence or shortage of the staff required to satisfy the customer’s needs, or

- the sale of the Products to purchasers other than consumers or authorised distributors, selected by the Supplier.

19.5 Furthermore, the parties agree that the following situations shall be considered as exceptional circumstances which justify the earlier termination by the other party[[36]](#footnote-38): declaration of bankruptcy, moratorium, receivership, liquidation or any kind of composition between the debtor and the creditors, or any circumstances which are likely to affect substantially one party's ability to carry out its obligations under this Contract.

ARTICLE 20
EFFECTS OF TERMINATION

20.1 Upon termination of the Contract, the Supplier shall, if a minimum stock is required under Annex 6 or has been otherwise agreed, take back the entire stock of Products in good condition remaining in the Distributor's possession, at the price paid by the Distributor. Any excess stock of Products may be repurchased by the Supplier at its discretion.

20.2 The Distributor shall return to the Supplier all commercial documents and other advertising or promotional materials regarding the Products that are in its possession. The Distributor shall also return the shop sign (if any) and remove any reference identifying it as a distributor of the Supplier's Products.

ARTICLE 21 PREVIOUS AGREEMENTS - MODIFICATIONS - NULLITY

21.1. This Contract replaces any other preceding agreement be­tween the parties on the subject, except for any pre-existing confidentiality agreements..

21.2. No addition or modification to this contract shall be valid un­less made in writing. However a party may be precluded by its conduct from as­serting the invalidity of additions or modifications not made in writing to the ex­tent that the other party has relied on such con­duct.[[37]](#footnote-39)

21.3. If any provision or clause of this Contract is found to be null or unenforceable, the Contract will be construed as a whole to effect as closely as practicable the orig­inal intent of the parties; however, if for good cause, either party would not have entered into the Contract knowing the interpretation of the Contract result­ing from the foregoing, the Contract itself shall be null.

ARTICLE 22
NO WAIVER[[38]](#footnote-40)

22.1 No delay or failure to act, whether express or implied, on the part of one of the parties when faced with a failure by the other party to perform any obligation, shall be interpreted or deemed approval or acceptance of such a breach or any other breach of the same or a different nature committed by the offending party.

22.2 The failure, on the part of one of the parties, to exercise any of its rights may in no way hamper the exercise of such right at a later time.

ARTICLE 22BIS
FORCE MAJEURE

WE PROPOSE TO INCLUDE DIRECTLY THE ICC SHORT FORM:

I PROPOSE TO INCLUDE DIRECTLY THE ICC SHORT FORM

In case a party fails to perform any of its obligations, the following ICC FM clause shall apply.

1. "Force Majeure" means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: [a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.
2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.
3. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impedimentexceeds 120 days.

22BIS.1 A party is not liable for a failure to perform any of its obligations in so far as it proves

(a) that the failure was due to an impediment beyond its control, and

(b) that it could not reasonably be expected to have taken the impediment and its effects upon its ability to perform into account at the time of the conclusion of the contract, and

(c) that it could not reasonably have avoided or overcome the impediment or its effects.

22BIS.2 A party seeking relief shall, as soon as practicable after the impediment and its effects upon that party’s ability to perform become known to it, give notice to the other party of such impediment and its effects on its ability to perform. Notice shall also be given when the ground of relief ceases.

 Failure to give either notice makes the party thus failing liable in damages for loss which otherwise could have been avoided.

22BIS.3 A ground of relief under this clause relieves the party failing to perform from liability in damages, from penalties and other contractual sanctions, and from the duty to pay interest on money owing as long as and to the extent that the ground subsists.

22BIS.4 If the grounds of relief subsist for more than three (3) months, either party shall be entitled to declare the contract to be avoided without notice.

ARTICLE 23
APPLICABLE LAW[[39]](#footnote-41)

|  |  |
| --- | --- |
| 23.1. AAny questions relating to this Contract which are not expressly or implicitly settled by the pro­visions contained in this Contract shall be gover­ned, in the following order: (a) by the principles of law generally recognised in international trade as applicable to selec­tive distribution contracts,(b) by the relevant trade usages, and(c) by the Unidroit Principles of International Commercial Contracts,with the exclusion - subject to Article 23.2. hereunder - of national laws. | 23.1. BThis Contract is governed by the laws of ........... (name of the country the law of which is to apply)[[40]](#footnote-42). |

23.2 In any event consideration shall be given to mandatory provisions of the law of the country where the Distributor is established which would be applicable even if the Contract is governed by a foreign law. Any such provisions will be taken into account to the extent they embody principles which are universally recognised and provided their application appears reasonable in the context of international trade.

23.3 Unless otherwise agreed in writing, the sale contracts concluded between the Supplier and the Distributor within this selective distribution Contract will be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention of 1980, hereafter referred to as CISG), and to the extent that such questions are not covered by CISG, by reference to the rules and principles of law generally recognised in international trade as applicable to international contracts of sale.

ARTICLE 24
RESOLUTION OF DISPUTES

24.1 The parties may at any time, without prejudice to Article 23.2, seek to settle any dispute arising out of or in connection with this Selective Distribution Contract in accordance with the ICC Mediation Rules[[41]](#footnote-43).

|  |  |
| --- | --- |
| **24.2. AICC Arbitration** | **24.2. BLitigation (ordinary courts)** |
| All disputes arising out of or in connection with this distributorship contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.Optional features[[42]](#footnote-44):Place of arbitration: ...................... (city, country)Number of arbitrators: ...................... (1 or 3)Language of arbitration: ...................... (only one language is recommended) | In case of dispute the courts of ....................... (place) ........................... (country) shall have exclusive jurisdiction. |

ARTICLE 25
AUTOMATIC INCLUSION UNDER THE PRESENT CONTRACT

25.1. If the parties have not made a choice between the alternative solutions provided in Articles 18, 23.1 and 24.2 under the letters A and B, by deleting one of the alternatives, and provided they have not expressly made a choice by other means, alternative A shall be considered applicable.

25.2 The Annexes attached to this Contract form an integral part of the Contract. Annexes or parts of Annexes, which have not been completed, will be effective only to the extent and under the conditions indicated in this Contract.

ARTICLE 26
AUTHENTIC TEXT

The English text of this contract is the only authentic text[[43]](#footnote-45).Made in ……………………………… on the …………………………………………

The Supplier The Distributor…………….. ……………….**ANNEX 1SCOPE OF THE CONTRACT**

1-A Contractual Products (Article 1)

The products the Distributor has the right to market in the Authorised Sales outlet are:

.........................

.........................

.........................

.........................

.........................

1-B Authorised Sales Outlet (Article 1)

The Authorised Sales Outlet is the shop situated at .....................................................................(address)

**ANNEX 2SELECTION CRITERIA (Article 1)**

REQUIREMENTS OF THE POINT OF SALE

..........................................

..........................................

REQUIREMENTS AS TO THE PERSONNEL

..........................................

..........................................

REQUIREMENTS REGARDING SALE OF THE PRODUCTS

............................................

............................................

OTHER

..............................................

..............................................

**ANNEX 3DISTRIBUTOR’S MINIMUM PURCHASE OBLIGATION (Article 5)**

The minimum amounts of products the distributor agrees to purchase during each reference period are the following:

|  |  |
| --- | --- |
| PERIOD (YEAR, SEMESTER) | QUANTITY (IN EURO) |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |

**ANNEX 4SUPPLIER'S GENERAL CONDITIONS OF SALE (Article 6.3)ANNEX 5AFTER-SALES SERVICE (Article 11)ANNEX 6STOCK OF PRODUCTS (Article 12)**

**ANNEX 7REQUIREMENTS FOR SALES ON THE INTERNET (Article 9.3)**

A Sales from the Distributor own website

**Electronic Window**

Distributor is authorized to offer and sell Products on its own website on condition that the presentation can be considered as an electronic window display of the point of sale and that the brand image of the Products is preserved. The following specific requirements apply in this respect:

- the name and address of the Distributor must be clearly visible and it must be clear that the Distributor is a member of the Supplier’s selective distributor system;

- there may be no links on the site to any unauthorized distributor;

- ………………………

- ………………………

- ………………………

**Presentation of Products**

The Distributor shall comply with the following requirements regarding the presentation of Products on the website:

- Products must only be presented with their brand name "XXXX", an exact description of the product, the retail price and an original picture (if provided or approved by the Supplier);

- All Products placed on the site must be available for immediate delivery;

- ………………………

- ………………………

- ………………………

**Other[[44]](#footnote-46)**

- ………………………

- ………………………

- ………………………

B Sales through third parties websites/platforms

 □ the sale of the Products through third-parties websites and/or platforms is allowed, provided that the conditions indicated in the above paragraph A are met.

 □ should the Distributor intend to sell the Product on third-parties websites and/or platforms it shall have to inform in advance the Supplier, who may deny its consent should such sale not be consistent with the Supplier trade image.

□ The Distributor may not promote and/or sell the Products though the following platforms:

- ………………………

- ………………………

- ………………………

In case the Distributor intends to sell the Product through other platforms it shall have to inform in advance the Supplier, who may deny its consent should such sale not be consistent with the Supplier trade image.

**ANNEX 8ICC MODEL CONFIDENTIALITY CLAUSE (Article16)**

**[ED NOTE: TO BE ADDED]**

1. See the ICC Model Commercial Agency Contract, ICC Publication n. 766. [↑](#footnote-ref-2)
2. See the ICC Model Distributorship Contract, ICC Publication n. 776. [↑](#footnote-ref-3)
3. This is why selective distribution systems will be used mainly where the products require particular care in the retail distribution and the producer thinks that it is worthwhile to organise such a network. [↑](#footnote-ref-4)
4. This aspect, which in principle restricts competition, may give rise, as will be seen later (§ 8 of this Introduction), to problems of compliance with antitrust rules. [↑](#footnote-ref-5)
5. Moreover, franchising implies in most cases that the franchisee/retailer sells only one brand of products, while in selective distribution the normal situation is that the retailer sells a variety of competing products. [↑](#footnote-ref-6)
6. This is a basic difference with respect to franchising, where it is normal that the franchisee sells only one brand of product. [↑](#footnote-ref-7)
7. This is particularly the case within the European Union, to the extent obstacles to cross-border trade are gradually disappearing. [↑](#footnote-ref-8)
8. The text of the Unidroit Principles 2016 can be found on the Unidroit website at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ [↑](#footnote-ref-9)
9. For further information about the choice of a-national rules to govern the contract, see the ICC Publication *"Developing Neutral Legal Standards for International Contracts. A-national rules as the applicable law in international commercial contracts with particular reference to the ICC Model contracts"*, which can be downloaded from the ICC website at http://store.iccwbo.org/content/uploaded/pdf/Developing%20neutral%20legal%20standards%20for%20Intl%20contracts.pdf. [↑](#footnote-ref-10)
10. 9 This solution takes into account that a limited number of provisions of the Unidroit Principles may not actually reflect the expectations of international trade. This may be the case with respect to certain rules which protect the disadvantaged party to an extent that goes beyond the standards that are usual in business to business relations: see, for instance, Article 3.2.7(1) on gross disparity (particularly as concerns the end of the sentence in para 1(a), where reference is made to “the improvidence, ignorance, inexperience or lack of bargaining skill” of a party in order to justify contract avoidance) and the rules on hardship contained in Articles 6.2.1-6.2.3 (particularly with regard to the rule authorising courts to modify the contract terms). With respect to such rules general principles of law and trade usages will in principle prevail over the Unidroit Principles. Of course, parties may also expressly exclude the application of specific provisions of the Unidroit Principles that they consider inappropriate. [↑](#footnote-ref-11)
11. It should in any case be considered that, even if no choice of a national law has been made, internationally mandatory rules (i.e. rules which would be applicable independently from the applicable law: so called "lois de police" or “overriding mandatory provisions”) of a national law having a close connection with the contract may be applicable in certain circumstances under Article 23.2. [↑](#footnote-ref-12)
12. EU regulation n. 720/2022 is available on the European Commission website at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN>. [↑](#footnote-ref-13)
13. The supplier cannot prohibit sales to unauthorised distributors established in territories where the Supplier does not operate a selective distributor system. The Supplier must therefore be aware that if it establishes a selective distributor system only in some Member states and not in others, it it should not be able prevent its selective distributors from selling to the distributors of these latter Member states who, in return could sell into the territories where there is a selective distributor system. For possible remedies, see infra ... [↑](#footnote-ref-14)
14. . [↑](#footnote-ref-15)
15. The restriction seems not admissible in the territories that the Supplier has simply reserved to the selective distribution system but there is no distributor system actually operating. [↑](#footnote-ref-16)
16. Art. 4c (i) Regulation 2022/720: the restriction of the territory into which, or of the customers to whom, the members of the selective distribution system may actively or passively sell the contract goods or services, except: (1) the restriction of active sales by the members of the selective distribution system and their direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors; (2) the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised distributors located within the territory where the selective distribution system is operated; (3) the restriction of the place of establishment of the members of the selective distribution system; (4) the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level of trade; (5) the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier. [↑](#footnote-ref-17)
17. Please note, that while the Commissions considers technical and logistical information, as well as information on customer purchases, promotional campaigns, as, in principle not relevant to exclude the block exemption, information regarding future sale/resale price applicable downstream, information on identified end-users, if not required for specific requirements, e.g. special conditions, adaptations, loyalty programs, after-sales service monitoring of compliance with selective distribution agreements, may, in principle, exclude the application of the block exemption. [↑](#footnote-ref-18)
18. Judgment of 25 October 1977, Metro v Commission, Case 26/76, EU:C:1977:167, paragraphs 20 and 21. [↑](#footnote-ref-19)
19. Selective distribution is mainly used for: (a) products of a highly technical nature for which specific assistance to the prospective purchaser is appropriate, and (b) for luxury goods or products with a significant reputation justifying that they are sold in premises having a certain image and offering personal advice and demonstration.

The preamble makes clear that the supplier is seeking to improve, through the selection of its distributors, the distribution of its products. [↑](#footnote-ref-21)
20. The expression ‘Selected Distributor’ or ‘Approved Distributor’ is often used to indicate that the distributor fulfills the selection criteria. To simplify, in this model contract, the terms ‘Distributor’ and ‘Supplier’ will be used. [↑](#footnote-ref-22)
21. See Introduction, § 7. [↑](#footnote-ref-23)
22. It is frequent to fix a minimum turnover the distributor must attain. This clause refers to Annex 3 where the periods of reference (year, semester) and the respective amounts must be indicated.

It should be noted that in Article 5.1, reference is made to products purchased directly from the supplier, without considering possible products bought from other distributors. [↑](#footnote-ref-24)
23. This means for instance that the Supplier cannot claim damages unless it shows that the Distributor has breached another obligation under the contract. [↑](#footnote-ref-25)
24. Article 6.1 tries to make a responsible compromise between the distributor’s need to be supplied with all products ordered, and the supplier’s preoccupation not to be in breach when a refusal to accept orders is justified by objective reasons. [↑](#footnote-ref-26)
25. Article 6.3 makes reference to the supplier’s general conditions of sale, which will regulate the issues regarding the sales contract not treated in the distribution contract. When drafting the general conditions of sale, parties may make reference to the ‘ICC Model International Sale Contract’, ICC publication no. 811. [↑](#footnote-ref-27)
26. The effectiveness of Article 6.5 (reservation of title) depends on the law applicable in the country where the goods are, and may therefore be invalid (or ineffective) in certain countries. [↑](#footnote-ref-28)
27. The supplier may need information from the distributor, in particular regarding the marketing fo the products and any changes affecting its company or, even, its financial condition.

Furthermore, the supplier will require information necessary to prevent violations of the prohibition to sell to non-authorised resellers such as, for example, 7.1(b) ad 7.2(b). However, these clauses must be reasonable, because an excessive interference in the distributor’s activity could amount to a violation of the EU competition rules, particularly if it appears that the supplier actually wishes to prevent lawful ‘horizontal sales’ between distributors or in the particular case of dual distribution (see Introduction, 8.1). [↑](#footnote-ref-29)
28. Where the Products are such as to require after-sales service, repairs, etc., a clause to this effect may be added. For example, it could be said that "Maintenance and repair of the Products shall take place in a workshop conforming to the requirements set out in Annex ...". [↑](#footnote-ref-30)
29. According to the EU antitrust rules, the distributor must remain free to sell the products to any other member of the network. This clause aims at facilitating the supplier’s control over such sales, in order to make sure that the products are not sold to non-members of the network. However, we believe that an exception may be made when the distributor must be aware that the buyer intends to actively resell the goods in the territory where the selective distribution system is operated. A very special problem arises when the supplier wishes to limit the sale of certain products to a certain area (and thus to forbid the distributors in such area to resell them elsewhere). In cases where the supplier wishes to launch certain new products in one area only, exceptions to the freedom of horizontal sales are possible for a limited period of time. In this case the advice of an expert is recommended. [↑](#footnote-ref-31)
30. This clause is in accordance with Regulation 720/2022 where the market share of each of the parties to the agreement does not exceed the 30% threshold. However, please bear in mind that although the imposition by the supplier of a maximum resale price or the recommendation of a resale price is not a hardcore restriction, if the supplier combines such measures with incentives to apply a certain price level or disincentives to lower the sale price, this can amount to resale price maintenance (‘RPM’), which is considered a hardcore restriction under EU antitrust law (see Commission Guidelines on vertical restraints, 2022 C(2022) 3006 -https://competition-policy.ec.europa.eu/system/files/2022-05/20220510\_guidelines\_vertical\_restraints\_art101\_TFEU\_.pdf-). [↑](#footnote-ref-32)
31. This clause will not be applicable for products which do not require after-sales service or when such service is given by the supplier itself. [↑](#footnote-ref-33)
32. The supplier will usually seek to have a standard presentation and quality for its products in all markets where they are sold. Any alteration or modification of the products by the distributor, without the supplier’s authorization, could disrupt this requirement and possibly confuse customers. [↑](#footnote-ref-34)
33. The selected distributor does not as a rule operate its business under the supplier’s trademark, since it also sells competing products. However, it may be to the distributor’s advantage to advertise itself as a distributor selected by the supplier and to use, for such purpose, the trademark and other distinctive marks and trade names of the supplier. [↑](#footnote-ref-35)
34. A selective distribution contract is not necessarily a contract entered into ‘*intuitu personae’*. However, the distributor must meet certain requirements in order to be selected. It is thus preferable to provide for an approval clause, allowing the supploer to reject a potential assignee who does not fulfill such conditions even before the assignment or transfer. [↑](#footnote-ref-36)
35. The parties may make reference here to those articles for which a breach is of particular importance. It is recommended that the use of this Article be limited to essential situations only. [↑](#footnote-ref-37)
36. Although provisions of this kind are commonly found in distributorship and agency agreements, it should be reminded that in several countries clauses which provide for the earlier termination in case of bankruptcy or similar proceedings are unlawful under such law. [↑](#footnote-ref-38)
37. The second sentence of this clause is meant to protect a party against the other party using the clause in bad faith. When a party accepts a modification made orally and gives the other party reasons to rely upon the validity of such modification, it cannot thereafter argue that the modification was invalid because not made in writing. [↑](#footnote-ref-39)
38. In general, it is provided that the tolerance of one of the parties, confronted with a breach of duty by the other, or the failure of one of the parties to exercise a right it has, must not be deemed a waiver of the right to take action or to use the unexercised right at a later date.

It should be noted that clauses of this type may be ineffective in certain jurisdictions, particularly where their strict application may conflict with the principle of good faith. [↑](#footnote-ref-40)
39. For the choice between 23.1A and 23.1B, see Introduction § 6. [↑](#footnote-ref-41)
40. This model contract has been prepared on the assumption that it would not be governed by a specific national law (as stated in alternative A of Article 23.1.) If the parties prefer nevertheless to submit the Contract to a national law (by choosing alternative B), they should carefully check in advance if the clauses of the model contract conform to the provisions of the law they have chosen. [↑](#footnote-ref-42)
41. The ICC Mediation Rules can be found on the web site http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/. [↑](#footnote-ref-43)
42. If parties do not make a selection, these can be chosen in the course of the arbitration. [↑](#footnote-ref-44)
43. If the contract is written in another language, this clause should of course be modified to indicate the language of the Contract. [↑](#footnote-ref-45)
44. Supplier may impose display, presentation, or quality requirements that the distributor’s website must comply with within the limit of not preventing the selective distirubto from making an effective use of the Internet to sell the products. [↑](#footnote-ref-46)