Distribution Q&A: Brazil

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Brazil-specific information concerning the key legal and commercial issues that arise when appointing a distributor.

This Q&A provides country-specific commentary on *Practice note, Distribution: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

Regulation and legal formalities

1. Is distribution specifically regulated by national law? Are there any special rules or definitions applicable to:

- Exclusive distribution?
- Sole distribution?
- Non-exclusive distribution?
- Selective distribution?
- Is any legislation pending, which is likely to affect distributions?
- Are there any formalities that a supplier must comply with when setting up a distribution network, for example, any registration or disclosure requirements?

The general rules applicable to distribution agreements are set out in Articles 710 to 721 of the Brazilian Civil Code (BCC). The provisions regulate both distribution and agency agreements (see Questions *2*, *3*, *8*, *25*, *27* and *29*) and, in relation to distribution specifically, they contain rules regarding:

- Costs borne by the parties.
- Exclusivity.

- Territory.
- Indemnification.
- Compensation.
- Effects of termination.

The general rule is that exclusivity (or sole distributorship) in favour of the distributor is presumed (*Article 711, BCC*). However, the parties are free to decide through the terms of agreement whether the distribution is exclusive or not.

There are no specific formalities for setting up a distribution network under the BCC.

In addition to the rules set out in the BCC, Law no 6729/1979 (Ferrari Law) applies specifically to the distribution of terrestrial motor vehicles (including agricultural equipment and implements). The Ferrari Law contains:

- A defined set of persons who are subject to its provisions (*Article 2*).
- The possible scopes of the applicable agreements (*Article 3*).

In general, only industries which produce or assemble motor vehicles or agricultural equipment can be the principal (i.e. Ford, GM, Renault, John Deere, New Holland, etc) and the distributors are the authorised resellers of these products and related services.

For instance, the Ferrari Law requires minimum distances between distributors operating within the same territory (*Article 5*) (selective distribution), among other requirements. There are also specific formalities for setting up a distribution network regulated by Ferrari Law: Article 19 stipulates that a brand agreement must be executed by and between each manufacturer and its network of distributors, indicating the rules with which all distributors of a given brand must comply. The brand agreement must cover, for example:

- Car warranty and services.
- Use of trademarks
- Inclusion of new models and products under ongoing agreements.
- Sale of parts outside the territory.

2. Are there any laws, regulations or case law which apply to agency relationships that might be interpreted in such a way as to apply to a distributor relationship as well?

The BCC regulates agency and distribution agreements within the same chapter.

Article 710 of the BCC sets out the key factors that differentiate agency from distribution, and specifies that the distributor must have possession of the goods to be sold. In other words, first there should be a sales agreement between distributor and supplier/manufacturer, and then the distributor resells the products to the clients, who can freely agree among themselves the terms of the sale and purchase.

However, if there is a mixed relationship (for example, where the distributor receives commissions), the provisions of the specific statute for commercial agents (*Law 4.886/1965*) may apply in relation to these payments or even to the relationship as a whole.

To avoid the application of provisions relating to agency agreements, it is therefore key that a two-step process of sale can be clearly identified:

- From manufacturer/supplier to distributor.
- From distributor to final client.

Therefore, if there are direct sales from supplier to final client, and commissions are paid to the distributor, there is a reasonable risk (depending on the other elements of the relationship) that the arrangement would be seen as one of agency, terms of Law 4.886/1965 would apply.

In cases where there are no elements that would cause the agreement to be one of agency rather than distribution, case law does not support the application of any of the specific statutes or provisions exclusive to agency agreements (*Request for Clarification (ED) No. 70056192438, 15th Civil Chamber, Rio Grande do Sul State Court, Rapporteur Ana Beatriz, 3 July 2018*).

Competition law

3. Are there any national laws or regulations that would affect the following business practices:

- Grant of exclusive territory?
- Tied selling?
- Territorial restrictions?
- Customer restrictions?
- Resale price maintenance?
- Minimum purchase targets?
- Imposition by the supplier of restrictions on the sources of supply to distributors?
- Refusal to deal?

Territorial restrictions

National law does not prohibit the granting of exclusive territory, or the imposition of territorial or customer restrictions. In fact, in the context of distribution agreements, exclusivity is the norm, as Article 711 of the BCC, presumes exclusivity whenever there is no written agreement between the distributor and principal (see *Question 1*).

Minimum sales targets

A principal can establish minimum sales targets for the distributor, which must be determined expressly in the distribution agreement or in another document executed by the parties. The relevant document must also state the consequences of a failure to meet sales targets (for example, contractual breach, termination or loss of exclusivity). (Outside the competition context, it should be borne in mind that minimum sales targets could be used by distributors as evidence of the existence of an employment relationship between them and the principal, under the Consolidation of Labour Laws. If such employment relationship is found to exist, the principal will have to comply with all the relevant obligations under employment law.)

Practices that may trigger competition issues

Resale price maintenance, refusal to deal and the imposition of minimum or maximum prices may be prohibited or restricted if any of the below conditions are present:

- The principal has market power or a dominant position in the relevant market (or is part of a group of resellers or an economic group).
- The practices limit or damage competition.

(*Anti-trust Law 12.529/2011*.)

The relevant market can be determined by assessing:

- The relevant product/service being offered (duly identified in its segment and in comparison to its competitors).
- The principal's market share in comparison to its competitors.
- The territory in which it carries out its activities.
- The actual power it exerts.

There is a rebuttable presumption of a breach of competition law whenever an entity with a dominant position (usually considered as having at least 20% of the relevant market share) imposes the following measures on the sale of goods or services to distributors, resellers, or agents, in relation to transactions carried out with third parties:

- Resale prices, discounts, terms and conditions of payment, minimum or maximum orders, profit margins (*Article 36, paragraph 3, IX, Anti-trust Law*).
- Any other sales conditions (*Article 36, paragraph 3, IX, Anti-trust Law*).

- Tied selling (*Article 36, paragraph 3, XVIII, Anti-trust Law*).
- Refusal to deal (*Article 36, paragraph 3, XI, Law Anti-trust Law*).
- Division of markets or clients (*Article 36, paragraph 3, I, c, Anti-trust Law*).

It should be noted that these practices are not deemed illegal of themselves, and may be considered legitimate, but this will depend on a detailed case-by-case analysis, especially taking into account:

- Whether or not the supplier is in a dominant position in the market.
- Whether these practices can (even in cases where there is no dominance) be deemed as limiting or damaging competition.

4. Is there specific competition or anti-trust law regulation of exclusive and selective distribution? Describe briefly.

Under Brazilian law, exclusivity encompasses several possible obligations, both in relation to territorial limitations of the distributor and the principal. In this context, there is no assumption that exclusivity is of itself illegal or violates competition rules; the burden of proof to demonstrate that the exclusivity was used in an abusive manner is borne by the party who alleges it.

Issues that are taken into account when evaluating the legality of the exclusivity include, among others:

- Whether it causes prejudice to consumers.
- The level of economic dependency.

Therefore, both dominant and non-dominant suppliers can operate exclusive and selective distribution arrangements, as long as such agreements do not lead to limitations or damages to competition (which will be subject to a case-by-case analysis).

5. Are there any national provisions relating to the imposition of minimum or maximum prices?

The Brazilian anti-trust authorities consider that imposing any of the following on the trade of goods or services to distributors, retailers and representatives may be considered anticompetitive, in the context where the supplier has a dominant position and/or the effects of these actions can damage competition.

- Resale prices.
- Discounts.
- Payment terms.
- Minimum or maximum quantities.
- Profit margin.
- Any other market conditions related to their business with third parties.

(*Article 36, Anti-trust Law*).

These actions may be deemed anticompetitive acts if the supplier (even if unintentionally):

- Restrains or in any way injures free competition or free initiative.
- Controls the relevant market of goods or services.
- Arbitrarily increases profits.
- Exercises a dominant position abusively.

(*Anti-trust Law*.)

6. Can a supplier impose minimum purchase obligations or targets on a distributor?

Yes, this is feasible under Brazilian law. In fact, there are even legal provisions imposing minimum purchase obligations in some circumstances, such as the Ferrari Law regarding the distribution of terrestrial motor vehicles (see *Question 1*). Under the Ferrari Law, the default rule is that a minimum purchase obligation must be imposed. The contract can also provide that non-attainment of the sales targets entitles the supplier to terminate the agreement, or even to revoke exclusivity.

There could be issues under competition rules if the distributor engages in any of the conducts listed under *Question 5*.

7. Can a supplier impose exclusive purchase obligations on a distributor?

As specified in *Question 1*, exclusivity is not only possible, but presumed in the case of verbal agreements or if the written agreement does not expressly regulate this matter. It should be noted that exclusive purchase obligations on the distributor will be subject to the limitations of competition laws (see *Question 3*).

8. Are there any laws or regulations relating to restrictive covenants or covenants not to compete during the distribution agreement? To what extent is it possible to continue the restrictions after the agreement has expired? In particular, to what extent does the geographical extent and or the length of time of the restriction affect its enforceability?

Whenever the relationship between the parties has a commercial nature, it is possible to agree and to enforce a non-compete covenant during the term of the relationship. Article 713 of the BCC assumes that the distributor will not engage in business that is similar to that of the principal. Brazilian law does not specify which activities can be restricted, allowing the parties freedom to agree on these matters. When there are no written contractual provisions, the courts analyse on a case-by-case basis whether the activity has the potential to harm the principal's businesses or to mislead customers; activities such as selling, marketing, or manufacturing products similar to those of the principal are likely to be included in these restrictions.

Post-agreement restrictions are more controversial. These restrictions may be allowed if the agent was duly compensated for entering into the obligation. To minimise the risk of courts finding such a restriction abusive and, therefore, not enforceable, the parties should expressly define:

- The activities restricted by the obligation.
- The geographical scope of the obligation.
- The duration of the obligation (as a general guideline, since there is no express statutory provision, the courts usually do not allow such restrictions with a term of more than five years).

9. Is the supplier free to impose on the distributor an obligation to buy and keep a full stock of each of the products comprised in the range of products which are the subject of the distribution agreement?

If duly agreed with the distributor, the supplier can impose an obligation to buy and keep a full stock of each of the products contained in the range of products that are the subject of the distribution agreement.

However, from an anti-trust point of view, if this falls within any of the acts listed in *Question 5*, the arrangement may be restricted by competition law.

10. Where a distribution network involves trading online how is this regulated?

The commercial aspects of online transactions are also subject to the general contract rules out in the BCC, which has no express provisions regarding online trade. However, in relation to virtual sales, other statutes might also apply, depending on the nature of the parties involved, the products/services that are offered and (especially) who is the final purchaser of the product (if they are considered consumers, for example), such as:

- The Brazilian Internet Civil Framework (*Law 12,965/2014*), which provides principles, guarantees, rights and duties for using the internet in Brazil.
- The Brazilian General Law for Protection of Personal Data (*Law 13,709/2018*).
- The Brazilian Online Sales Decree (*Decree 7,962/2013*)

In addition to these statutes that have specific rules regarding online sales, which apply to distributors and suppliers alike, the rules of the Brazilian Consumer Code may also apply, regardless of the nature of the distribution network, if online or otherwise.

Intellectual property

11.Does a distributor enjoy an implied licence to use the supplier's intellectual property rights in performance of its obligations under the distribution agreement?

The law does not generally provide specifically for a licence to use the supplier’s intellectual property (IP) rights, meaning that parties are free to decide on the use of these licences (*Articles 710 to 721, BCC*). This situation is generally regulated by contracts, and usually distributors are contractually entitled to use the supplier’s IP rights in some way.

However, for agreements that fall within the ambit of the Ferrari Law (see *Question 1*), free usage of the supplier’s brand (as identification) falls within the scope of the distribution relationship (*Article 3(III), Ferrari Law*).

12. Is registration of intellectual property licences possible? Does this give any added protection?

The National Institute of Intellectual Property (INPI) is the authority responsible for the recordal of intellectual property licences in Brazil, subject to several requirements and regulations (*Industrial Property Law 9,279 of 1996*).

Patent/trade mark licence agreements and franchise agreements are subject to recordal with the INPI and registration with the Central Bank of Brazil for the following purposes:

- Remittance of royalties abroad.
- Tax deductibility of payments by the Brazilian company.
- Enforceability of the agreement in respect of third parties.

Under the Industrial Property Law, it is possible to license pending patents and trade mark applications before they are registered by the INPI. The payment of royalties to licensors/franchisors outside Brazil is affected in the following ways:

- Patents. Royalty payments are suspended until the INPI registers the patents, so any amount of royalties owed for this period is withheld until the INPI publishes a notice of registration.
- Trade marks. In relation to trademark license agreement, any payment to made to licensor depends on previous registration of the trade mark before the INPI. Therefore, no payments cannot be made retroactively, but only from the registration of the trademark at INPI onward.
- Franchise. In relation to franchising agreements, any payment made to the franchisor does not depend on the registration of the trademark at the INPI. Any such payments can be made even if the trade marks under the scope of the agreement have not yet been registered.

For distribution agreements, we recommend the execution of a separate trade mark and patent (if applicable) licence agreements for the purpose of recordal with the INPI if the parties intend to pay royalities. This avoids the need to disclose all the information contained in the manufacturing/distribution agreements to the INPI. Separate agreements would also avoid probable delay of the recordal process, as the INPI could request additional information on the other terms of the manufacturing/distribution transaction. If, however, there is no separate payment for trade marks and/or patents and these costs are “included” in the price of the produts or services, we usually do not recommend to have separate agreements, since there is no need to make any filings at the INPI.

Recordal of the IP rights with the INPI makes the IP rights enforceable by the distributor/licensee directly against third parties (*Industrial Property - Law 9,279 of 1996*). This is the case for all types of licence.

13. If the supplier is based abroad, does the distributor need to be registered as owner or user of the trade mark to be able to import goods bearing the trade mark?

Registration as owner or user of a trade mark is not a strict requirement, but it is highly advisable due to the benefits that INPI registration of trade marks provides (see *Question 12*). Where the distribution agreement includes a trade mark licence and the parties wish to record the licence with the INPI, the parties must file a trade mark application in Brazil (see *Question 12*).

14. Does the distributor become entitled to any rights in a trade mark (or any other intellectual property right) by virtue of selling the trade-marked products in its territory?

Whether the distributor is entitled to any rights in a trade mark (or any other IP right) depends on what is contractually agreed between parties. It is not presumed.

However, under the Ferrari Law, the distributor must abide by certain requirements to protect the supplier's IP, in the context of a working relationship between both parties; those requirements are provided in the brand agreement, which regulates the use of the supplier's IP and the terms and conditions of that use (see *Question 1*).

15. Are there any competition law or anti-trust implications of licensing intellectual property rights?

Yes, if licensing is seen as abusively exercising or exploiting intellectual or industrial property rights, technology or trade marks, competition law or anti-trust law issues may arise (*Article 36(3)(XIX), Anti-trust Law*) (see *Question 3* and *Question 5*).

16. Can the supplier impose restrictions on the use of the supplier's confidential information by a distributor either during or after the expiration of the distribution agreement?

Yes, it is common practice in Brazilian distribution agreements to impose restrictions on the use of supplier's confidential information. It is standard practice for parties to observe secrecy over confidential information and data exchanged for five years after the expiration of the agreement (in some cases even ten years); this is common market practice and also generally accepted by local courts.

Confidentiality clauses are recommended in distribution agreements, as information exchanged between market players is highly valuable and important.

Employment law

17. Is there a risk that distributors may be treated as employees of the supplier?

Although it is not as common as in agency scenarios, it is possible that the distributor could be treated as an employee of the supplier. In Brazilian employment law, the reality of the situation prevails over form, so the real relationship between the parties is more important than the wording of the agreement (*Articles 9 and 442, Brazilian Consolidation of Labour Laws*) (BCLL).

The distributor could be considered to be an employee if they provide services on a regular basis for compensation, under the orders or co-ordination of a company representative. Evidence to support the existence of an employment relationship may include situations where:

- The principal has control over the distributor's work schedule and working hours, method or schedule of distribution.
- There are performance targets in place for the distributor.
- There is any other type of control that indicates a lack of autonomy on the distributor's part.

In addition to subordination, the following are also requirements of an employment relationship:

- Personal nature (the contractor is hired specifically because of their personal qualifications and skills, and cannot delegate the work to anyone else).
- Economic dependence by the contractor on the company.
- Continuity (as opposed to being hired occasionally).
- Regular salary.

18. Could employment liabilities of an outgoing distributor be transferred to a new distributor or to the supplier itself?

If there is a transfer of business, with the new distributor assuming the business and the ongoing labour agreements of the former distributor, all the employment liabilities would be transferred to the new distributor (*Articles 448 and 448A, BCLL*).

However, where the supplier contracts with a new distributor without any relation to the previous company, and without any employee in common, liability will not automatically transfer.

The supplier would not be liable for employment issues unless either:

- Certain elements indicating an employment are present (see *Question 17*).
- The supplier takes on the former distributor's business.

Tax

19. Will a foreign supplier who appoints a distributor directly in the national territory be regarded as carrying on business for tax purposes in that territory?

In general terms, if a foreign company operates in Brazil through a fixed place of business or through an agent which has the power to enter into contracts in Brazil on behalf of the non-resident company, it can be considered a taxable presence.

A taxable presence should not be deemed to exist if the performance of the agent in Brazil has been limited to business intermediation or forwarding requests and proposals between the parties. Therefore, the essential criterion of taxable presence lies on the autonomy of the local agent or distributor to act on behalf of the non-resident.

Where the distribution activities are strictly limited to storage or display of goods (product storage and supply), the foreign supplier would not be considered to have a permanent establishment. It would therefore not be liable for any income taxes related to the income it receives from Brazil.

However, if the distributor located in Brazil is responsible for operating, for example, sales and shipments only and has powers (in law or in practice) to act on behalf of the foreign legal entity , the foreign supplier may also be subject to tax on income obtained in Brazil (see *Agency Q&A: Brazil*).

20. Are any withholding or other taxes levied in the territory on remittance monies? When and by whom are they payable?

A Brazilian distributor importing goods from a foreign supplier incurs the following taxes:

- Excise tax: the rate depends on the NCM (*nomenclatura comum do mercosul*) code under which the product is classified.
- State value-added tax on sales and services: the rate depends on the Brazilian state into which the goods will be imported.
- Import tax: the rate depends on the NCM code under which the product is classified.
- PIS/PASEP-import (federal contribution for the social integration program levied on imports): the rate is ordinarily 2.1%.
- COFINS-import (federal contribution for social security financing levied on imports): the rate is ordinarily 10.65%.
- Additional tax for the renovation of the merchant marine, which applies when the goods are unloaded from a ship, if they arrive in the country by sea.
- Withholding taxes, which may be payable on certain transactions if the relationship between the distributor and supplier is characterised as sending revenue or profits obtained in Brazil (*Articles 682 and 399, Brazilian Income Tax Regulation*). For example, certain distribution agreements may have clauses that provide for “reverse bonuses” or “split profits”, which may be deemed, if paid, as income subject to withholding at source. On the other hand, if only commercial transactions are performed under the contract, no withholding shall apply. This must be analysed on a case-by-case basis.

21. Will there be any difficulties in a domestic distributor making payment to a foreign supplier, either in local currency or in the currency of the supplier's country? Are there any exchange controls in operation?

It is simple for a domestic distributor to make payments to a foreign supplier.

Article 11 of the National Financial System Law No. 4595/1964 applies to foreign exchange where a domestic distributor makes payments to a foreign supplier. The Brazilian Central Bank controls payments made in foreign currency.

The payment to the foreign supplier can be made in national currency or in foreign currency. However, there are certain requirements, such as:

- To make the payment in national currency, the foreign supplier must have a bank account in Brazil.
- For payment in a foreign currency, it is usually necessary to have a foreign exchange contract with a financial institution in Brazil. However, it is also possible to pay the foreign supplier with an international credit card or with resources that the domestic distributor maintains abroad; in this case, an exchange contract with a financial institution in Brazil is not required, but the domestic distributors must comply with some obligations, such as to inform the Brazilian Federal Revenue Office (Receita Federal do Brasil) of such payments.

Product liability

22. To what extent is it possible to exclude liability as between the distributor and supplier for the supply of defective goods or services? To what extent can a distributor be indemnified against product liability claims?

Whether liability can be excluded depends greatly on the nature of the relationship between the parties and whether the final buyer is deemed a consumer under Brazilian law. If the final buyer is deemed a consumer, the rules of the Consumer Protection Code (CPC) apply and the parties cannot contract out of its application. That is because the consumer is the weaker party and therefore attracts extensive protection under Brazilian law.

In theory, it is possible to limit liability between the distributor and supplier, but case law indicates that to exclude it completely is controversial, especially if the parties are not of equal economic power or do not have balanced leverage over the negotiation (*Superior Court of Justice: STJ, REsp no 1076465/SP, Rel. Ministro Marco Buzzi, 4th Group, 10 August 2013*).

If there are product liability claims, and the final buyer is a consumer, the law allows the consumer to file suits both against the distributor and the supplier, because of the joint and several liability of the parties in the chain of supply (*Articles 18 and 34, CPC*). It is only possible to limit liability in justified cases (*Article 51, I, CPC*); however, the legislation does not specify what constitutes a justified case. Even in these instances, it is not possible to exclude liability entirely. It is important to note that the courts tend to be quite restrictive when accepting this limitation of liability.

In the context of relationships subject to the CPC (that is, where the final buyer is a consumer), it is more common for the supplier to be held liable for a manufacturing defect. If this is the case, the distributor can claim indemnification from the supplier if it is forced to pay damages (*Articles 12 and 18, CPC*), if this has not been excluded or limited under the distribution agreement, as mentioned above. In other words, even if the supplier limits its liability before distributors, the extent to which it can limit its liability to a final consumer is small.

However, for sales made by distributors which are not subject to the CPC, the general provisions of the BCC regarding limitation of liability will apply.

In any case where limitation of liability is being questioned, both under the BCC and the CPC, there is no express statute regulating this matter, but case law generally accepts such limitations as long as:

- They are not included in standard terms and conditions.
- They do not exclude a party's fundamental obligations.
- The damages were not caused by an act that is deemed illicit, by wilful misconduct or by gross negligence.

However, in cases subject to the CPC, the courts tend to have a narrower view of what can be excluded.

Regarding an express limitation of liability for damage to tangible property, the supplier can still be held liable towards the distributor for moral damages if the court holds that the supplier committed an illicit act (gross negligence, willful misconduct, fraud, or any other type of illicit act) (*Articles 186 and 187, BCC*). This is considered extra-contractual liability, which cannot be limited or excluded contractually. The court analyses this on a case-by-case basis.

The distribution agreement

23. Are any particular formalities required in relation to distribution agreements?

There are no special formalities required for distribution agreements. However, it is common practice that the parties initial all pages of the agreement, including exhibits, and sign at the end to prove their acceptance of all terms of the agreement (Article 107, BCC states that no formalities are required for the parties to express their will, unless expressly required by statute, which is not the case for distribution agreements).

It is not unusual to notarise the parties' signatures, but this is not a requirement for the validity of the agreement. If the document is produced abroad, the parties can choose to notarise and apostille the signatures, but even in this case, this is not a require for the agreement to be enforceable in Brazil.

The supplier does not need to present any formal authorisation to the distributor for the parties to execute the agreement.

However, for the distribution of motor vehicles, the Ferrari Law provides more stringent requirements, such as:

- Registration of the brand agreement at a notary.
- Promotion of its publication in the official publication of the federal government (*Diário Oficial da União*).
- Signature of the registration by the distributors' association.

(*Article 17, Ferrari Law*.)

24. Is it possible to incorporate the supplier's standard conditions of sale into the distribution agreement? What do such standard conditions normally cover?

Yes, this is possible. The supplier's standard conditions are usually included as an annex to the agreement; it is common practice, though not a requirement, for this annex to be initialled as well (see *Question 23*). These conditions usually establish how the price is determined and can be modified, and deal with issues regarding:

- Shipping.
- Tax and other costs.
- Delays.
- Acceptance of orders.

25. Does national law impose any obligations on the supplier or the distributor? Are there any obligations of either party which are typical due to local custom?

Except for issues of exclusivity and territory (if not expressly regulated under the agreement) (see Questions *Question 1* and *Question 3*), there are no express rules for the supplier except for those applicable to contracts in general under Brazilian law (*Articles 421 to 480, BCC*) (see *Country Q&A, Part 1 - Standard Clauses "Boilerplate" agreement: Brazil*; *Country Q&A, Part 2 - Standard Clauses "Boilerplate" agreement: Brazil*; *Country Q&A, Part 3 - Standard Clauses "Boilerplate" agreement: Brazil*). The distributor must act with diligence, following the instructions sent by the supplier and must bear all costs necessary to perform its distribution activities (*Articles 712 and 713, BCC*).

Where the Ferrari Law applies, there are several requirements and obligations to which the supplier and distributor are subject.

26. Are any terms implied by law as to the supplier's title to the goods? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

The law does not impose general terms regarding title. If possession of the goods is transferred to the distributor without any restrictions, it is assumed that the distributor holds title to the goods (*Article 1267, BCC*).

27. What term is commonly agreed for a distributorship? Does national law regulate the length of notice periods?

For agreements regulated under the BCC, it is common practice to provide a term of two to three years. However, there are cases when the parties agree to shorter terms to test the viability of the agreement.

The agreement can be entered into with an indefinite term, subject to Article 720 of the BCC, which introduces a 90-day notice period for termination without just cause for indefinite term agreements. It is questionable whether the parties can reduce this minimum term, but in certain cases the advance notice may need to be longer, depending on the level of investment made by the distributor and whether the distributor has been able to recover its costs (see *Question 29*).

For agreements under the Ferrari Law, the advance notice period should be a minimum of 120 days (*Article 22, paragraph 2, Ferrari Law*).

28. What events will be regarded in law as justifying termination of the distribution agreement? Do any statutory obligations arise on termination? What provision is usually made in the agreement for termination?

The BCC does not contain express provisions regarding what constitutes a justified termination in distribution agreements. Usually the circumstances would include scenarios such as:

- Breach of non-compete or exclusivity clauses.
- Negligence.
- Lack of performance.
- Business wind-up, death or bankruptcy.

For compensation on termination, whether for cause or for convenience, the distributor is usually entitled to receive the products/services corresponding to the orders it has already paid for. The supplier must therefore deliver those orders even after termination.

Ferrari Law agreements

For agreements regulated by the Ferrari Law, it is envisaged that justifiable termination would include breach of:

- Contractual obligations.
- The brand agreement.
- The Ferrari Law itself.

(*Article 22(III), Ferrari Law*.)

The Ferrari Law provides that whenever the supplier terminates an indefinite-term contract, the supplier must repurchase the stock of vehicles and components from the distributor, at the consumer purchase price as of the date of termination. The supplier must also buy equipment, machinery or tools from the distributor at the consumer purchase price, in the state that the equipment is found. The supplier must have previously determined the price or evaluated the state the equipment was in, and not objected to that price and condition (*Articles 23, II, and 24, Ferrari Law*). In addition, on termination, the supplier must also pay the distributor damages calculated under Article 24, item II of the Ferrari Law, as well as other compensation previously stipulated between the manufacturer and its network of dealers, if any (*Article 24, IV, Ferrari Law*).

Consequences of termination may vary if termination is justified due to breach by the supplier, or if the supplier does not wish to renew an automatically renewable agreement (*Articles 21, 23 and 25, Ferrari Law*). Compensation due to the distributor must always be paid within 160 days of the termination date (*Article 27, Ferrari Law*).

Therefore, where the distribution agreement relates to sales of vehicles, *Standard document, Distribution agreement: Cross-border: clause 16.3* must be adjusted accordingly.

29. What rights does the distributor have to compensation on termination of the distribution agreement or discontinuation of supply of the products? How is compensation for termination / discontinuation of supply calculated?

Indefinite term agreements cannot be terminated without cause until sufficient time has elapsed for the distributor to recover the costs incurred in entering into the agreement (*Article 720, BCC*). For this reason, it is advisable to include in the agreement the approximate amount invested by the distributor (if any) and a provision estimating the time necessary to recover that investment, to avoid being caught by surprise. No other statutory payments are due. However, distributors can claim other indemnification, such as damages related to building up the trade mark/client base. However, any such indemnification is subject to proof by the distributor (the burden is on the distributor) of the actual losses suffered; there is no statutory requirement for payments or any restrictions on how this is regulated by the parties.

When the supply of all products is discontinued because the supplier ceases to manufacture, the distribution agreement must be terminated under the terms of Article 720 of the BCC. If there is only partial discontinuation of supply and the agreement remains in force between the parties, no compensation will be due to the distributor, provided that the reduction of products does not make the continuation of the contract too burdensome for the distributor (*Article 715, BCC*).

For cases that fall under the Ferrari Law, there are specific rules for the calculation of an indemnification on termination without cause (*Article 24, Ferrari Law*). These rules include, among other obligations, the payment of mandatory indemnification of 4% of the projected gains for a certain period, multiplied by the number of years of the agreement's term.

30. Where the distributor holds stock or money or other property belonging to the supplier, can the supplier assert its rights of ownership against third parties:

- In the event of insolvency of the distributor?
- In the event that the distributor has dishonestly disposed of them to third parties?

This is not very common in Brazil because if the goods are in the distributor's possession, it is deemed as having acquired the property unless there is some form of lease arrangement between the parties (*Article 1267, BCC*).

In relation to stock, proof of ownership would depend on how the distributor came to be in possession of the products. If they were sent as a consignment or as a form of temporary loan, the supplier could assert rights of ownership before those of third parties (*Articles 534 to 537, BCC*). The supplier could also assert rights of ownership if there are established property rights under Articles 1361 to 1368B of the BCC for fiduciary property. In this context, for the creation of a fiduciary property the relevant agreements must be filed with the Registrar of deeds and documents in the local domicile of the debtor.

In this scenario, it is important that the products are easily identifiable (for example, by a serial number, bar code or model). If the goods are commingled, such as commodities, there are special formalities for transferring the property. The distributor's obligations would be to return the same quantity and quality of goods, but they do not need to be the same as originally deposited (*Article 645, BCC*).

Under a standard distribution agreement, it is uncommon for a distributor to hold money on the supplier's behalf since there is a direct sale to the distributor by the supplier, and therefore no money is flowing backwards from clients to distributor and back to the supplier. If, however, the distributor acts as an agent, and places orders and receives client payment that belongs to the supplier, the distributor should clearly account for this money in the distributor's books, showing that the money is merely held temporarily but that it belongs to the supplier.

The supplier is always able to recover its property and money if it can provide clear proof of title. The supplier can even claim for indemnity against the distributor, but a supplier's rights against third parties would greatly depend on the nature of the asset and the format in which the transaction was carried out.

31. What limitations and exclusions of liability might be appropriate?

Exclusions or limitations of contractual liability are generally permitted in commercial contracts under Brazilian law. However, parties cannot exempt themselves from extra-contractual liability (tort), including gross negligence, wilful misconduct, fraud and illicit acts (*Article 186, BCC*). This means that *Standard document, Distribution agreement: Cross-border: clause 14.2(c)* would not be enforceable in Brazil as it is drafted.

The validity of limited-liability clauses depends on the following:

- The parties must have equal bargaining positions (not possible in standard terms contracts where consumers are contracting on the other party's standard terms).
- A party cannot be exempted from liability related to essential obligations under the agreement, only consequential obligations.
- Compliance with Brazilian public policy.

Contractual liability in Brazil is always measured in accordance with the actual extent of the damages caused (*Article 389, BCC*). Therefore, damages are normally due whenever there is a verified causal link between the acts of one of the parties and the damages suffered by the other. Damages are, therefore, limited to the direct damage caused as well as to the profits the party would have received were it not for the contractual breach. This must be proven with evidence and is not presumed. Case law shows that proof of lost profits is quite difficult to establish (*Agravo em Recurso Especial No. 751.996 – RS 2015/0183860-2, TJRS, Recurso Cível no. 0008253-59.2015.8.21.9000, 30 June 2015; Apelação No. 0170304-09.2012.8.26.0100, TJSP, 4 February 2016; Apelação com Revisão No. 0012102-92.2011.8.26.0576, TJSP, 21 October 2015*).

Punitive damages are not available under Brazilian law.

Therefore, even in the absence of a limited-liability clause, the extent of indemnification is limited. This provides the parties with a certain level of certainty as they are only liable for damages reasonably predicted at the moment of formation of the contract.

Since exclusivity is presumed in distribution relationships (unless otherwise expressly excluded in the contract) *Standard document, Distribution agreement: Cross-border: clause 14.4* is not enforceable if the parties have not expressly excluded exclusivity in the agreement (see *Question 8*).

32. Could any terms be implied under local law which regulate the supplier's ability to increase prices to the distributor during the term of the agreement?

Brazilian law does not expressly regulate the supplier's ability to increase prices to the distributor during the term of the agreement. It is however common for the supplier to increase prices to adapt them to market prices, taking inflation into account, provided that prices are not excessively or unreasonably increased. Whether the increase is excessive or unreasonable would be subject to analysis on a case-by-case basis.

33. Are bank or parent company guarantees, letters of credit or other forms of security common practice in your jurisdiction?

Yes; in distribution arrangements, suppliers often require that the distributing company issue a promissory note or grant a letter of credit in favour of the supplier, depending on the sums involved.

34. Would it be permissible to include a clause (referred to as a retention of title clause in common law jurisdictions) to ensure the supplier retains ownership (title) of the products until payment has been received from the buyer?

Yes, retention clauses are common and are expressly regulated in the BCC for purchase and sale agreements. Brazilian law allows the seller of movable property to reserve the title over the goods until the buyer pays the price in full. To be valid and enforceable:

- The clause must be expressly set out by the parties in the agreement.

- The agreement must be registered at the relevant registry of deeds and titles in the distributor's domicile (*Article 522, BCC*).

It is referred to as a retention of ownership clause (*venda com reserva de domínio*) (*Articles 521 to 528, BCC*).

35. Are there any local laws, rules or practices in relation to set-off?

Yes, Articles 368 to 380 of the BCC allow and regulate set-off. The parties can expressly waive the right to set-off in the agreement. Also, when debts are due and payable in different places, set-off must deduct from the set-off amount any necessary expenses, such as bank transfer charges (*Article 378, BCC*).

However, set-off is prohibited between a party resident in Brazil and a party resident abroad if either:

- The set-off is not intermediated by banks authorised to convert the sums from one currency to the another (*Article 10, Decree-Law 9,025/1946*).
- The specific transaction is not filed at the Brazilian Central Bank (even if no actual money will be transferred).

In distribution relationships, the supplier does not normally owe the distributor any sums. Therefore, set-off is very rare in this type of agreement.

36. Will any customs duties be payable under the agreement for any products that are received by a distributor in your jurisdiction? Would the supplier or the distributor typically be responsible for paying any customs duties?

The Brazilian distributor, as an importer of the goods, must pay the customs duties on customs clearance when it registers the import declaration (*Article 11, Normative Instruction SRF No 680/2006*). In Brazil, even if the agreement incorporates the Incoterms 2010 (the International Chamber of Commerce official rules for the interpretation of trade terms), customs duties will always be the buyer's obligation.

- The customs duties are usually the following:
- State value-added tax on sales and services: the rate depends on the Brazilian state to which the goods will be imported.

- Import tax: the rate depends on the NCM code under which the product is classified.
- Excise tax: the rate depends on the NCM code under which the product is classified.
- PIS/PASEP-import (federal contribution for the social integration programme levied on imports): the rate is ordinarily 2.1%.
- COFINS-import (federal contribution for social security financing levied on imports): the rate is ordinarily 10.65%.
- Additional tax for the renewal of the merchant marine, which is a tax levied on sea freight fees on imports. The rate is 25% (over freight fees).

For customs clearance, the importer must present the following documents to the Brazilian Federal Revenue Service for assessment:

- The original of the bill of lading or equivalent document.
- The original invoice signed by the exporter.
- The packing list, if applicable.
- Other documents, depending on the country of origin of the goods, taking into account the relevant bilateral treaties signed between the countries (if any).

However, it is possible for the distributor to hire an intermediary company (a trading company) to import or order the merchandise on its behalf, if the distributor does not want to become involved with the customs procedures. If this is the case, the requirements and conditions set out in Normative Instruction SRF No 680/2006 must be fulfilled to avoid the application of penalties by the tax authorities.

37. Are there any compliance obligations on either party under your local laws?

Anti-bribery or anti-corruption clauses are common in all types of commercial contract. These clauses normally survive the term of the agreement, for a duration that is to be determined in court according to the specifics of the relationship between the parties.

Brazilian law does not specifically regulate anti-bribery or anti-corruption clauses in relation to distribution agreements. All legal entities incorporated in Brazil (including branches and subsidiaries) must abide by Brazilian Anti-Bribery Law No 12,846/13. Therefore, parties to any contract, not only distribution agreements, must comply with the Anti-Bribery Law regardless of whether a clause is expressly included in the document.

The main areas regulated by the Anti-Bribery Law are agreements and payments involving public entities or governmental authorities, including issues such as bribes, seeking unlawful advantages, among other things. In this

context, if a distributor acts on behalf of the principal in violation of the Anti-Bribery Law, the principal could also be held liable for acts of the distributor.

38. Should the distributor be solely responsible for compliance with import licensing laws?

Yes, the distributor that is the importer of the goods is solely responsible for compliance with import licensing laws.

39. Is the supplier, distributor or both parties responsible for ensuring products can be sold in the defined territory: (i) before the start of the agreement; and (ii) during the term of the agreement?

Brazilian law does not generally regulate which party is responsible for ensuring that products can be sold in the defined territory. However, while there is no statutory delineation, agreements will usually provide that each party has a duty to inform the other of any changes to its own national laws.

In cases where the CPC applies, both supplier and distributor may be, according to the circumstances, be joint and severally liable for a lack of compliance with local statute.

Therefore, *Standard document, Distribution agreement: Cross-border: clause 9.5* would be enforceable.

40. Would it be common practice in your jurisdiction for a supplier to include a clause / clauses stating that it makes no warranty or representation: (i) as to the validity or enforceability of trade marks; or (ii) as to whether the trade marks infringe any third party intellectual property rights?

Although possible, it is not common to include a clause stating that the supplier makes no warranty for:

- The validity or enforceability of the trade mark of the products sold.
- Whether the trade mark infringes any third-party IP rights.

Brazilian law does not regulate warranties and these are not commonly found in commercial agreements. The closest concept to warranties would be the parties' obligations undertaken in the contract.

41. In your jurisdiction, to what extent can a distributor incur personal liability to a customer?

The CPC stipulates that strict liability will apply in consumer relationships when damage is caused to the consumer.

Under the CPC, the distributor and the supplier are jointly and severally liable to the final consumer of the goods, along with any other party involved in the chain of supply. Therefore, the consumer may file a claim against the supplier and the distributor, at its own discretion. That is because there is joint and several liability between all of the parties in the chain of supply (*Articles 18 and 34, CPC*). Although it is uncommon for the distributor to obtain insurance to cover personal liability, it is usual for the distribution agreement to provide that the supplier must indemnify the distributor for any costs the distributor incurs due to personal liability claims, as provided for in *Standard document, Distribution agreement: Cross-border: clause 13.1*.

Generally, the supplier cannot exclude or limit its liabilities towards individual consumers (*Articles 25 and 51, CPC*). Consumers are highly protected under Brazilian law and by courts, because they are considered to be the weaker party in relation to the supplier, agents and distributors.

There is one exception when dealing with limitation of liability: limitation of liability is permitted when the consumer is a legal entity. However, the limited liability clause must be clearly written, in bold letters, to ensure that the consumer is fully aware of its existence and terms. In addition, the situation must justify this limitation (*Article 51, item I, CPC*). Case law shows that this is verified on a case-by-case basis by courts, which tend to be quite restrictive when accepting limitation of liability (*Agravo de Instrumento 7286498-9, TJSP, 11ª Câmara de Direito Privado, 16 January 2009; Apelação 8986238, TJPR, 12ª Câmara Cível*) (see *Question 22*).

42. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to the distribution agreement?

There are certain precedents in case law that dictate that the parties cannot choose the applicable law to their agreement, since the BCC and the rules relative to distribution agreements are deemed as part of the public order. If the agreement is submitted to local courts and the contract is silent about the jurisdiction, the Code of Civil Procedure (CPC) will determine the jurisdiction based on the type of claim. In most cases, the courts of the city where the defendant is domiciled will have jurisdiction (*Article 46, CPC*).

The Law of Introduction to Brazilian Law Rules (Decree-Law No 4,657/42) provides guidance where there is a conflict of laws in the context of international private law. A foreign choice of law is accepted as long as the agreement is international in nature and the Brazilian judiciary does not have concurrent jurisdiction (*Article 25, CPC*).

Parties may have a foreign governing law apply to the agreement where arbitration is the method of dispute resolution. Parties may choose any applicable law for the arbitral proceedings and the merits of the case, provided that no Brazilian public policy and good moral values are violated (*Article 2(1), Brazilian Arbitration Law No 9,307/1996*).

43. Does the agreement need to be in a language other than English for it to be valid and enforceable?

There is no language requirement for an agreement to be considered valid or enforceable in Brazil. However, it must be accompanied with an official translation in Portuguese when submitted to a Brazilian court. This also applies to any other document presented in court (*Article 192, CPC*).

It is common for distribution agreements executed between parties from different countries to be written in two languages, with a clause providing that one of the versions will prevail in the event of inconsistencies or divergence.

44. How does this agreement need to be executed to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

For further information, see *Question 23*.

Registration formalities

For further information, see *Question 23*.

45. Are there any clauses in the distribution agreement that would not be legally enforceable or not standard practice in your jurisdiction?

The supplier's imposition of maximum resale prices (such as *Standard document, Distribution agreement: Cross-border: clause 3(d)*) is permitted by Brazilian law. Generally, prices must be reasonably set; for example, they must not be below market price (*Article 36, Law No 12,529/11*).

The terms of *Standard document, Distribution agreement: Cross-border: clause 3(e)*, *(p)* and *(q)* could be considered subordination, which is a factor in determining whether an employment relationship exists (see *Question 17*). It is, therefore, ideal to make the distributor as independent as possible in relation to the supplier, to avoid this risk.

It is also uncommon for the supplier to monitor the distributor's sales and customer orders. This is because the distributor only resells purchased products from the supplier and does not render any services on behalf of the supplier in the territory, as opposed to an agent. The distributor's main duty in this type of agreement is to pay for the products manufactured by the supplier.

Standard document, Distribution agreement: Cross-border: clause 3(f), *(g)* and *(j)* would also not be normally found in distribution agreements, since this would fall under the distributing company's own internal duties.

With regards to *Standard document, Distribution agreement: Cross-border: clause 10.3*, *clause 15.2(b)* and *clause 15.3*, Brazilian law does not have an equivalent to material breach. A breach of any obligation undertaken by the parties is simply treated as contractual breach, with consequences which vary according to the type of obligation that was not complied with. Therefore, the cure period provided in *Standard document, Distribution agreement: Cross-border: clause 15.2(b)* would usually be applied to any type of breach of contract.

It is also uncommon for the distributor to be obliged to maintain product liability insurance as in *Standard document, Distribution agreement: Cross-border: clauses 13.3 to 13.5*) (see *Question 41*).

Regarding *Standard document, Distribution agreement: Cross-border: clause 13.6*, it is the supplier's duty to inform local authorities and consumers in the event of recall, by public announcements in the media. It must also bear all related costs (*Article 10, CPC*).

Misrepresentation is considered a breach of good faith and fair dealing in Brazil. The closest concept to negligent misrepresentation in Brazil would be accidental misconduct (*dolo acidental*). This is where, even without misrepresentation, the innocent party would have still entered into the agreement, merely in different circumstances (*Article 146, BCC*). This would only entitle the innocent party to damages, to be determined by the court, as opposed to an annulment of the agreement in case of wilful misconduct. Therefore, *Standard document, Distribution agreement: Cross-border: clause 19.2* would be unenforceable in Brazil.

46. Are there any other clauses that would be usual to see in a distribution agreement and/or that are standard practice in your jurisdiction?

There are no other clauses that would be usually provided in the agreement.

Brexit

47. From the point of view of your jurisdiction, what issues do you anticipate arising in relation to distribution agreements which either: (i) contain an express choice of English law as governing law; or (ii) have a UK-incorporated supplier or distributor as a party and are governed by the laws of your jurisdiction, in consequence of the UK ceasing to be a member state of the European Union?

If the UK ceases to be a member of the European Union during the term of a distribution agreement that applies English law (or where one of the parties is a UK-incorporated company), from the Brazilian law standpoint, no changes to the agreement would be necessary.

Regardless of the UK being a member of the European Union, if distribution were to take place in Brazil, Brazilian law would most probably apply to the agreement. The only way Brexit would have an impact is if the parties choose the laws of England and Wales as the governing law of the agreement.

48. In relation to any points identified in *Question 47*, would you recommend that any adjustment should be made now to *Standard document, Distribution agreement: Cross-border* if it were to be used as an agreement governed by the law of your jurisdiction, in order to address those points in advance?

No.

END OF DOCUMENT