



# Should you be a distributor, an agent or a franchisee?

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# Definitions and Sources (1)

- **Distribution Agreements**

- «The supplier (manufacturer or merchant) grants the distributor the right to purchase certain goods whereby in turn the distributor takes up certain duties.»
- many forms; usually includes exclusivity rights in favour of the distributor (in particular regarding the territory) in exchange for the distributor's duty to promote/enhance sales
- not regulated by Swiss statutory law

# Definitions and Sources (2)

- **Agency Agreements**

- «An agent is a person who undertakes to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf and for their account without entering into an employment relationship with them.»
- regulated by Swiss statutory law in art. 418a et seqq. Swiss Code of Obligations (CO)

# Definitions and Sources (3)

- **Franchising Agreements**

- «The franchisor grants the franchisee the right against payment to distribute certain goods and/or services by using the franchisor's image, name, mark or signs, equipment, symbols or other property rights and to profit from his commercial and technical experiences as well as by observing the organization and marketing system developed by the franchisor.»
- not regulated by Swiss statutory law

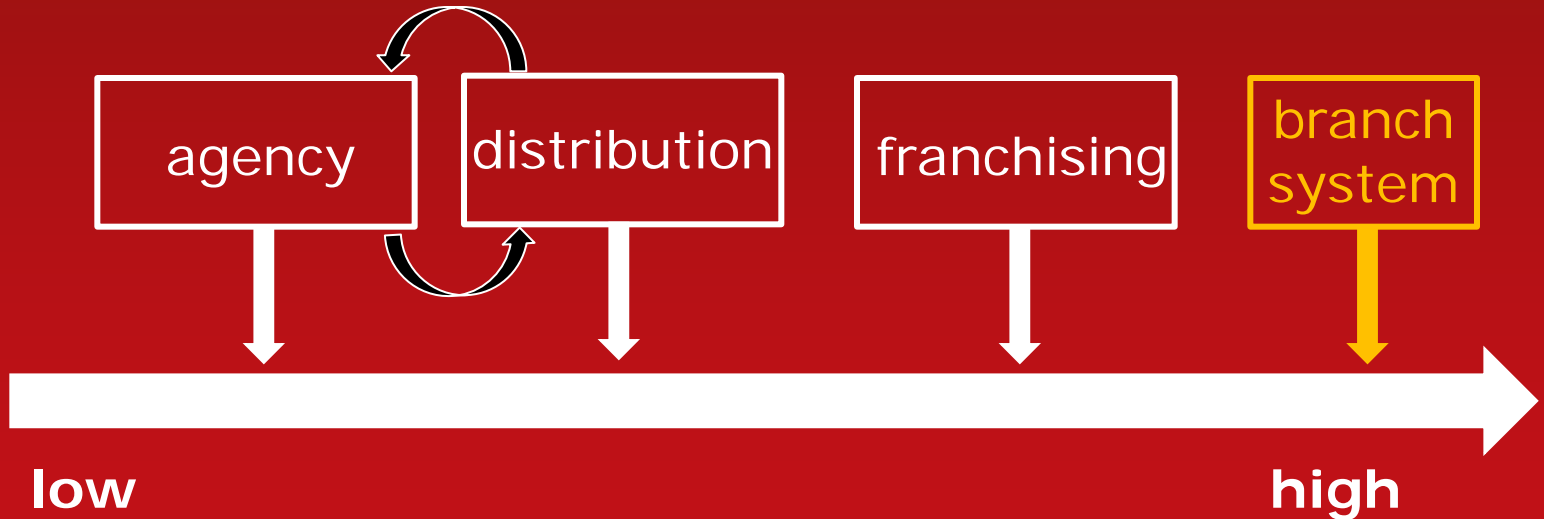
# Main Differences (1)

- **Representation/Agency:**
  - **distributor** acts in his own name and on his own account  
→ no representation of the supplier
  - **agent** acts in the name and on the account of the principal → direct representative of the principal
  - **franchisee** acts in his own name and on his own account  
→ no representation of the franchisor

# Main Differences (2)

- Intensity of Integration/Cooperation:

degree of integration into the supplier's business



# Main Issues (1)

- **Termination Compensation**
  - **Agency Agreements:** mandatory if statutory prerequisites pursuant to art. 418u CO are fulfilled
  - **Distribution Agreements:** analogous application of art. 418u CO if distributor's position is comparable to an agent (cf. in particular SFT 134 III 497)
  - **Franchising Agreements: ???**

## **Art. 418u CO: Termination / Claims of the Agent / Compensation for Clientele**

- <sup>1</sup> Where the agent's activities have resulted in a substantial expansion of the principal's clientele and considerable benefits accrue even after the end of the agency relationship to the principal or his legal successor from his business relations with clients acquired by the agent, the agent or his heirs have an inalienable claim for adequate compensation, provided this is not inequitable.
- <sup>2</sup> The amount of such claim must not exceed the agent's net annual earnings from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract.
- <sup>3</sup> No claim exists where the agency relationship has been dissolved for a reason attributable to the agent.



# Main Issues (2)

- **Protection of the «Weaker Party»**
  - **Agency Agreements:** cf., e.g., art. 418d para. 2 CO (non-compete obligation) and art. 418r para. 2 CO (termination for good cause)  
→ reference to employment law
  - **Distribution Agreements:** punctual analogous application of agency law provisions, but generally not of employment law provisions
  - **Franchising Agreements:** punctual analogous application of employment law provisions ???

# Practical Hints – And the Winner is...? (1)

- **Distribution:**

- from the supplier's perspective if he:
  - wants to minimize his commercial risk when exploring a new market
  - mainly needs an intermediary to profit from the intermediary's local market knowledge the supplier himself lacks
- from the intermediary's perspective if he:
  - wants to have as much economic freedom as possible
  - wants to set and control prices as freely as possible

# Practical Hints – And the Winner is...? (2)

- **Agency:**

- from the supplier's perspective if he:
  - is interested in keeping an intensive, direct customer relationship
  - wants to be free to terminate at short notice
- from the intermediary's perspective if he:
  - has limited resources / wants to minimize own investments
  - wants to ensure (as far as possible) receiving a compensation for clientele at termination

# Practical Hints – And the Winner is...? (3)

- **Franchising:**

- from the supplier's perspective if he:
  - wants to avoid (as far as possible) paying a compensation for clientele
  - wants to keep maximum control on quality and consistent appearance of his brand and products on the market
- from the intermediary's perspective if he:
  - does not want to assume too much economic risk (→ profit from established concept)
  - wants to ensure (as far as possible) a maximum notice period in the event of termination

# Thank you

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