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Protecting the supplier against breach of the distribution contract

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ABSTRACT

Distribution is essential in today's economy, as it facilitates consumers' access to a wide range of products. In fact, the primary function of distribution is to make a broad spectrum of goods available to consumers, whether directly from producers or through specialist distributors. Thanks to their sales expertise, these distributors are often crucial in helping producers connect effectively with the market. Nevertheless,

this dynamic is not without risks, particularly for suppliers, who may find themselves in a delicate position if distributors fail to fulfil their obligations.

Within this general framework, it is crucial to consider the protection of suppliers against the breach of distribution contracts. Indeed, although the distribution contract formalises the agreement between the supplier and the distributor, the specific terms of this agreement are not always governed by clear legal provisions, particularly in the

Moroccan context where the distribution contract does not feature in the official catalogue of contracts. This lack of codification creates a legal vacuum that requires **protective mechanisms tailored to commercial relationships**. The establishment and effective development of these relationships depend on ensuring a contractual balance that safeguards the interests of the commercial parties.

To this end, the supplier adopts protective measures against breach of contract and failures on the part of its distributor, which may damage the supplier's brand reputation. It is also essential to ensure that distributors are able to fulfil their commitments, in order to maintain a healthy and sustainable commercial relationship.

The focus of this article is on analysing the means of protection available to the supplier in the event of a breach of contract by the distributor, by examining a range of protective mechanisms in favour of the manufacturer. In this sense, a distributor's efficiency and loyalty to the supplier's brand image constitute an intangible form of protection, much like a guarantee or retention-of-title clause for the benefit of the supplier or manufacturer.

Keywords: protection, contract, distribution, supplier, distributor.

Introduction

The primary function of distribution is to make a range of products available to consumers. This role may be undertaken by the manufacturer itself, either on an integrated or non-integrated basis. However, for many manufacturers, access to the market ultimately depends on distributors, who are responsible for stocking sufficient quantities, packaging, retail sales and the promotion of the goods distributed to customers.

Alternatively, distribution can be delegated to specialist distributors who are well versed in sales techniques.

In this sense, distribution helps to reduce the costs of making products available to consumers (costs associated with storage, transport, splitting of consignments, etc., as well as transaction costs: prospecting, negotiation, etc.) whilst offering them services (products available in sufficient quantity and quality, adherence to delivery schedules, shop opening hours, proximity of points of sale, etc.).

Furthermore, a company specialising in retail can, more easily than a food and drink producer, possess broad expertise in product distribution: knowledge of markets, sales techniques, transport methods and equipment. It can thus maximise the profitability of its commercial services and facilities.

The distribution sector establishes the necessary link between producers and consumers. Its efficiency is essential to guarantee the supply of a wide variety of products at competitive prices. This sector acts as a driver of development, economic growth and wealth creation. It is characterised by the diversity of economic actors who establish and develop their commercial relationships through a distribution agreement (DA).

This contract formalises the agreement whereby a distributor markets the products of a producer or supplier. It sets out the general framework for the commercial relationship between supplier and distributor. It can take several legal forms, and its scope is broad. It may be exclusive or non-exclusive, limited geographically or in time... it all depends on the agreement and the subject matter of the contract.

This contract does not appear in the official catalogue of Moroccan contracts. It has evolved through professional practice, and its content is limited to the contractual provisions applied in accordance with the legal rules governing contracts, which form part of a broader body of law known as the law of obligations¹.

However, in the absence of a legal definition of the term 'distribution' in the Moroccan Commercial Code – which deals solely with purchasing for resale (Article 6 of Law No. 15-95 establishing the Commercial Code of 1996)² – this term falls within the scope of competition law and food safety law.

In this context, the supplier and the distributor are free, by their own volition, to establish their own rules through the exercise of their contractual freedom in drawing up their contract, which is regarded as the pre-eminent source of law. The content of the contract is determined by the will of the parties, or 'autonomy of will', which is in line with the principles of economic liberalism.

In this sense, a contract can only be fair if it is the product of the parties' free will, since free and equal individuals are the

¹ Jean-Michel, **Do Carmo Silva**, et al. DSCG1 – Legal, Tax and Social Security Management – Handbook 2023–2024. Paris, Dunod. 'Expert Sup', 2023, p. 2

² Dahir No. 1-96-83 of 15 Rabī' 1417 (1 August 1996) promulgating Law No. 15-95 establishing the Commercial Code. Official Gazette No. 4418 of 19 Jumādā I 1417 (3 October 1996)

best defenders of their own interests³. This is the meaning of Fouillée's famous maxim: 'what is contractual is fair'.

This agreement has become a legal tool available to legal persons and, in particular, to businesses. It is through contracts that a business carries out its economic activities (purchasing, selling, distribution, provision of services, etc.).

On the other hand, distribution contracts also encompass those necessary for the creation of product distribution networks, such as exclusive supply contracts, concession agreements, selective distribution agreements or franchise agreements. More often than not, these are standard-form contracts, which explains the need to protect the weaker party within distribution relationships through the intervention of the courts and the legislature.

They aim to organise networks for the sale of products by bringing together various parties who, individually, cannot ensure the distribution of goods satisfactorily. Indeed, beyond the supply of products, these contracts provide that the supplier will make available to the distributor a certain amount of information, whether protected or not (licences for know-how, trademarks, trade names, etc.). In return, the distributor must comply with the obligations imposed by the supplier.

In this context, a large distributor's choice of supplier is fundamentally determined by the supplier's ability to handle delivery, to contribute to the listing of its product, and to enhance the point of sale's profile in terms of image⁴. However, the choice of distributor may be based on its efficiency and loyalty within the supplier's network.

In this respect, the relationships between distributors and suppliers – vertical relationships that are most often non-integrated and involve a complex mix of cooperation and competition –⁵.

In this sense, as a binding agreement in the business world, the distribution contract must ensure the distributor's protection against contractual imbalance and the supplier's protection against the distributor's failure to fulfil contractual clauses.

This contract will only effectively fulfil its purpose, to the supplier's satisfaction, if the supplier's interests are protected.

³ Christophe Lachière. Contract Law. Paris, Ellipses. 'Mise au point', 2020, p. 26. CAIRN.INFO, droit.cairn.info/droit-des-contrats-5e-edition--9782340042568-page-26?lang=fr.

⁴ Chabi Benoît, Kpassi Gobi. 'Business logic and the integration of distribution channels as a strategic response to competition: the case of the Monastère Notre-Dame de l'Etoile'. Management & Prospective, 2022/2, Volume 39, 2022, pp. 99–120.

For this reason, the distribution of products must be set out in writing (although no specific form is required for the contract to be valid, a written agreement is strongly recommended in practice as evidence in the event of a dispute). Under French civil law, those drafting the contract must ensure compliance with the general conditions of validity for agreements between economic operators, as set out in Article 1128 of the Civil Code, in order to provide protection against any form of contractual imbalance and against the likely non-performance of obligations by one of the parties⁶.

In this regard, the purpose of this article is to identify certain means of protecting suppliers against the distributor's failure to perform the contract in relation to both pecuniary and non-pecuniary obligations, through an analytical, critical and practical study. This paves the way for the exploration of protective contractual mechanisms to organise distribution operations, which most often take the form of a continuous flow of contracts from the producer to the consumer, frequently involving multiple intermediaries.

In this context, the following question arises: Is it possible to protect the supplier through the distribution contract?

Generally speaking, the supplier can be protected by adopting certain contractual mechanisms designed to ensure the performance of the contracts entered into with their suppliers. With this in mind, I shall address the protection of the supplier against the non-performance of non-monetary (I) and monetary (II) obligations.

I. Protection of the supplier against non-performance of non-monetary obligations

Depending on the market segment in which they operate, suppliers select distributors on the basis of objective qualitative criteria (such as competence, professional experience in a given market, staff and equipment) that are non-discriminatory towards any other reseller in their network.

This choice results in the establishment of a framework agreement between the supplier-seller and the distributor-buyer, which sets out the terms for the conclusion of the numerous commercial sales that will be entered into

⁵ Claire, Borsenberger, et al. 'Commercial relations between suppliers and distributors'. Économie & prévision, 2006/4 No. 175–176, 2006. pp. 189–195. CAIRN.INFO, shs.cairn.info/revue-economie-et-prevision-1-2006-4-page-189?lang=fr.

⁶ Schönberg, Ève. 'Topic 8. Distribution structures'. Business Law for Managers, Ellipses, 2019. pp. 167–174. CAIRN.INFO, droit-des-affaires-pour-managers-4e-edition--9782340029866-page-167?lang=fr.

successively in the form of implementing contracts. There are **a great many** clauses relating to commercial sales; some are more specific⁷.

In this context, the contractual relationships between suppliers and distributors meet the standard conditions for the formation of contracts (consent, capacity, lawful subject-matter and cause). The business relationship between the supplier and the distributor is governed by the free play of competition in order to best satisfy consumers and avoid contributing to economic dysfunction⁸.

In this sense, failure to achieve the agreed turnover constitutes a breach of contract on the part of the distributor, for which the supplier may impose sanctions.

Traditionally, non-performance is regarded as the 'failure to fulfil a contractual obligation, which may be total or partial. It may result from an omission, a fault on the part of the debtor (culpable non-performance) or an external cause (fortuitous non-performance).

In this context, to protect itself against non-monetary non-performance, the supplier imposes a number of non-monetary requirements on the distributor (franchisee or other) through the distribution contract, in order to ensure the best possible implementation of its commercial policy. Among these requirements, we shall examine the distributor's efficiency (**A**) and mandatory loyalty (**B**) towards the supplier.

A. The distributor's efficiency

Generally, the distributor will assume not only the natural obligation to pay the price of the goods or services purchased, but also, if the contract so provides, the obligation to purchase a minimum volume of goods, provided that the level of requirement set by the supplier is reasonable. This purchase requirement is limited in duration, in accordance with French law and EU provisions.

In addition to these obligations, there is the requirement to resell the supplier's products and achieve the annual turnover

set out in the distribution agreement. Achieving this turnover clearly demonstrates the distributor's performance.

In addition to complying with the marketing standards set by the supplier, the distributor must adhere to clauses relating to sales targets, quotas and minimum sales levels. They must resell within their network, whilst complying with the non-competition clause which prohibits, for the entire duration of the contract, the direct or indirect resale of goods or services identical to those of the supplier.

These prohibitions serve as a mechanism to protect the supplier and limit the extent to which the supplier's commercial policy may be breached.

More broadly speaking, relationships within the product distribution sector are based on principles of efficiency, supplier-retailer relations and compliance with certifications that guarantee product quality, originating from the industrial sector⁹.

In this context, a distributor's efficiency is also evident in its provision of a varied product range to consumers and services to producers, such as commercial cooperation services, which are remunerated through back-end margins¹⁰.

Furthermore, to counteract the inefficiency inherent in a non-integrated vertical structure – linked in particular to phenomena known as 'double marginalisation' or 'moral hazard' – relations between producers and distributors are most often governed by clauses defining vertical restraints.

These restrictions may relate to the transaction price of the goods (mandatory resale price, non-linear pricing) and the demarcation of exclusive territories or areas of exclusivity. This establishes a certain degree of economic dependence in commercial relations, particularly in distribution contracts where exclusive supply is stipulated¹¹.

Generally, the distributor is obliged to perform effectively within the distribution network by achieving a minimum turnover or an annual sales quota. For this reason, the distributor must be incentivised to improve their results or

⁷ Daniel Mainguy. Clauses relating to commercial sales (fasc. 400). *JurisClasseur Contracts – Distribution*. LexisNixis, July 2021, No. 2.

⁸ Gaylor Rabu, *The Essentials of Distribution Law*, Gualino éditeur, Lextenso, 2014, p. 21

⁹ Corentin Roznowicz and Philippe Odou. 'In Search of New Legitimate Compromises? The Integration of "Short Supply Chains" by Large-Scale Food Retailers'. *Décisions Marketing*, No. 102 (April–June) 2021, pp. 31–52.

¹⁰ Claire Borsenberger et al. 'Commercial Relations between Suppliers and Retailers'. *Économie & prévision*, 2006/4 No. 175–176, 2006. pp. 189–195. CAIRN.INFO, shs.cairn.info/revue-economie-et-prevision-1-2006-4-page-189?lang=fr.

¹¹ Michel, Dupuis et al. *Commercial Law: Lectures and Exercises*. Paris, Ellipses. 'Law Special', 2018, p. 375. CAIRN.INFO, droit.cairn.info/droit-commercial--9782340026216-page-375?lang=fr.

performance through the inclusion of a **minimum or quota clause** within the distribution contract.

The first clause is one whereby the distributor undertakes to enter into a contract with their partner to purchase a minimum value of goods¹² ; the second, however, is a clause that obliges the distributor to achieve a very high turnover with their supplier¹³ .

As such, the majority of distribution contracts contain quota clauses, imposing a minimum turnover requirement on the distributor. These clauses are valid provided they are not imposed in an abusive manner and are not disproportionate¹⁴ .

In this sense, meeting the targets set by the supplier encourages the distributor to act in the best interests of both the supplier and consumers, which justifies its effectiveness within the distribution network.

These incentives enable the distributor to obtain end-of-year rebates expressed as a percentage of the retail price of the supplier's products, as well as **back-end commissions**, which are generally contingent upon achieving a certain sales volume over a specified period and meeting a target for sales growth of the product¹⁵ .

Furthermore, the retailer's effectiveness in marketing the supplier's products is demonstrated by extensive customer prospecting. Added to this is the fact that the majority of retailers have gradually developed genuine marketing expertise in terms of market knowledge and the analysis of purchasing behaviour¹⁶ , with a view to ensuring wide distribution of the range of products on offer and by maintaining the supplier's brand image, through the implementation of storage, transport and delivery in accordance **with safety and hygiene** requirements under Act 28-07¹⁷ and Act 24-09¹⁸ , as well as control mechanisms to

protect **the trade mark** against unfair competition, pursuant to Act No. 23-13 amending Act 17-97 on the protection of industrial property¹⁹ .

Thus, the distributor is not merely the supplier's preferred buyer²⁰ , but also its permanent representative, who must attract a large customer base to familiarise them with its products and build brand loyalty, through good commercial services, including after-sales service.

B. The distributor's loyalty

Generally speaking, a written distribution contract is not strictly required in theory; however, in practice it is necessary in order to establish the obligations of the parties and to standardise the distribution network, which can draw up the same contract with each distributor²¹ .

To avoid breach of contract and retain their position within the supplier's network, distributors are obliged not to breach the exclusivity clause. In this regard, franchisees or distributors are contractually obliged to purchase a minimum annual volume or value of products from the supplier, bearing in mind that the common interest and exclusivity underpinning this contract impose a non-competition obligation during the term of the contract.

In practice, however, a difficulty may arise when a distributor subject to an exclusivity clause, whilst not directly marketing competing products themselves, sells such products through another company they have set up. In this case, two points are noteworthy:

- The distributor breaches the exclusivity clause by setting up a front company to carry out a competing activity;
- The distributor's breach is concealed under the principle of company law, which does indeed recognise that each

¹² M. Malaurre-Vignal. Distribution Law, **Edition**, 2006. p. 96

¹³ M. Malaurre-Vignal. Distribution Law, **Edition**, 2018. p. 102

¹⁴ [Commercial Court of Cassation, 29 January 2008, No. 06-20.808; JurisData No. 2008-042625; Contracts, Consumer Contracts 2008, comment 96, M. Malaurre-Vignal.](#)

¹⁵ Arnaud, Sévigné, et al. '99. Mass retail: Sector fact sheets'. The Handbook for 'POST-BAC' Motivation Interviews: Entrance Exams for Business Schools, Ellipses, 2024. pp. 340–343. CAIRN.INFO, [shs.cairn.info/le-manuel-des-entretiens-de-motivation-post-bac--9782340085633-page-340?lang=fr](#).

¹⁶ Marc, Filser, et al. 'Chapter 5. The Retailer's Purchasing Policy'. Retail: Organisation and Strategy, EMS Éditions, 2020. pp. 187–240. CAIRN.INFO, [shs.cairn.info/la-distribution--9782376873389-page-187?lang=fr](#).

¹⁷ Law No. 28-07 on the safety of food products,

¹⁸ Law No. 24-09 on the safety of products and services, supplementing the Dahir of 9 Ramadan 1331 (12 August 1913) establishing the Code of Obligations and Contracts.

¹⁹ Law No. 23-13 amending and supplementing Law 17-97 on the protection of industrial property, promulgated by Dahir No. 1.14.188 of 27 Muharram 1436 (21 November 2014).

²⁰ Martine Behar-Touchais and G. Virassamy. Distribution Contracts. 1999, p. 214.

²¹ Kahn, Michel. 'Chapter 6. Contracts: A Practical Guide'. Franchising and Partnership: Developing or Integrating a Retail Network, Dunod, 2023, pp. 149–174. CAIRN.INFO, [shs.cairn.info/franchise-et-partenariat--9782100848263-page-149?lang=fr](#).

company has its own legal personality and legal independence.

It therefore seems logical not to challenge the conduct of the front company involved in the distributor's breach of contract on the basis of company law. Admittedly, even outside an exclusive territory, it is lawful to allege a distributor's breach of loyalty under contract law, and in particular the principle of good faith and fair dealing²² in the performance of contracts.

In this regard, the contract must be performed to the letter and in good faith, which requires a duty of loyalty on the part of both the debtor and the creditor²³. This obligation is established under French civil law even during negotiations, in which the supplier and the distributor are both, at the same time, creditor and debtor.

Furthermore, it is inconceivable that an exclusive distributor, whose contract is classified under the Doubin Act or French commercial law as a contract of common interest, could pursue legitimate interests through the marketing of **competing products** by taking the initiative to set up a hidden or legally independent company. This simply means that the distributor must comply with the rules of exclusivity, loyalty, good faith and common interests, in order to avoid unfair competition and maintain ties of loyalty with their supplier.

In this sense, if the distribution network is lawful, it constitutes the specific representation of the common interest of its members and a legitimate interest deserving of specific protection from the manufacturer of the goods. The distribution network thus becomes the forum for organised collective distribution, where each member is subject to the obligations arising from the network, such as the obligations of cooperation, negotiation, assistance and loyalty²⁴.

A supplier keen to protect the brand image of its network will ensure that members of its network comply fully with distribution standards. In particular, it will ensure that its network operates in an orderly manner, especially in view of the ever-present risk of **parallel distribution**. However, case law does not regard this as a wrongful act, unless it can be demonstrated that the reseller obtained these products outside

the network in an irregular manner, thereby justifying an action for unfair competition²⁵.

II. Protection of the supplier against a distributor's failure to pay

The relationship between a supplier and a distributor is akin to a bond established and developed between a buyer and a seller, which depends on the size of the businesses, the sector of activity, the products and services concerned, but also on the personalities of those involved²⁶.

This relationship establishes a set of financial obligations incumbent upon the distributor. These consist of paying the price of the products and the entry fee into the supplier's network within the timeframe agreed in the distribution contract, with a view to ensuring the smooth continuation of business and avoiding the risk of insolvency caused by a build-up of unpaid invoices.

Failure by the distributor to fulfil these obligations triggers the application of contractual penalties in favour of the supplier, up to the amount specified for this purpose, regardless of the actual amount of loss suffered. These penalties must be expressly provided for in the contract, which must specify the obligations subject to such penalties, the conditions for their application and the method of calculation.

These penalties may also be provided for in the event of a delay in performance, non-compliance of the service's operation with the contractual requirements and the contractually agreed performance targets, a delay in carrying out the investments stipulated in the agreement, or failure to comply with health and safety regulations, etc.

In this context, the supplier seeks ways to protect itself against the distributor's failure to pay. Among these means, we shall examine the protection afforded to the supplier by the right of retention (A) and by the provision of guarantees (B).

A. Protection of the supplier through the right of retention

Given the proliferation of contractual forms and the diversity of commercial transactions, issues arise concerning **non-payment for purchased goods**. These issues necessitate

²² Article 231 of the DOC: Every contract must be performed in good faith, and entails not only the obligations expressly set out therein, but also all the consequences which the law, custom or equity attach to the obligation by virtue of its nature.

²³ Christophe, Lachière. Contract Law. Paris, Ellipses, 2020, p. 220.

²⁴ Laurence Amiel-Cosme, Distribution Networks, 1998, p. 366.

²⁵ Schönberg, Ève. 'Topic 8. Distribution Structures'. Business Law for Managers, Ellipses, 2019. pp. 167–174. CAIRN.INFO, droit.cairn.info/droit-des-affaires-pour-managers-4e-edition--9782340029866-page-167?lang=fr.

²⁶ Bompar, Laurent, and Oihab Allal-Chérif. "The Dynamics of Trust in Buyer-Seller Cooperation in B2B." Logistics & Management 25 (4), 2017, pp. 253–65. doi:10.1080/12507970.2017.1376602.

precautions being taken before establishing business relations and selecting distributors, through the determination of payment terms, with a view to protecting the supplier's interests within a commercial sector which, in Morocco, remains largely dominated by traditional distribution²⁷.

In this context, protection against non-payment or financial default stems from the nature of the distribution contract and the way it is drafted, which must provide for both favourable and unfavourable scenarios. In this sense, a distribution network, whether a franchise or another form, cannot be built without a solid legal foundation²⁸. The prospective franchisor must therefore ensure that it has the necessary contractual framework to establish its project on a sustainable basis and to protect itself against breach of contract by its franchisee or distributor of its products.

In this regard, the supplier may be protected by the **right of retention** mechanism in accordance with Articles 505 and 507 of the Dahir establishing the Code of Obligations and Contracts (DOC)²⁹. This right of retention is the right of a creditor who holds property belonging to their debtor to refuse to return it until the debt has been paid in full³⁰.

Within the meaning of the latter article, the right of retention grants the seller or supplier who has granted the distributor a payment period, the option to refuse delivery of the goods sold until the sale price has been paid in full, if the buyer or distributor has reduced the security provided for payment to such an extent that the seller is at risk of losing the sale price, or if the buyer or distributor has become insolvent or entered into bankruptcy. Admittedly, in the latter case, Book Five of the Moroccan Commercial Code applies to deal with matters relating to the payment of debts.

Furthermore, according to Article 505 of the DOC³¹, where several items have been sold as a single lot, the seller is

entitled to retain all the items sold until the full price has been paid. Therefore, on the basis of DOC³² and the absence of distribution rights, the supplier, as the seller of the goods, has the right not to deliver its products until it has received payment. This can often serve as a means of exerting pressure against the risk of non-payment of the price and as protection for the supplier against the distributor's failure to fulfil its financial obligations under the distribution contract.

In short, this right of retention applies to all types of goods, even those with no market value, such as documents withheld by an unpaid chartered accountant³³.

This right constitutes a protective mechanism in favour of the supplier, enabling them to counter the distributor's failure to fulfil their financial obligations.

B. Protection through the provision of guarantees

The supplier can protect themselves against the risk of their distributor's insolvency by taking out credit insurance, which ensures reimbursement for any losses incurred in the event of default. However, they must bear the cost of the 'credit insurance' guarantee, which may increase the selling price of their products.

In such circumstances, it may be preferable for the supplier to turn to traditional security interests under the law of security. For this reason, the supplier may ask its distributor to charge its personal property as security for the debts arising from the distribution contract and may require the guarantees commonly found in distribution contracts, namely the retention-of-title clause and a personal guarantee from the managing director of the distributing company. In most cases,

²⁷ Camal, Gallouj, *Food Retail in Morocco: Players and Strategies*, L'Harmattan, 2022. p. 9. CAIRN.INFO, shs.cairn.info/grande-distribution-alimentaire-au-maroc--9782140284625-page-9?lang=fr.

²⁸ Le Péchon, Martin. *A Practical Guide to Franchising and Commercial Networks: Creating, Developing and Sustaining Your Network*. Paris, Dunod. 'Entrepreneurs', 2020, p. 95

²⁹ Article 507 of the DOC. The seller is not obliged to deliver the goods sold, even if they have granted a period for payment:

- If, since the sale, the buyer has become insolvent;

- If the buyer was already bankrupt at the time of the sale, without the seller's knowledge;

- If the buyer has reduced the security provided for payment, such that the seller is at risk of losing the purchase price.

³⁰ Brice-Voltaire, Etou Obami. *Issues and solutions to various legal, tax and social questions: case study: OHADA Uniform Act – GENERAL CONGOLESE TAX CODE*. Paris, L'Harmattan. 'Out of series', 2020. p. 361.

³¹ Article 505 of the DOC: Where several items have been sold as a single lot, the seller is entitled to **retain** all the items sold until the full price has been paid, even if the price of each item had been determined separately.

³² Dahir (9 Ramadan 1331) establishing the Code of Obligations and Contracts. (Official Gazette, 12 September 1913)

³³ Jacques, Saez. 'Chapter on the Right of Retention'. *Corporate Insolvency: A Guided Tour – Procedures, Terminology and People – Understanding Insolvency to Address It*, L'Harmattan, 2020. pp. 113–114.

firms with market power can include clauses in the contract that are particularly favourable to them³⁴.

To address issues of non-performance of the distribution contract, the use of retention-of-title clauses and personal guarantees is permitted to ensure the performance of the contract and the protection of the manufacturer's interests. In this regard, we shall examine in turn the protection afforded by the retention-of-title clause (1) and the personal guarantee provided by the company director (2).

1. The retention-of-title clause

In the performance of a distribution contract containing a retention of title clause, it is standard practice for payment not to be made in cash, with the distributor often being granted payment terms. However, between the time of delivery and the actual payment, the distributor may become subject to insolvency proceedings, which, pursuant to Book Five of the Moroccan Commercial Code, may hinder the payment of the price or certain claims.

In these circumstances, it may be preferable for the supplier to recover their goods and terminate the distribution agreement, as such agreements often stipulate that non-payment of the price of the goods constitutes grounds for termination. Such recovery is possible provided that the termination takes effect before the commencement of administration or winding-up proceedings.

However, where the distributor is subject to safeguard, reorganisation or compulsory liquidation proceedings, the supplier's request to terminate the contract is precluded by Article 686 of Law No. 73-17 amending Book Five of the Moroccan Commercial Code³⁵, which prohibits and suspends all legal proceedings brought by any creditor whose claim predates the judgment commencing one of these three proceedings.

In this regard, the supplier may be prevented from seeking payment of its claims arising prior to the commencement of these proceedings, particularly following the issuance of a judgment commencing one of these three proceedings relating to the resolution of corporate difficulties. This

judgement imposes a prohibition on the payment of claims arising prior to the commencement of these proceedings, in accordance with Article 690 of Book 5 of the Moroccan Commercial Code.

Therefore, to circumvent these legal provisions, the supplier must avoid finding themselves in the position of a mere unpaid creditor by including a retention-of-title clause. This clause ensures that, in the event of the distributor's default, the supplier is regarded as the owner entitled to take legal action to reclaim their goods, thereby providing a guarantee against non-payment.

However, the retention-of-title clause is not particularly well suited to transactions involving goods intended for rapid resale³⁶, such as the distribution of perishable foodstuffs.

In short, the transfer of ownership of the goods sold will take place after full payment of the sale price, in accordance with the retention of title clause included in the distribution contract. However, outside the corporate insolvency proceedings and within the meaning of Article 582 of DOC³⁷, where the distributor has no payment deadline, failure to pay the price entitles the supplier, as the seller, to reclaim the movable goods that have already been delivered to the distributor and to prohibit the distributor from selling those goods in respect of which payment is in arrears, by means of an action for recovery; it should be noted that, under Moroccan DOC, such an action is not admissible after 15 days from the delivery of the goods sold to the purchaser.

2. The personal guarantee of a company director

Where the distributor operates as a legal entity, the latter is solely legally liable for the contractual obligations; the company director or principal partner cannot be sued by the supplier against their personal assets to secure payment of the debts.

Therefore, to remedy this situation and obtain an additional guarantee of payment for its supplies, the supplier very frequently requires a personal guarantee from the company

³⁴ Sophie Bienenstock and Maxime Charreire. Unfair Terms and Rules on the Allocation of Legal Costs. *Revue économique*, Vol. 71, No. 3, May 2020, pp. 503–526.

³⁵ Dahir No. 1-18-26 of 19 April 2018 promulgating Law No. 73-17 repealing and replacing Book V of Law No. 15-95 constituting the Commercial Code relating to corporate difficulties.

³⁶ Martine Behar-Touchais and G. Virassamy. *Op. cit.*, p. 238.

³⁷ Article 582 of the DOC, a seller who has not **granted a payment period** may, in the event of non-payment of the price, reclaim the movable property held by the buyer and prohibit the buyer from selling such property that is the subject of the non-payment, by bringing an action for reclaiming the property, bearing in mind that such an action is not admissible after 15 days from the delivery of the sold property to the buyer.

director, who undertakes to pay the contractual debts of the distribution company he or she manages.

This guarantee is, by its nature, a civil contract whereby a person undertakes to pay the debtor's obligation to the creditor, in accordance with Article 1117 of the Civil Code.

In reality, I would say that the protection afforded to suppliers against non-payment remains inadequate, but the only truly effective means of ensuring such protection are the **right of retention** (Article 291 of the **DOC**) or the right to retain possession of the debtor's property until the debts are settled, and the threat of expelling the defaulting distributor from the network, through termination or non-renewal of their contract, which is regarded as a business asset or a component of their estate.

Conclusion

The distribution contract is entered into between a supplier and a distributor to comply with the supplier's network requirements for the marketing of products. It aims to organise sales which are not themselves contracts of sale. This contract is not included in the official catalogue of Moroccan contract law, which limits the supplier's protection regarding the performance of contracts concluded with its distributors under the principle of freedom of contract. This places the supplier in a situation where it must constantly seek mechanisms to protect its financial and non-financial interests.

Due to the lack of codification of distribution law, an economic imbalance persists in the contractual relations between the supplier and the distributor, which calls for legislative intervention to establish a legal framework for distribution contracts, enabling the reciprocal protection of the contracting parties, who regard themselves as both creditors and debtors within the context of their commercial relationship and the performance of their product distribution contract.

In line with European and French legislation, competition law in Morocco — which prohibits cartels and abuses of a dominant position — provides a framework for distribution contracts. However, the protection afforded to the supplier is limited, which highlights the need to establish a specific legal framework for distribution contracts, rather than leaving the supplier or manufacturer constantly seeking protective mechanisms for their commercial relationships, whilst remaining subject to contractual freedom.

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