In the matter of an Arbitration under the
Rules of Arbitration of the
Arbitration Institute of Stockholm Chamber of Commerce

FINAL AWARD

Made on 3 October 2022
The seat of arbitration is Stockholm, Sweden

SCC Arbitration V 2021/110

Claimant

Mr. Fernando Pérez Luis
FPL MOBILITY
("**Mr. Pérez**" or "**FPL**")

Claimant's counsel

[redacted]
Antonio Delgado
[redacted]

Respondent

Permobil AB
("**Permobil**")

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Arbitral Tribunal

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agreed information or documentation. Insofar the lack of such documentation or information is unsatisfactory to FPL and has failed to provide FPL with the expected outcome, is immaterial to the issue of the alleged non-compliance. FPL's assertions that the relevant documentation or information exists is merely speculative. Permobil has therefore been in compliance with Procedural Order No. 17.

684. FPL's document requests no. 19 covers Purchase Orders received by Permobil from Permobil Spain. Notwithstanding that Permobil did not object to FPL's request and provided FPL with 61 documents FPL seems to be of the view that the documents are unsatisfactory to FPL's case. Worth mentioning is that Permobil Spain only recently commenced its business operations which is one of the reasons why there may not be more documentation to provide to FPL. The fact that some of the Purchase Orders already were previously submitted to FPL is unrelated to the question whether Permobil has complied with the request. Permobil has therefore been in compliance with Procedural Order No. 19.

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VIII AWARD

685. After having considered the Parties' respective arguments in full, the Sole Arbitrator has decided upon the dispute as follows.

VIII.1 Key Issues at Dispute

686. The allegations and arguments of the Parties submitted during the proceedings have been somewhat imprecise and intertwined. The Claimant has invoked several issues that it considers have entailed a breach of the Distributorship Contract, yet the relief sought requests for an overall assessment of whether a breach has taken place or not.

687. The Respondent has, to a large extent, not disputed the actual events but argued that none constitutes a breach of contract. As regards the termination of the Distributorship Contract, the argumentation is similarly multifaceted. The Claimant argues that the Distributorship Contract was in fact repudiated by the Respondent due to the actions taken in May 2021 but at the same time stated in its Request for Arbitration dated 17 August 2021 that with the same the Claimant terminated the Contract with immediate effect. Furthermore, the Respondent had terminated the Contract with 12-months' notice on 3 August 2021.

688. The Sole Arbitrator has, however, identified the following key questions that need to be resolved in the dispute at hand:

1. Did Permobil breach the Distributorship Contract by

   i. excluding Mr Pérez from the Part Trap, thereby *de facto* rescinding the Contract and not giving Mr Pérez 12-months' notice?

   ii. marketing and/or selling Products in the Territory covered by the Distributorship Contract?

   iii. attempting to solicit Mr Giraldo to work for Permobil Spain?

   iv. attacking Mr Pérez' reputation and business by spreading false rumours?

   v. offering predatory prices to orthopedic stores in breach of Spanish unfair competition rules?

   vi. depriving Mr Pérez of his right to a 12-month period free from competition as per Article 8 of the Distributorship Contract?

2. If Permobil breached the Distributorship Contract, was the breach material?

3. Did Permobil breach the Emergency Arbitrator's Order?

4. Was Mr Pérez' recission of the Distributorship Contract with the Request for Arbitration valid?

5. When did the Distributorship Contract end?

6. If Permobil breached the Distributorship Contract, did the breach cause damage to Mr Pérez, and if so, what is the amount of compensable damage?

VIII.2 Did Permobil breach the Distributorship Contract?

VIII.2.1 Introduction

689. As noted, the Claimant has invoked several individual actions of the Respondent that, in the Claimant's view, constitute breaches of the provisions of the Distributorship Contract. The core of the Claimant's arguments is, however, that the Respondent unjustifiably and without informing the Claimant, breached the Claimant's exclusive distributorship rights by taking over the Claimant's business to its newly established Spanish affiliate, Permobil Spain.

690. The Claimant also argues that the Respondent's actions were against its duty of loyalty. According to the Claimant, in Swedish and Nordic law, the duty of loyalty constitutes a principle of contract law requiring the parties to consider or even care for the interests of the counterparty. In commercial cooperation contracts, such as long-term distribution agreements, the requirements of loyal behaviour are high and in the case of the Distributorship Contract, Permobil's duty of loyalty is especially high due to its stronger bargaining position.

691. The Respondent argues that the duty of loyalty under Swedish law is a principle which does not create any rights or obligations by itself. The principle of loyalty alone cannot be applied to certain factual circumstances with any particular legal consequence. Instead, the duty of loyalty is a principle which is used to construe or interpret law and/or contractual conditions, if needed. Its primary function is to supplement the contract by signifying legitimate interests behind certain rules. Thus, when the Claimant invokes certain factual circumstances and labels them as "breach of the principle of loyalty" this does not in the Respondent's view entail any specific legal consequence.

692. The Respondent admits that the duty of loyalty principle may come into play in long-term agreements when the obligations therein need to be defined or interpreted. However, in this specific case, the Claimant is simply stacking factual circumstances on each other without tying them to any specific provision in the Distributorship Contract.

693. The Respondent further notes that the duty of loyalty principle does not interfere with rational business decisions that may or may not harm the other party to the agreement.

694. The Sole Arbitrator agrees in general with the explanations of the Respondent as to the contents of the duty of loyalty. The Sole Arbitrator does not, however, understand the Claimant's claim to be that specific remedies or consequences should be attached to the claims on breach of duty of loyalty except that in assessing potential damages, the Sole Arbitrator should consider that Permobil has acted in a manner which is incompatible with the duty of loyalty under the Distributorship Contract. Instead, the Claimant has invoked the duty of loyalty as a parallel and concurrent obligation to those specifically provided for in the Distributorship Agreement.

695. Accordingly, when considering the specific breaches alleged by the Claimant and discussed in sections VIII.2.2 to VIII.2.7 below, the Sole Arbitrator has also taken into account the general principle of duty of loyalty.

VIII.2.2 Claimant's Orders and the Part Trap System

696. According to the Claimant, the first indication of Permobil taking over the Claimant's business was in May 2021, when the Respondent cut off the Claimant from the Respondent's online platform for the placing of orders, i.e. the Part Trap system, and subsequently informed the Claimant via e-mail of 24 May 2021 that in the future, all orders should processed by Permobil Spain and the Claimant's activity should be limited to the supply of warranty parts.

697. The said e-mail, sent by Mr Miguel Ibarra, undersigned as the Country Manager of sales in Spain, read in relevant parts as follows:[9]

> "*As you may know, Permobil Spain started direct activities in the Spanish market a few weeks ago.*
>
> *For this reason, any commercial activity carried out in this territory must be processed by our Customer Service Department and, for this purpose, the customer must be registered in our customer database. At this time, FPL is not included in our customer database and therefore we are unable to process any orders placed by FPL, either internationally or locally.*
>
> *It is therefore necessary to register FPL in order to be able to transfer the orders placed internationally to our local structure. Otherwise, unfortunately, these orders will remain pending.*
>
> *Please fill in the attached form with the data included on it, and send it to Rosario Santos (copied in this email), so that we can proceed with the processing of these pending orders.*
>
> *Likewise, as I understand you discussed with Permobil at the time, FPL's activity should be limited to the supply of warranty parts for wheelchairs sold in those cases where this is required.*
>
> *As there are currently some orders that need to be transferred internationally, we will supply these orders, but from now on we will only supply the orders corresponding to the above-mentioned warranties.*"

698. The Respondent does not deny that the Claimant's access to Part Trap was cut off but further argues that this was done solely because Permobil Spain was implementing a new ERP system and had no access to Part Trap. Since the orders were to be consolidated to Permobil Spain, the Claimant was to use manual order forms as also provided by Article 4 of the Distributorship Contract.

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[9] Exhibit C-7.

699. Article 4 reads as follows:

> "*The Distributor shall order the Products by Permobil Part Trap System or by using given order forms.*"

700. The Claimant has explained that during the Parties' cooperation it had used a manual order form only twice for the purpose of ordering discontinued wheelchairs which did not appear on Part Trap. The Respondent has not denied that Part Trap was the means used by the Claimant to place its orders.

701. There is no argument or evidence that the change in the order procedure from Part Trap to manual orders was communicated to the Claimant beforehand. In fact, the Claimant had approached the Respondent on 14 May 2021 seeking confirmation of certain orders without receiving an answer.[10]

702. The Sole Arbitrator notes that the Contract is not clear as to whether there was an obligation on Claimant to use either the Part Trap or manual order forms as instructed by the Respondent, or if the choice was that of the Claimant. The Sole Arbitrator does not, however, find this question to be decisive. A mere instruction to use a different way of ordering would not, in the Sole Arbitrator's view, constitute a breach of the Contract, let alone a material one. Consequently, the Sole Arbitrator does not consider it necessary to decide upon whether the exclusion of the Claimant from Part Trap was (solely) due to Permobil Spain's transfer to an ERP system or not.

703. The Sole Arbitrator, however, understands the Claimant's case to be that the exclusion of the Claimant from the ordering system was only one practical aspect of the fact that it was the intention of the Respondent to cease supplying the Claimant with the Products apart from the ones already ordered, and instead take over the sales itself.

704. In plain reading of the e-mail of 24 May 2021, the message conveyed to the Claimant appears clear. Permobil Spain had started direct activities in Spain, which the Sole Arbitrator understands to mean direct sales, and the Claimant's business would in the future be limited to warranty issues. The plain wording of the e-mail of Mr Ibarra thus supports the Claimant's argument.

705. The Respondent argues that this particular part of the message, whereby the Claimant would be restricted to spare parts, was never authorized by the Respondent nor does it reflect the Respondent's view on the Distributorship Contract. The Respondent further states that Miguel Ibarra explained his intention regarding the wording in his witness statement

[10] Exhibit C-6.

during the emergency arbitration. Such witness statement is, however, not part of the case file of the current arbitration.

706. The Sole Arbitrator does not find the Respondent's explanation plausible. The e-mail was sent from an e-mail address of Permobil and signed by the Country Manager for sales in Spain. Had the said part of the e-mail been a mistake, the Respondent could have and should have rectified the issue, especially since the Claimant's counsel notified the Respondent on the same day (24 May 2021) of the Claimant's position.[11]

707. The Sole Arbitrator's view is further strengthened by the fact that, as per the witness testimonies of Mr Ouvry and Mr Österlund, the persons in charge at Permobil were not aware of the Contract with Mr Perez. Mr Österdahl told that the steering group that was preparing the launch of Permobil Spain thought that there was no valid Contract in force with the Claimant. Mr Österdahl also told that he instructed Mr Jose Moreno to discuss a six-months' notice period with the Claimant in October 2020. Mr Österdahl was himself not present in such discussions. Mr Österdahl could also not tell, when the persons in charge of establishing Permobil Spain became aware of the Contract.

708. Considering that at least in late 2020, Permobil did not consider that there was a valid Distributorship Contract with the Claimant, the Sole Arbitrator finds it likely that at the time of the e-mail of 24 May 2021, Mr Ibarra considered it possible to limit the Claimant's future operations to the supply of spare parts.

709. In conclusion, the Sole Arbitrator finds that the exclusion of the Claimant from the Part Trap system was, as such, not a material breach of contract, but that, considering especially the e-mail from Mr Ibarra and the testimony of Mr Österdahl, Permobil was in May 2021 at least planning on taking over the supply of the Products distributed by the Claimant in the Territory. Based on the evidence presented, it has, however, not been established to what extent the Claimant's orders were in fact hindered or prevented due to Part Trap not being available.

710. The Respondent also states that it informed Mr Pérez of its intention to set up distribution business with Permobil Spain and that Mr Pérez did not object to this. The Respondent refers to Exhibit R-22 and Mr Österdahl's testimony. The Claimant denies having been informed of Permobil's plans (or accepting them).

[11] Exhibit C16.

711. Exhibit R-22 is an e-mail from Mr Pérez dated 16 March 2020 to Mr Mauer from Permobil, and Mr Mauer's reply to the same.[12] In his e-mail, Mr Pérez explains as follows:

> "[…] *This past March 4, I had a meeting with José Luis Moreno, Business Development Manager from Permobil, who explained to me that Permobil planes to invest in Spain and had to do the feasibility study.*
>
> *I have provided all possible data but I think I did not want to see the reality of the Spanish market and intended to get the entire market which is formidable and I would also like it. If Permobil plans to invest in Spain, I am sure that I could achieve its objectives, because I have the confidence of the market, I am a reference in the country and always turn to me to get the most complicate solutions for the more special patients, therefore We have already started the road and the confidence of the Spanish market.*
>
> *If Permobil would like to invest in four vendors, demo material, exhibitions, customer training and support the expenses to do more aggressive work, I commit to getting the best figures in the market, we have everything in our favor.* […]
>
> *I present by business plan that I hope is attractive and I ask for a vote of confidence in the product.* […]"

712. Mr Mauer replied as follows:

> "*Dear Fernando,*
> *thanks for your mail and feedback. Currently we have business development manager (José Moreno) working for us in Spain who is evaluating the Spanish market. José has, or will be in contact with you and I will follow up with him. So I would appreciate if you could discus directly with him first.*
>
> *I hope this is ok.* […]"

713. The Sole Arbitrator agrees with the Claimant in that the e-mail exchange between Mr Pérez and Mr Mauer cannot be construed as the Claimant being aware of Permobil's plans to start direct sales in the Territory or to end the Claimant's distributorship. Quite the contrary, in his e-mail, Mr Pérez appears to be soliciting and looking forward to a larger business than before.

714. As regards Mr Österdahl's testimony, his understanding of what was discussed with Mr Pérez was based on his understanding of the discussions

[12] Exhibit R-22 also includes e-mails of Mr Österdahl and Mr Ouvry forwarding the e-mail chain within Permobil in September 2020.

between Mr Moreno[13] and Mr Pérez without any detailed information as to the actual contents of such discussions.

715. The Sole Arbitrator, therefore, concludes that Permobil did not inform the Claimant before the e-mail of 24 May 2021 that Permobil Spain will commence direct sales, or that the distributorship of the Claimant would be reduced or terminated. Nor did the Claimant agree to any such changes.

716. As per Article 1 of the Distributorship Agreement, the Parties "*shall not - through any act of omission to act – jeopardize the validity of any provision of this Agreement.*" The Sole Arbitrator considers that the actions of the Respondent in May 2021 were not in line with the Claimant's exclusive distributor rights set forth in the Contract and therefore not complying with the undertaking in Article 1.

717. The Sole Arbitrator, however, considers that in order to decide whether the e-mail of 24 May 2021 together with the exclusion of the Claimant from Part Trap constituted a *de facto* termination or recission of the Distributorship Contract, and thereby a material breach of the Contract, the subsequent and parallel events need to be considered as well.

VIII.2.3 Did Permobil market and/or sell Products in the Territory covered by the Distributorship Contract?

718. According to Article 1 of the Contract, the Claimant was granted "[…] the exclusive right to market and sell the products listed in Appendix 1 as well all accessories and spare parts thereto (hereinafter collectively referred to as "the Products" alt. the countries set forth in Appendix 1) (hereinafter referred to as "the Territory").

719. The Parties are in disagreement over (i) whether Permobil engaged in marketing and selling activities within the Territory during the validity of the Contract and (ii) which products were included in the Products as defined in the Contract, especially as regards the so-called M1 model.

720. According to the Claimant, Permobil started its marketing activities already in January 2021 without the knowledge of the Claimant and these marketing activities were targeted at the orthopedic stores that were the Claimant's clients. With reference to especially witness statements C-37 (Velasco) C-38 (Mieres), C-40 (Escanellas Vendrell), C-58 (Camarasa) and C-70 (Suarez) filed by the Claimant as well as quotes and purchase orders in Exhibits C117 to C149, the Claimant submits that in year 2021, Permobil conducted business with (at least) 17 of Mr Pérez's intermediaries out of a total number of 32 orthopedic stores, and that Permobil Spain registered in its CRM system (at least) 42.85% of Mr Pérez's clients.

[13] Mr Moreno did not appear as witness in the proceedings.

721. The Respondent denies this and argues that Permobil enjoys an extensive and vast network of stores and clinics with which it works and conducts business and that Permobil has had a presence in Spain for many years and has throughout this time worked with and been approached by many of the intermediaries that the Claimant worked with. According to the Respondent, its communication and dialogue with its business network in Spain did not constitute a violation of the Distributorship Contract as Permobil Spain was free to contact anyone Permobil Spain chose to contact in order to announce its presence in a certain area. The Respondent argues that it may be that the sales representatives of Permobil Spain e.g. shared a generic price list which included Products or that generic marketing material showing Products was handed to intermediaries. Promoting products and even promoting the Products can, according to the Respondent, never amount to a breach of the Distributorship Contract.

722. The Respondent further argues that Permobil Spain started its operations only in May/June 2021. Before that Permobil Spain announced its presence in Spain by, for example, e-mail correspondence and shop-visits, which in no way interfered with the Distributorship Contract, since Permobil Spain was free to market Permobil's brand and products, inter alia the M1-model and other products that were not Products as per the Contract. As per the Respondent, in the event Permobil did promote Permobil's brand or products during various events, this does not mean that the Products were marketed by Permobil in the Territory, since Permobil did not try to sell the Products to any intermediaries within the Territory of the Claimant.

723. The Respondent also denies having sold any Products in the Territory in 2021 before the Claimant's rescission of the Contract on 17 August 2021. Since the Respondent is of the view that the M1 model was not a Product and therefore not covered by the exclusivity of the Distributorship Contract, no Products were sold before the rescission. Seven orders were made for M1 before the rescission. All orders for Products during 2021 were made after the Claimant's rescission of Contract.

724. On the face of the evidence, the Sole Arbitrator finds it established that Permobil Spain was actively marketing its products also within the Territory starting from the beginning of 2021. In fact, the Respondent is not even disputing that certain marketing events and contacts with the clients of the Claimant took place. The Respondent's defence is that such marketing efforts did not breach the Contract as they were "generic" and did not result in any sales at least before the Claimant rescinded the Contract in August 2021.

725. The Sole Arbitrator does not agree with the Respondent.

726. Firstly, The Distributorship Contract does not limit the exclusive rights of the Claimant to selling the Products. It also includes the exclusive right to market the Products regardless of whether such marketing efforts result in sales or not.

727. Secondly, the contention that the marketing efforts taken by Permobil Spain would not have been targeted at generating sales for Permobil Spain directly, is not convincing considering the contents of Mr Ibarra's e-mail of 24 May 2021, the fact that Mr Barrera had informed orthopedic stores that were the Claimant's clients already in January 2021[14] and again in June 2021[15] that Permobil Spain would "land" in Spain in 2021 and the "*team had taken the streets*" as well as the fact that as per the witness statements referred to above, the clients of the Claimant understood Permobil Spain to market the Products previously sold by the Claimant.

728. The Sole Arbitrator, therefore, concludes that the marketing efforts of Permobil Spain taken at least before 17 August 2021 were in breach of the Distributorship Contract and also against Permobil's duty of loyalty towards the Claimant. The Sole Arbitrator will later discuss whether the actions after 17 August 2021 constituted a breach as well.

729. As to the Products that were covered by the Contract, the Respondent's view is that the so-called M1 model was not part of the Claimant's exclusive rights. According to the Respondent (and supported by e.g. Mr Barrera and Mr Österluns' testimonies) the M1 model was a novelty that did not replace any previous models included in the Claimant's Products, whereas the earlier additions to the Products had been updated models of the original models listed in Appendix 1 to the Contract. The Respondent argues that according to the Contract, adding any new products would have required a written amendment.

730. The Claimant submits that the M1 model was in fact a product that corresponded to the business plan of Mr Pérez suggested in his e-mail to Mr Mauer on 16 March 2021. According to the Claimant and as evidenced by Exhibit C-95, in an e-mail of 14 July 2020, Mr Medic from Permobil wrote to Mr Pérez and offered the M1 to the Claimant and provided him with purchase order forms. As per the Claimant, before 19 May 2021, Mr Pérez was able to customize the M1 and sell it in the Territory subject to his commercial judgment.

731. According to the Respondent, Exhibit C-95 is a piece of generic correspondence regarding the launch of M1 with an accompanying template order form and is thus completely silent on any alteration of the Distributorship Contract.

[14] Exhibit C-34.
[15] Exhibit C-33.

732. On the basis of Exhibit C-95 it has been established that at least in July 2020 Permobil was still considering that the M1 model would have been open for order by the Claimant, which suggests that it would have been included in the Products as per the Contract. The Sole Arbitrator also notes that the Respondent's argumentation on what was included in the Products, has been somewhat contradictory. In the Statement of Defence, the Respondent stated that "[a]*lthough updates of and variations of related Permobil wheelchair models have subsequently come to be distributed by FPL, only the products specified and defined as Products are subject to FPL's exclusive appointment under the Distributorship Contract"*, which the Sole Arbitrator understand to mean that Respondent was saying that the updates and variations were distributed by the Claimant, they were not part of his exclusivity. In the Rejoinder, the Respondent, however, noted that for the updates and variation, no written agreement was required but that they became part of the Products automatically.

733. The Sole Arbitrator concludes that on the basis of the evidence presented it is not possible to conclude with certainty whether the M1 model would have been covered by the exclusivity of the Claimant's Distributorship Contract or if it would have required an amendment to the list of covered Products. It seems clear however, that the Claimant would have, at least, been entitled to distribute also the M1 model.

734. The Sole Arbitrator does not, however, consider that the question of whether the M1 was a Product, as defined in the Contract, is of material relevance. As concluded above, already the marketing efforts of the Respondent constituted a breach of the Distributorship Contract and these marketing efforts were not limited to the M1 Model. Hence, the fact whether Permobil Spain managed to sell only M1 wheelchairs before 17 August 2021 does not affect the end conclusion. In addition, should the Sole Arbitrator consider that the Contract was still valid after 17 August 2021, then it is undisputed that Permobil Spain's sales also included Products.

VIII.2.4 Did Permobil attempt to solicit Mr Giraldo to work for Permobil Spain?

735. The Claimant contends that the Respondent breached the Contract also by attempting to hire Mr Giraldo, Mr Pérez' "right-hand man" since Mr Giraldo had technical expertise on Permobil's products. As per Mr Giraldo's witness statement (Exhibit C-39), he was first contacted by Bertrand Ouvry in November 2020 and by Mr Ibarra in February 2021, when Mr Ibarra contacted Mr Giraldo several times. This contact was aimed at "*moving forward in a collaboration agreement*" between Permobil Spain Newco and Mr Giraldo. The contacts, however, did not lead to anything.

736. The Respondent does not deny that Miguel Ibarra contacted Mr Giraldo in early 2021. According to the Respondent this was to ask him about his experience working with Permobil and the Products that the Claimant was distributing. Given his expertise and knowledge he was offered the opportunity to provide training courses to Permobil personnel, but he declined this offer.

737. The Respondent denies that the correspondence with Mr Giraldo amounts to a breach of the Distributorship Contract. According to the Respondent, Mr Giraldo approached Permobil Spain regarding a position with the company, but was never offered a one and any correspondence between Mr Giraldo and Bertrand Ouvry was only on an informal basis. The Respondent also notes that the Distributorship Contract does not contain any non-solicitation clause preventing Permobil from having conversations with Mr Giraldo.

738. The Sole Arbitrator agrees with the Respondent in that the Distributorship Contract does not contain a non-solicitation clause that would as such prohibit the Respondent from seeking to hire employees of the Claimant. Therefore, the contacts with Mr Giraldo do not, as such, constitute a breach of the Distributorship Contract.

739. The Sole Arbitrator, however, notes that the contacts with Mr Giraldo in November 2020 and February 2021 coincide with the establishment of Permobil Spain and the start of its operations. The fact that Permobil Spain endeavoured to hire a technician from the Claimant (or even if he was only contacted to give technical training to Permobil Spain) also supports the conclusion that it was the intention of Permobil Spain already in the beginning of 2021 to take over the direct sales of the Products without the notice period provided for in the Contract.

VIII.2.5 Did Permobil attack Mr Pérez' reputation and business by spreading false rumours?

740. The Claimant argues that the Respondent breached the Contract also by ruining Mr Pérez' reputation and goodwill. According to the Claimant, this was done by the having contacts with his business network of orthopedic stores, by informing his clients that he was no longer distributing the Products and by contacting CEAPAT (Centro de Referencia Estatal de Autonomía Personal y Ayudas Técnicas – Spanish Centre of Personal Autonomy and Assistive Technologies), telling them that Mr Pérez was no longer Permobil's distributor as he was retiring. The Claimant further argues that the Respondent has been gossiping about these arbitration proceedings with Mr Perez's business network. These actions, according to the Claimant have resulted in Mr Pérez suffering serious reputational damage and are in breach of Spanish unfair competition rules.

741. The Respondent denies acting in any way that would have harmed Mr Pérez' reputation.

742. According to the Respondent, in the event any comments were made by sales representatives to the effect that the orthopedic stores should not buy Products from the Claimant, this was not authorized by Permobil. If such comments were made, they were also very few and did not influence the business or reputation of the Claimant and did not amount to a breach of loyalty under Swedish law (in the event Permobil would be responsible for any unauthorized comments by Permobil Spain's sales representatives). The same applies for all the breaches alleged by the Claimant – these would not have harmed Mr Pérez' reputation.

743. The Sole Arbitrator notes that whilst a unilateral termination of a distributorship -or any long-term contractual relationship - is in general likely to cause discussions that may not be considered as positive, in the case at hand, the evidence of any intentionally harmful information being spread by the Respondent is lacking. It is understandable that Mr Pérez feels his reputation suffered from Permobil Spain taking over his business under the Distributorship Contract, but this does not, in the Sole Arbitrator's view, amount to a specific breach of contract.

744. The Sole Arbitrator therefore concludes that it has not been proven that the Respondent attacked Mr Pérez' reputation and business by spreading false rumours.

VIII.2.6 Did Permobil offer predatory prices to orthopedic stores in breach of Spanish unfair competition rules?

745. The Claimant argues that the Respondent engaged in "predatory pricing" as regards the Products. According to the Claimant, Permobil Spain offered prices to an orthopedic store in the Territory, Servi Rodes, for models F3, F5, M3, M5 and M1 and offered discounts ranging between 30 % and 35 % and these prices for example gave a price for a tilt at EUR 0 in the different models of wheelchair offered by Permobil, whereas for the Claimant tilt is normally priced at EUR 1.990, increasing the price of Models F3, F5, M3 and M5 by almost EUR 2.000. The Claimant claims that similarly, the pricing of the M1 (as evidenced by Exhibit C-95) to the Claimant was such that the Claimant could not have competed with the prices given by Permobil Spain to the orthopedic stores.

746. The Claimant argues that Permobil Spain's pricing is in breach of Spanish unfair competition rules because it has been carried out in bad faith and involves the use of pricing below cost. Offering tilt to consumers at no cost is a clear example of predatory pricing that is having the effect of severely damaging the reputation of the Claimant in the Spanish market.

747. The Respondent disputes that Permobil willingly or intentionally engaged in "predatory pricing". The M1 model was never sold based on the list price set out in Exhibit C-95. The M1 is unfit for distribution by external distributors since the margins are low and the prices are set according to the market, in this case of M1, the budget segment. The Respondent further argues that since the M1 was not a Product and not exclusive to the Claimant, Permobil and Permobil Spain were free to market and sell M1 in the Territory during the term of the Distributorship Contract.

748. The Respondent notes that the Distributorship Contract is governed by Swedish law and not by Spanish law and holds that this dispute shall not be decided directly or indirectly by applying Spanish law. If Spanish law would be applied to this dispute, it is rebutted by the Respondent that a breach of Spanish law directly or indirectly entails a breach of the Distributorship Contract.

749. In addition, the Respondent argues that Spanish legislation to which the Claimant refers to is not even applicable since it does not apply in B2B relations. Further, Permobil did not engage in predatory pricing as the law stands in Spain, i.e. it is disputed that any action by Permobil Spain meet the prerequisites for "predatory pricing" under Spanish law. Permobil has never offered any prices - predatory or non-predatory - in Spain.

750. Respondent also disputes that offering different prices (higher or lower prices) on Products to intermediaries or dealers in Spain than the prices FPL offers the customers in the Territory is a breach of the Distributorship Contract. It is disputed that it follows from the Distributorship Contract that Permobil or its subsidiary may not run its business regarding the Products as it decides.

751. The Sole Arbitrator notes that, as stated by the Respondent, the Distributorship Contract is governed by the laws of Sweden. Accordingly, the actions of the Respondent must be assessed on the basis of the Contract and applicable Swedish law. No claims or evidence has been submitted on the pricing of the Respondent being against Swedish law, nor has the Claimant identified any specific provision in the Contract that would have been breached by the alleged predatory pricing.

752. The Sole Arbitrator understands that the allegations on predatory pricing fall under the Claimant's general claim of the Respondent breaching the Contract and its duty of loyalty, but concludes that, as such, the pricing of the Respondent has not been proven to have breached the Distributorship Contract or the applicable law.

753. The Sole Arbitrator notes, however, that to the extent the Respondent marketed or sold the Products during the validity of the Contract, such marketing or selling is a breach of contract regardless of the pricing used by Permobil Spain.

VIII.2.7 Did Permobil deprive Mr Pérez of his right to a 12-month period free from competition as per Article 8 of the Distributorship Contract?

754. Article 8 provided that

> "*The Distributor may freely appoint sub distributors, agents or other intermediaries for the marketing and sales of the Products in the Territory.*
>
> *During the term of this Agreement and for a period of 12 months after the termination thereof, the Supplier shall not retain the Distributor's agents or other intermediaries for the marketing or sale of the Products.*"

755. According to the Claimant, Article 8 prohibits Permobil from retaining Mr Pérez's network of orthopedic stores for the marketing or sale of the Products for a period of 12 months after the effective termination of the Distributorship Contract. The Claimant argues that the purpose of Article 8 is to grant Mr Pérez a period with no interference to allow him to reposition himself in the market. The Claimant further argues that Article 8 required Permobil to be transparent with Mr Pérez and to communicate to him in accordance with its duty of loyalty that it would launch a Spanish subsidiary 12-months after effective termination, allowing him sufficient time to plan and move his business into other brands, which Permobil did not.

756. The Respondent argues that orthopedic stores in Spain are not intermediaries in the meaning of clause 8 of the Distributorship Contract. The Respondent disputes that the Claimant "*appointed*" any intermediaries that were orthopedic stores or that the Respondent ever "*retained*" any-one for the marketing and sales of Products in the Territory. According to the Respondent to "retain" means to "engage" or "assign someone to do something". In this context, Permobil never engaged any orthopedic store "*for the marketing and sale*".

757. According to the Respondent, already the wording speaks against an interpretation according to which an orthopedic store can be considered an intermediary. Furthermore, the Respondent holds that an intermediary under Swedish law (Sw: förmedlare) is someone who is assigned by one party in a contemplated transaction with a third party. The Respondent disputes that the Claimant ever assigned any Spanish orthopedic store to seek to close any deal between the Claimant and a third party. In relation to the Claimant, the orthopedic store is a buyer, and the Claimant is a seller. Thus, an orthopedic store is not an intermediary in any transaction between the Claimant and a third party, but a counter party in a sales transaction. The Respondent also disputes that an orthopedic store would be a sub-distributor in the sense of Article 8.

758. According to the Respondent, it would be illogical to regard every orthopedic store the Claimant ever engaged with for 10 years as "intermediaries" from a general commercial perspective. This would effectively mean that Permobil would not be able to sell Products in the Territory to the benefit of no-one and especially not for patients and users of Permobil's products during 12 months. This, according to the Respondent, cannot be regarded as the purpose of Article 8.

759. The Respondent further argues that Article 8 is not applicable following a rescission of the Contract, as only a termination without cause, pursuant to clause 22 entails such a 12 months' period free from competition. The Respondent also disputes that the Claimant was deprived of any such period or that the Distributorship Contract was rescinded on 19 May 2021.

760. In addition to the Respondent disputing that a rescission took place in May 2021, the Claimant, according to the Respondent, never accepted any rescission. The Claimant cannot thus claim a right to a notice period since no such a period was triggered. As per the Respondent, Claimant continued to place orders under the Distributorship Contract and confirmed in December 2021 that the contract expires in August 2022. Thus, any breach of clause 8 was remedied and cannot be invoked as a ground for a rescission of the Distributorship Contract.

761. In the event the Distributorship Contract is deemed to have been "de facto terminated" on 19 May 2021, the Respondent disputes that the Claimant was not given a 12-month period free from competition in the meaning of Article 8. Permobil did not retain the Claimant's agents or intermediaries for the sale or marketing of Products. Neither did Permobil apply "predatory pricing" in any legally relevant sense. Nor did Permobil damage the Claimant's reputation.

762. The Sole Arbitrator notes that no evidence has been put forward as regards the Parties' purpose in including Article 8 in the Distributorship Contract. The wording of the said Article leaves room for interpretation as to what is meant with "intermediaries" or "sub-distributors". Even the Respondent has used the word "intermediaries" when discussing the orthopedic stores in its submissions.

763. The Sole Arbitrator also notes that the sales model, i.e. the supply chain of wheelchairs in Spain appears undisputed. It was known to both Parties, that the Claimant's sales are done to orthopedic stores, who in turn sell the wheelchairs to the end customers. It was also known that this is the manner, in which wheelchairs must be sold in Spain.

764. If the standpoint of the Claimant was accepted, this would *de facto* mean that Permobil would not be allowed to conduct any sales of the Products in the Territory for a period of 12 months after termination (or alternatively that this would be allowed only through another distributor, which in the Sole

Arbitrator's view would not be logical). Absent any contrary evidence, the Sole Arbitrator finds is unlikely, that this would have been the intention of the Parties.

765. The plain reading of the wording of Article 8 results in the same conclusion. The orthopedic stores are not appointed by the Claimant to sell and market the Products, but instead are the buyer, as argued by the Respondent.

766. The Sole Arbitrator therefore concludes that Article 8 of the Distributorship Contract is not applicable in this case, as the orthopedic stores are not intermediaries or sub-distributors in the sense of Article 8. Hence, it is not necessary to rule on whether the clause would be applicable only when the Contract was terminated in accordance with Article 22 of the Contract.

VIII.3 If Permobil breached the Distributorship Contract, was the breach material?

767. The Respondent argues that under Swedish law, an agreement can only be rescinded due to breach of contract if the breach is material. The burden of proof for the circumstances that according to Claimant made the breach material rests on the Claimant. The Respondent further argues that under Swedish law, the concept of materiality is assessed on the whole, considering factors such as what kind of obligation is in question, consequences for the aggrieved party, if materiality of the breach in point was foreseeable for the breaching party, to what extent the breach affects the trust between the parties, if any less severe consequence is available and to what extent a rescission is sincere, or in fact based on other irrelevant grounds, are relevant for the assessment.

768. The Claimant has not disputed that a breach needs to be material in order to allow recission but has argued that the breaches of the Respondent are material.

769. The Respondent argues that even if any of the alleged breached were found to have taken place, such breach was never material and could thus not give rise to a right to terminate the Distributorship Contract. Further, the Respondent did not realize and ought not have realized that any of the issues invoked by the Claimant would entail a breach of the Distributorship Contract, or that this would be material to the Claimant as this was not visible to the Respondent.

770. The Sole Arbitrator has above concluded that the Respondent breached the Distributorship Contract when it commenced marketing activities in the Claimant's Territory in the beginning of 2021. Although the Sole Arbitrator has not found that (i) the exclusion of the Claimant from Part Trap, (ii) the contacts with Mr Giraldo, (iii) the events related to Mr Pérez reputation or (iv) the pricing of the Respondent, as such, constituted specific breaches of the Distributorship Contract, all the mentioned circumstances are in

connection with and related to the fact that it was the intention of the Respondent to cease the distributorship of the Claimant and commence direct sales activities through Permobil Spain during the first half of 2021. This constituted a breach of the Distributorship Contract. Still, it was only on 3 August 2021 and after the Emergency Arbitration that the Respondent gave a notice of termination to the Claimant.

771. Hence, the Sole Arbitrator considers that the conduct of the Respondent needs to be assessed as a whole, when determining whether the actions of the Respondent materially breached the Distributorship Contract.

772. What is considered material, needs to be assessed on a case-by-case basis. The Sole Arbitrator accepts the Respondent's notion that materiality is assessed on the whole, considering issues such as the nature of the obligation breached, the consequences for the aggrieved party, if the materiality of the breach was or should have been foreseeable for the breaching party etc.

773. Generally, a breach that affects the primary obligations and rights of a party may be considered material. In other words, a breach has been described as material if it causes such harm to the other contracting party that the injured party loses, in substantial parts, what he was expecting to receive from the contract.

774. In the case at hand, the main right given to the Claimant with the Distributorship Contract was the right to exclusively market and sell the Products in the Territory. The purpose of the Contract was that the Claimant would purchase the Products from the Respondent with a discount and sell the same with a margin to the orthopedical stores in the Territory in Spain without interference from other sellers of the same Products.

775. The Sole Arbitrator has accepted the Claimant's claim that the Respondent's plan was to take over the sales of the Products in the Territory through Permobil Spain, and that the Respondent did so without informing the Claimant and without first terminating the Contract in accordance with its provisions. The Sole Arbitrator considers that the Respondent's actions go against the very purpose of the Distributorship Contract, thereby depriving the Claimant of the core of its receivable from the Contract.

776. Contrary to the Respondent's arguments, the Sole Arbitrator also considers that the Respondent should have understood and foreseen that breaching the exclusive right of the Claimant to market and sell the Products would have a material effect on the Claimant.

777. Consequently, the Sole Arbitrator considers that the breach by the Respondent was material, entitling the Claimant to terminate the Contract with immediate effect.

VIII.4 Did Permobil breach the Emergency Arbitrator's Order?

778. The Claimant submits that notwithstanding the EA Order of 19 of July 2021, Permobil (i) resisted compliance and then (ii) faked compliance to avoid abiding by the EA Order.

779. According to the Claimant, the following actions taken by the Respondent after 19 July 2021 were against the EA Order:

(i) On 26 August 2021, Permobil Spain was selling a K300 wheelchair to the orthopedic store Mueve y Accede, one of Mr Pérez's clients in Barcelona (inside the Territory).

(ii) On 22 September 2021, Permobil Spain offered various models to the Valencia (inside the Territory) orthopedic store Servi Rodes.

(iii) On 13 October 2021, Permobil Spain sent to Mediatric, another of Mr Pérez's clients in Barcelona (inside the Territory) an e-mail offering to carry out a demo of a K300.

(iv) On 24 October 2021, Permobil Spain sent an e-mail to Ortopedia Técnica Farmacia La Torreta in Alicante (inside the Territory) offering the M1 and the "remaining wheelchair range" at the same prices as Servi Rodes.

(v) Purchase orders filled-in by orthopedic stores show that since August 2021, Permobil has marketed in the Territory 16 M1, 6 M3 Corpus, 6 F3 Corpus, 3 F5 Corpus, 1 F5 Corpus VS and 2 K300.

(vi) After the EA Order, (i) at no point Permobil granted immediate access to Mr Pérez to Part Trap and (ii) at no point has Permobil immediately served pending orders placed by Mr Pérez.

780. According to the Claimant Permobil faked compliance with the EA Order and obstructed the processing of the Claimant's orders and quotations by firstly changing the quoted prices without notice and secondly disrupting access to Part Trap.

781. The Respodent's position is that since the Claimant was granted an interim order according to which the Claimant was to be reconnected to Part Trap and Permobil was prohibited from marketing and selling Products in the Territory, any breach that potentially may have occurred, was cured.

782. The Respondent also argues that it has fully complied with the emergency arbitrator's order of 19 July 2021, including giving immediate access to Part Trap, which according to the Respondent is evidenced by Exhibit C-23 and Exhibit R-26.

783. Furthermore, according to the Respondent, the effect of the EA Order lapsed when the Claimant rescinded the Distributorship Contract, since Permobil cannot be held accountable to abide by an order to comply with a contract under which no obligations exist. The consequence of a rescission is that the parties' obligations under the contract cease. Thus, as per 17 August 2021, the Claimant had no further claims against Permobil in contract for performance of any kind and the EA Order became obsolete. It was, therefore, impossible for Permobil to have breached the Distributorship Contract by marketing or selling Products in the Territory after 17 August 2021.,

784. As to the Respondent's argument that the EA Order "cured" any possible breaches, the Sole Arbitrator disagrees, if the Respondent is suggesting that the breaches before the EA Order would have also been cured. The purpose of an interim relief is not to cure the underlying breach nor to provide a permanent remedy for the same. However, if the Respondent is merely suggesting, that if and to the extent it complied with the EA Order, the breach no longer continued, then the Sole Arbitrator agrees.

785. There are two distinct elements in the Claimant's claim of non-compliance with the EA Order. First, that the Respondent did not truly give the Claimant access to Part Trap, and second, that the Respondent continued to market and sell the Products after the EA Order.

786. As regards the access to the Part Trap, the Sole Arbitrator has no reason to question either the description of the events by Mr Pérez or the witness statement of Mr Tinnerholm (Exhibit R-26). It appears that there were certain issues with the access, as well as use of the system, but the evidence is inconclusive as to what was the cause of these issues or if there was undue delay in correcting such issues. In any event, the Sole Arbitrator finds that it has not been proven that the Respondent would have intentionally obstructed the Claimant's access to Part Trap after the EA Order.

787. With regard to the marketing and selling the Products, the Respondent does not deny doing so after 17 August 2021, when the Claimant informed that it is rescinding the Contract. The events invoked by the Claimant post-date 17 August 2021, although the Claimant implies that it is not aware of all the activities the Respondent took after the EA Order.

788. If it was considered that the Claimant rescinded the Contract on 17 August 2021, the Sole Arbitrator would agree with the Respondent in that the order became obsolete. If and when there was no Contract in force, any interim measures upholding obligations under the Contract would equally no longer be in force. However, if the Contract remained in force after 17 August 2021, any marketing and selling efforts of the Products in the Territory during the validity of the Contract would have been against the EA Order. As is concluded in the following sections VIII.5 and VIII.6, it is, however,

the Sole Arbitrator's conclusion that the Contract was rescinded only on 28 December 2021. Accordingly, the marketing and sales of the Products up until 28 December 2021 were in breach of the EA Order.

VIII.5 Was Mr Pérez' recission of the Distributorship Contract with the Request for Arbitration valid?

789. According to the clarification given by the Claimant in the oral hearing, the Claimant is seeking confirmation that the recission of the Contract that the Claimant made in the Request for Arbitration is lawful. However, such confirmation is not included in the relief sought by the Claimant. The Sole Arbitrator understands the Claimant to nevertheless request that the Sole Arbitrator takes a stand as to whether the Claimant was entitled to rescind the Contract with immediate effect due to the breaches that the Respondent has in, the Claimant's view, conducted.

790. The Sole Arbitrator has above concluded that the actions of the Respondent constituted a material breach of the Distributorship Contract and that these actions were commenced in the beginning of 2021 and came to the knowledge of the Claimant in May 2021, mainly by the e-mail of Mr Ibarra on 24 May 2021.

791. The Respondent has not disputed that in a situation, where the other contracting party has materially breached the contract, as a starting point the injured party has, under Swedish law, the right to terminate the Contract. The Sole Arbitrator agrees. A material breach, such as the one confirmed by the Sole Arbitrator in this case, entitles the injured party to terminate the Contract with immediate effect.

792. Considering especially the fact that the Respondent's breach continued regardless of the EA Order, as confirmed above, it would have not been reasonable that the Claimant was tied to the Contract for the notice period.

793. The Respondent has further accepted (under reservation) the ending of the Contract due to the recission by the Claimant.

794. The Sole Arbitrator thus concludes that the Claimant has justifiably rescinded the Contract with its Request for Arbitration dated 12 August 2021. However, as explained in the following section, this recission was only notified properly to the Respondent on 28 December 2021.

VIII.6 When did the Distributorship Contract end?

795. As noted in the previous section, in the Request for Arbitration dated 12 August 2021, the Claimant submitted a request for a relief, whereby it would be declared that the Contract was terminated with cause.

796. In its Answer to the Request for Arbitration, dated 17 September 2021 the Respondent stated in this respect as follows:

> "*As far as Permobil understands, FPL claims that Permobil breached the Distributorship Contract and that the Distributorship Contract therefore was or is to be terminated with immediate effect. Permobil did not receive any notice of termination from FPL. In the event FPL suggests that a third party, e.g. an arbitrator, shall declare the Distributorship Contract terminated, this is not possible under Swedish law. If FPL means that Permobil de facto termination the Distributorship Contract with immediate effect during 2021, this is disputed. Permobil reserves all rights to terminate the Distributorship Contract for cause with immediate effect once FPL explains the basis for the declarations sought in this arbitration.*"

797. Based on the Respondent's Answer, on 17 September 2021 it was not clear for the Respondent if the Claimant had terminated the Contract with immediate effect or not.

798. In the Statement of Claim, dated 28 December 2021, the Claimant clarified the situation as follows:

> "*In submitting his Request for Arbitration, Mr Pérez terminated the Distributorship Contract with immediate effect and requested the Tribunal to award damages. The Request for Arbitration clearly states in para. 73 that Mr. Pérez's intention is to terminate the contract for cause due to Permobil's breaches thereof.*
>
> *The Request for Arbitration is crystal clear and constitutes a valid notice of a material breach of contract under Swedish law. In case NJA 1992 s. 728, the Swedish Supreme Court found that there is no need for an explicit notification when it is clear to the parties that the agreement cannot be fulfilled.*
>
> *Therefore, under this decision, the Request for Arbitration constitutes sufficient notice of termination.*"

799. In its Statement of Defence, the Respondent stated the following:

> "*While it is disputed that the filing of a Request for Arbitration amounts to proper notice of claim under Swedish law, Permobil accepts, under protest and with all rights reserved, that the Distributorship Contract ended on 17 August 2021 or at the latest in any event on 28 December 2021 when FPL explained that the Distributorship Contract was terminated with immediate effect on 17 August 2021.*
>
> *Since FPL rescinded the Distributorship Contract, this means that the parties' respective obligations and performances under the Distributorship Contract ceased as of 17 August 2021. Permobil's deliveries of orders by FPL after*

that point in time were solely due to the fact that FPL's position was made clear only by the Statement of Claim submitted on 28 December 2021."

800. The Claimant's recission of the Contract was preceded by the Respondent's notice of termination dated 3 August 2021. The Respondent's notice was given with 12 months' notice period in accordance with Article 22 of the Contract. Hence, according to the Respondent's notice, the Contract would have ended on 3 August 2022.

801. However, since the Sole Arbitrator has in the previous section confirmed that the recission of the Contract by the Respondent was justified, the Contract was immediately terminated at the moment when the Respondent was notified of the Claimant's recission.

802. As described above, on the basis of the Request for Arbitration, the Respondent was not clear as to the meaning of the declaration the Claimant was seeking. It was only with the Statement of Claim dated 28 December 2021 that the recission of the Contract became clear to the Respondent.

803. Consequently, the Sole Arbitrator concludes that the Contract was terminated with immediate effect on 28 December 2021.

VIII.7 If Permobil breached the Distributorship Contract, did the breach cause damage to Mr Pérez, and if so, what is the amount of compensable damage?

VIII.7.1 Basis of the damage claims

804. The Claimant has submitted two alternative basis and calculations for the damage it argues has been caused by the Respondent's breach. The first being based on general principles of Swedish law and the second on the application of the Swedish Act on Commercial Agents by analogy, in case the Sole Arbitrator would conclude that the general principles of Swedish law would not result in the Respondent's liability.

805. The Respondent has denied that the application of the Swedish Act on Commercial Agents by analogy is possible in this case.

806. The Sole Arbitrator notes that the direct applicability of the Act on Commercial Agents is limited to agency relationships where a principal has authorised an independent commercial intermediary to enter commitments on a continuing basis for the sale or purchase of tangible goods on its (the principal's) behalf and in its name, as per section 1 of the Act.

807. The *travaux préparatoires* provide for the possibility of a limited analogical application of the Act, but explicitly leave the question to be determined by the courts. The Swedish Supreme Court has evaluated the possible analogical application of the Act on a few occasions.

> In NJA 2018 s.19, invoked by the Respondent, and concerning the termination of a resale agreement between an American agricultural equipment manufacturer and a Swedish reseller that had been in force for 22 years. The reseller sought *inter alia* goodwill compensation for the termination of the contract. The Supreme Court noted that both the Act on Commercial Agents and the Factorage Act (2009:865) provide for such compensation, that a similar provision protecting resellers was considered when the Act on Commercial Agents was written but never adopted, that the standard contracts in the sector are not uniform in this regard, that the only country found to offer such protection to resellers in a Europe-wide review was Belgium, that the Danish courts have taken a relatively restrictive approach to a potential analogical application of the legislation concerning commercial principal-agent relationships (the exception being situations where the agent has been found to be so tightly integrated into the business organisation of the principal that the agent has not been regarded as independent), and finally that the Norwegian courts have applied legislation on commercial principal-agent relationships by analogy only in circumstances where a fair outcome could not otherwise be reached.
>
> Based on this, the Supreme Court concluded that, as a general rule, a reseller is not entitled to the compensation in question by an analogical application of the Act on Commercial Agents. However, when the need to protect a reseller is particularly strong, this could exceptionally be case. The Court explicitly gives the example of when a reseller is non-independent.

808. The Sole Arbitrator therefore notes that the Act on Commercial Agency can be applied analogically as non-mandatory provisions in cases where the contract under evaluation resembles a commercial principal-agent relationship. While there has been some disagreement in the literature as to the extent that the mandatory provisions of the Act on Commercial Agency can be applied outside the formal scope of application of the act, the Swedish Supreme Court has in its decision of NJA 2018 s.19 explicitly defined a safety valve whereby section 28 can be applied only in situations where the need to protect a reseller is particularly strong. The application by analogy is thus an exception.

809. The Sole Arbitrator concludes that she does not find that the circumstances in the case at hand are such that application of the Act on Commercial Agency would be justified. The Claimant has clearly acted as an independent distributor, acting in his own name and there is nothing in the Contract that would resemble a principal-agent relationship.

810. The application of the general principles of Swedish contract law on available remedies has not even been denied by the Respondent and the Sole Arbitrator confirms that such are to be applied.

811. Both Parties agree that according to Swedish law, liability for damages due to a breach of contract entail that the aggrieved party is put to the same situation as if no breach occurred. The Parties, however, disagree on how this is to be construed. In addition, the Respondent denies the causality between any breach invoked by the Claimant and the damage claimed.

812. As the Sole Arbitrator has rejected the application of the Swedish Act on Agency, only the primary claim of the Claimant is considered.

VIII.7.2 Claimant's primary claim

813. The Claimant's primary claim is evidence by the two Damages Expert Reports by Professor Martins de Lima.[16] Professor de Lima calculates Mr Pérez's financial damage based on discounted cash flows derived from Permobil's weight in the average contribution margin of Mr Pérez's network of intermediaries, during the average customer lifetime (the average length of time that an orthopedic store is a customer of FPL Mobility) of 8 years and applies a discount to expected cash flows of 6% corresponding to the cost of equity.

814. According the first report of Professor de Lima, the clientele portfolio value of Mr Pérez is 850,379.44€, which is the present value of the sum of the discounted Permobil's contribution margin over customer average lifetime (2021-2028).[17] The value has been calculated as follows:

Average Permobil contribution margin	124,932.60
Inflation	2.1825%
Equity Rate	6.0000%
Discounted Permobil contribution margin (EUR)	850,379.49

815. In addition, the Claimant is claiming sunk costs in the amount of EUR 24,132.60 consisting of wheelchair stock in the amount of EUR 21,242.60 and vehicles in the amount of EUR 2,890.00 as well as interest on the total amount at the annual rate of 8 % and daily rate of 0.02192% as from 19 May 2021 until date of the award.

816. The Respondent denies that the compensable damage should be calculated on the basis of the value of the client portfolio of the Claimant. According to the Respondent the model and methodology used are inappropriate and

[16] Exhibits C-32 and C-94 with appendices.
[17] See Exhibit C-32.

cannot be applied since it is based on assumptions that do not mirror the realities. The Respondent further submits that the Contract could have always been terminated with 12-months' notice, so this presents the hypothetical scenario against which any losses should be assessed.

817. The Respondent relies on the two Expert Reports by EY.[18] In addition to questioning the method of calculating the damage based on the value of the client portfolio for 8 years, EY criticizes the claim on sunk costs. The sunk costs presented in Professor de Lima's s report do not, in EY's view, reflect sunk costs. They are by nature assets that can be sold. In addition, they represent spend that the Claimant has made knowing the business risk relating to the 12-month notice period in the Contract. Sunk costs could, however, comprise of costs that the Claimant could not have immediately reduced when a breach of contract became apparent. According to EY, such costs could be personnel costs relating to the one employee of the Claimant for a period when the employee cannot be made redundant or moved to other tasks.

818. The Sole Arbitrator agrees with the Respondent. The two scenarios to be compared is i) one where the Respondent would not have breached the Contract, but instead would have terminated the Contract as per its provisions, i.e. with a 12-month notice period and ii) the other where due to the breach of the Respondent, the Claimant had the right to terminate the Contract with immediate effect, thereby losing the sales for the notice period. In other words, even absent the Respondent's breach, the value of the Claimant's portfolio as claimed, would not have been compensable. There is also no evidence that the Claimant would have been able to retain its clients and corresponding sales after the notice period with products from another supplier.

819. In the said scenario, the allegations of the Respondent as regards the lacking causality are not relevant. The loss of sales is a direct consequence of the Claimant being deprived of the notice period.

820. EY presents their own calculation of the potential damage for the 12-month notice period. According to EY, the information used in the calculation derives directly from the Profit and Loss accounts of the Claimant. The lettered (A-E) explanations below refer to the letters in the figure on the right-hand side:

[18] Exhibits R-39 and R-116.

Table 2: Overview loss of profit	EUR	#
Description		
Net sales 5 year average 2016-2020	434 543	
Contribution margin	139 855	
Contribution margin %	32%	
90 % average business costs	94 397	
Contribution by Permobil contract adding	45 459	
Assuming 6 months notice period for facilities lease	6 094	A)
Personnel	30 239	B)
Illustrative impact of loss of business	**81 792**	**C)**

A) Facilities lease is an item that typically would be subject to a termination notice period, hence a cost saving would not come into immediate effect after giving notice. We have here shown schematically a delay of 6 months that these costs would run despite the business would come to an end.

B) Likewise reducing personnel costs would not likely start to have effect immediately, but only after a period of notice. We have simply assumed a schematic 6 month period, without connection to any real employment terms.

C) This is the illustrative damage for loss of the business based on the data and assumptions described above

821. As part of the alternative claim Professor de Lima also provides for a calculation of the damage for the 12-month notice period. According to Professor de Lima, as per the Distributorship Contract, Permobil applies a 52 % discount to the Claimant on all its products. Therefore, he has computed that 52 % discount to get the remuneration the Claimant should receive. For this calculation, he has analyzed the total purchases made by the Claimant during the last 5 years and weighing how much of this amount pertains to purchases from Permobil. According to Professor de Lima the average amount of 52 % discount from Permobil purchases in the last 5 years will be the compensation for not complying with the notice period, which results in a total amount of 289,210.00 euros.[19]

	2016	2017	2018	2019	2020
FPL Mobility purchases of Permobil brand (including discount)	382,036	334,163	295,708	168,749	154,160
Total price without discount	795,909	696,173	616,059	351,561	321,168
52% discount on the total price	413,873	362,010	320,351	182,812	167,007
Average			289,210		

822. The EY calculation differs from that of Professor de Lima in that it takes into account also other costs than purchases from Permobil. According to EY, it is imperative in calculating loss of business to consider all items attributable to the event. Another difference is that that Professor de Lima has considered prices from the Permobil price list whereas EY says it has used actually realized sales prices.

[19] Figure 34 of Exhibit C-32.

823. In his second report, Professor de Lima explains that EY makes an error when stating that to compute loss of profit with contribution margin, fixed costs should be taken out from sales in addition to variable costs. According to Professor de Lima, that is a mistake as fixed costs are unavoidable. Therefore, what is lost is the income and the cost of goods sold which are variable. The rest remains, so these cannot be deducted from the losses. Professor de Lima also explains, how he has used the same contribution margin (33 %) as EY in his calculation for the primary claim, but for the alternative claim, he has considered the 52 % discount that Permobil gave to the Claimant, having nothing to do with Contribution Margin.

824. The Sole Arbitrator considers that the most correct way to calculate the loss for 12-months is to use the average margin of 5 years preceding 2021. The Sole Arbitrator accepts the Respondent's view that the actual contribution margin should be used instead of the discount percentage of 52. Professor de Lima and EY agree on the actual contribution margin being the following:

Year	2016	2017	2018	2019	2020
EUR	107,111	171,711	103,036	185,378	131,441

825. The above gives a yearly average of EUR 139,735.40.

826. The Sole Arbitrator accepts the Claimant's view that the fixed costs should not be deducted from the contribution margin. The contribution margin represents the amount that was deprived of the Claimant due to the breach irrespective of the cost structure of the Claimant.

827. The Sole Arbitrator, however, agrees with the Respondent in that the sunk costs are not compensable damage as these would have remained even if the notice period of the Contract would have been honored before the breach. The Sole Arbitrator also agrees with the Respondent that in calculating the loss of business one should by definition also take into account any effect of actual Permobil contract related business that occured during the damage period.

828. According to the Respondent, during the period beginning 19 May 2021 until the date of the Respondent's Rejoinder i.e. 2 May 2022, the Claimant had ordered and bought Products from Permobil in an amount of EUR 78,132.46. This has not been disputed by the Claimant.

829. A contribution margin of 33 % would thus be EUR 25,783.71, which is to be deducted from the yearly average of EUR 139,735.40, resulting in EUR 113,951.69 as the compensable damage for loss of the business during the notice period.

830. The Claimant has claimed interest on the amount claimed as from 19 May 2021 until the date of the award. The Sole Arbitrator notes that the applicable Swedish Act on Interest (Räntelagen 1975:635) provides that in the case of a claim for damages or other similar compensation that cannot be determined without further inquiry, interest is payable on the sum due from the thirtieth day after the creditor demands payment and presents a statement of what he or she can reasonably claim.

831. The Respondent has, however, not disputed or commented on the start date of the interest in its submissions. EY notes in its first report that "[w]*e have compared the interest rate to applicable rates according to Swedish practice and find the rate as such to be in agreement with such practice. As the damage period is not defined, it is debatable when to start the interest computation*". At the hearing the Respondent argued that 29 December 2021 is the earliest date when interest may start to run.

832. The Sole Arbitrator considers that the claim has been made at the date when the Request for Arbitration was notified to the Respondent, i.e. on 17 August 2021, and the interest thus started running on 17 September 2021 on EUR 113,951.69 at the admitted annual rate of 8 % (or daily rate of 0.22 %). The amount of interest as per the date of the award, 3 October 2022 is thus (381 days x (0,022 % x 113,951.69)) EUR 9551.43.

833. Finally, the Claimant claims compensation for non-pecuniary damage due to damage to Mr Pérez business reputation.

834. According to the Respondent, the claim should be dismissed on formal grounds, i.e. not tried and if not dismissed then rejected since non-material or non-financial losses are not compensated for under Swedish contract law. The Respondent also notes that the Claimant does not even present a pecuniary loss, because there is no loss or harm inflicted and if Mr. Pérez suffered "harm" this harm does not amount to a compensable loss since it is not a legally relevant harm or damage to his reputation.

835. The Sole Arbitrator does not agree with the Respondent in that the claim could be dismissed already on formal grounds.

836. The Sole Arbitrator has, however, above rejected the Claimant's claim that the Respondent would have breached the Contract by attacking his reputation and business by spreading false rumours. This in itself means that any damage claims based on damage to Mr Pérez business reputation are to be rejected.

837. The Sole Arbitrator, nevertheless, notes that it agrees with the Respondent in that non-pecuniary damage is, as a rule, not compensable. The rare exceptions are situations where such damage can nevertheless be quantified as confirmed in NJA 2016 s. 900 and the legal literature invoked by the Claimant, which is not the case here.

proceedings as the other. Accordingly, the procedural conduct of the Parties shall not affect the allocation of costs.

899. Acknowledging that the Respondent has made a settlement offer that exceeds the amount now awarded to the Claimant and taking into consideration the fact that the Respondent continued its marketing and selling efforts after the EA Order, the Sole Arbitrator considers it appropriate that in this case both Parties are to bear their own costs and the costs of the SCC and the Sole Arbitrator, shall be borne equally.

X DISPOSITIVE PART

900. For the foregoing reasons, the Sole Arbitrator renders the following decision, rejecting all other claims submitted:

1. DECLARES that Permobil AB materially breached the Distributorship Contract dated 17 December 2010 and the Emergency Arbitrator Order dated 19 July 2021;

2. ORDERS Permobil AB to pay compensation to Mr Pérez in the amount of EUR 123,503.12 added with interest in accordance with Section 6 of the Swedish Act on Interest (Räntelagen 1975:635) as from the date of this award up until the date of payment;

3. ORDERS that both Parties are to bear their own legal costs;

4. ORDERS that, pursuant to Article 49 (7) of the SCC Rules, the Parties are jointly and severally liable to pay the arbitration costs. The arbitration costs have been determined as follows:

   a. Sole Arbitrator's Petra Kiurunen's Fee 38,700 plus any VAT, Expenses EUR 1,501.09 plus any VAT;

   b. Stockholm Chamber of Commerce Administrative fee EUR 17,835 plus any VAT.

   The Sole Arbitrator notes that no VAT is to be paid on the fees and expenses of the Sole Arbitrator. The administrative fee of the SCC is subject to VAT to the extent finally borne by Permobil AB, a party registered for VAT in Sweden. Fernando Pérez Luis is a sole trader with EU VAT no. ES12230045W and therefore not liable for VAT.

5. ORDERS that as between the Parties, Permobil AB shall bear 50 % of the costs of the Arbitration and Fernando Pérez Luis/FPL Mobility 50 % as follows:

- Permobil AB is to pay to Petra Kiurunen EUR 20,100.55.

- Fernando Pérez Luis/FPL Mobility is to pay to Petra Kiurunen EUR 20,100.55.

- Permobil AB is to pay to the SCC EUR 8,917.50 together with VAT of EUR 2,229.38.

- Fernando Pérez Luis/FPL Mobility is to pay the SCC EUR 8,917.50.

To the extent the advance on costs paid by Fernando Pérez Luis/FPL Mobility to the SCC is drawn in paying these costs to a greater extent than his liability as ordered above, Permobil AB shall reimburse Fernando Pérez Luis/FPL Mobility the amount exceeding his share of all costs.

901. This Award has been issued in four (4) original copies, one for each party, one for the Sole Arbitrator and one for the Arbitration Institute of the Stockholm Chamber of Commerce. The parties' originals shall be delivered by courier to the address of such party's counsel. One original copy shall be delivered to the Arbitration Institute of the Stockholm Chamber of Commerce.

902. A party may apply to amend the award regarding the decision on the fees of the arbitrator. Such application should be filed with the Stockholm District Court within two months from the date when the party received this award.

This Award is made on 3 October 2022. The seat of arbitration is Stockholm, Sweden.

Petra Kiurunen