RUSSIN, VECCHI
& HEREDIA BONETTI

AGENCY AND DISTRIBUTION AGREEMENTS IN THE DOMINICAN REPUBLIC

GEORGES SANTONI RECIO

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& HEREDIA BONETTI

Dominican Republic

Georges Santoni Recio

Partner – Russin Vecchi & Heredia Bonetti

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1. LEGAL FRAMEWORK

Foreign suppliers may sell goods and services in the Dominican Republic through several mechanisms. Dominican law does not require foreign suppliers to have an agent or distributor in the country. Such suppliers can (1) make direct sales to Dominican purchasers, (2) establish a subsidiary, branch, or sales office, or (3) sell through Dominican agents or distributors.

The main advantages of direct sales are simplicity and lower costs. There are no commissions to be paid to local agents or distributors. This approach, however, leaves foreign suppliers without a local representative to promote their goods or services. Since Dominican income tax is generally applied on a territorial basis, income from direct sales outside the Dominican Republic is normally not subject to Dominican income tax, as it is not considered "Dominican-source income".

Establishing a subsidiary, branch, or sales office can strengthen the local sales and marketing of goods and services. Establishing and maintaining such an entity, however, requires an investment in time and effort and entails certain costs. The income generated by such sales is normally subject to Dominican income tax.

Selling through local agents or distributors allows foreign suppliers to establish an effective sales network at relatively low cost. This alternative, however, must be analysed by taking account of the strong protection afforded to agents and distributors by Dominican Law 173, of April 6, 1966, as amended (hereinafter "Law 173" or simply "the Law"). As discussed below, after an agent or distributor is appointed (what the Law terms

"concessionaires"), the foreign supplier may have very little flexibility in terminating or not renewing the agent or distributor, even in the face of marginal performance.

1.1. Courts and Administrative Agencies

There are no special courts or tribunals for Law 173 cases. The ordinary trial courts have jurisdiction over disputes between foreign suppliers and their local concessionaires. Before a concessionaire can file a claim for termination or non-renewal without "just cause," it first must attempt a conciliation procedure before the local chamber of commerce and production. Only when such conciliation is unsuccessful can the concessionaire file a claim with the competent trial court.

There are no government agencies or authorities that regulate the appointment, use, and termination of commercial intermediaries. A very important aspect of Law 173 is that the local concessionaire must have registered the name of the foreign firm it represents and the terms of its agreement with the International Department of the Central Bank within 60 days of signing the agreement. While nonregistration generally bars a claim under Law 173, the Constitutional Court has held that the registration period is not necessarily a hard deadline.

Since agents and distributors sometimes fail to register their agreements with the International Department of the Central Bank, in the past to avoid having to exchange their hard currency commissions, it is vitally important for foreign suppliers to submit a formal request to the Central Bank seeking to determine if the requisite registration was made before considering the termination or non-renewal of local concessionaires.

1.2. Choice of Law/Choice of Forum Clauses

Although Dominican courts previously tended to retain jurisdiction over disputes under Law 173 despite foreign forum clauses, decisions of the Dominican Supreme Court and Constitutional Court have upheld the validity of such clauses. Their reasoning is that, although Law 173 is a public order statute, Article 7 refers matters of jurisdiction, procedure and limitation periods to ordinary law (*derecho común*), under which parties may agree to

submit disputes to a foreign forum. Accordingly, valid foreign choice of forum provisions must be respected. This does not mean, however, that a foreign governing law clause displaces the mandatory substantive protections of Law 173. Arbitration clauses must be assessed separately under the applicable statutory or treaty framework. (SCJ, 1st Chamber, Judgment No. 9, April 4, 2012, B.J. 1217 and Constitutional Court, Judgment TC/0033/24, May 9, 2024).

The law does not require that concession agreements be entered into in Spanish. To register the agreement with the International Department of the Central Bank, a translation into Spanish by a judicial interpreter however is required.

1.3. Law 173 and CAFTA-DR

As has been mentioned, Law 173 is a "public order" statute whose provisions may not be superseded by private contract. Nevertheless, with the taking of effect of the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) on March 1, 2007, a special regime applies to contracts involving a United States supplier of goods or services or an enterprise controlled by that supplier. According to Chapter 11, Annex 11.13, Section B, of the CAFTA-DR and Articles 67–71 of Law 424-06, a covered contract signed after entry into force will not be governed by Law 173 unless the contract explicitly provides for its application. Otherwise, the contract will be ruled by general Civil Code principles and the specific treaty rules. A separate exception applies under the Dominican Republic–CARICOM framework: in the circumstances covered by that framework, the parties may expressly agree to exclude the application of Law 173.

2. GENERAL CONCEPT: CONCESSIONAIRES

Agents and distributors are treated equally under Law 173 as "concessionaires" so they both will be covered in this section. Concessionaires are defined as:

"[The] natural or legal person engaged in the Republic to promote or manage the importation, distribution, sale of products or services, rent or any other form of traffic, exploitation of merchandise or products of foreign provenance and the services related to such procedures or when they are manufactured in the Dominican Republic, whether acting as agent, distributor, representative, commission agent, concessionaire, or under another name."

Under this broad statutory language, both agents and distributors are considered as subject to Law 173.

2.1. Definition

Agents are those who sell on account of others and generally are paid a commission on sales by the foreign supplier. Distributors, on the other hand, buy and resell on their own account and the profit results from the differential, which is received directly from the final customer.

2.2. Registration Obligation

As indicated above, Article 10 of Law 173 provides that registration with the International Department of the Central Bank is a prerequisite for the concessionaire that wishes to file a claim for unjust termination against its foreign supplier. Failure to comply with this obligation may result in the concessionaire being barred from filing a Law 173 claim.

2.3. General Duties: Scope of Its Powers

The duties of the agents or concessionaires are those set forth in the agreement with the foreign supplier. General principles of contract law apply in the absence of specific contractual undertakings. Under Dominican law, agents do not have implied authority to act for their foreign principals. The parties may establish the general duties and powers of agents in their agreements.

The foreign principal's duty to accept orders from its local concessionaire depends on the agreement. An unjustified refusal to supply may be considered as constructive termination of the agreement.

Dominican law is not specific as to the powers of foreign principals over the local agents. As indicated above, the parties may stipulate in their agreement as to their respective powers and duties.

2.4. Exclusivity

Law 173 is silent on the question of whether a foreign supplier can have several nonexclusive concessionaires. In only one section of the Law, Article 5, there is a provision concerning exclusive contracts. That section has been interpreted to mean that the Law recognizes the existence of nonexclusive agreements.

As a practical matter, the International Department of the Central Bank registers exclusive as well as nonexclusive concession agreements. The parties therefore are free to negotiate on exclusivity. The agreement should expressly state whether the distributorship is exclusive or nonexclusive and, if nonexclusive, reserve the supplier's right to appoint other distributors. In general, exclusivity is interpreted to mean that the foreign manufacturer or supplier is barred from appointing other concessionaires or from selling the product within the assigned territory. The appointment of nonexclusive concessionaires may be an option for the foreign supplier to limit the protective effect of Law 173, so if a concessionaire performs marginally, the foreign supplier could appoint a new nonexclusive concessionaire and avoid having to terminate the marginally performing concessionaire. It is therefore preferable to clearly indicate in the agreement whether it is exclusive or non-exclusive. For covered contracts under CAFTA-DR, exclusivity must be expressly established by the contractual terms.

2.5. Term and Renewal

For concession agreements governed by Law 173, expiration of the agreed term does not, by itself, permit the foreign supplier to end the relationship without just cause, given the mandatory nature of the Law. Article 2 of Law 173 states as follows:

Notwithstanding that a contract contains a clause by which the parties reserve the rights of unilaterally terminating their commercial relations, the foreign...[manufacturer] shall not terminate the relationship nor refuse to renew the contract upon its normal expiration, except for just cause.

Although expiration alone does not displace the protections of Law 173 in agreements subject to that Law, including a fixed term may nevertheless be useful, as concessionaires with marginal performance sometimes allow an agreement to expire without claiming compensation.

2.6. Termination and Non-Renewal

2.6.1. With Cause

Law 173 defines "just cause" as noncompliance with an essential obligation of the concession agreement or an action or omission that adversely and substantially affects the licensor's interests in the promotion or commercial exploitation of its goods or services. The burden of proving "just cause" falls to the licensor. The local agent or distributor is required to prove only that explicit or constructive termination or non-renewal occurred.

Law 173 may provide sanctions against termination or non-renewal of concessionaires even if the concessionaire violates certain terms of the agreements, unless such violations are deemed by Dominican courts as breaches of "essential obligations". Here again, there are few reported decisions regarding what constitutes "just cause." If the distributors' obligations are designated in the agreement as "essential obligations", there is a reasonable prospect that breach of such obligations would be recognized by a Dominican court as "just cause." Thus, for example, the inclusion of quotas or minimum sales, together with a

stipulation that compliance with those provisions constitutes an essential element of the agreement, may result in a finding of "just cause" by Dominican courts.

2.6.2. Without Cause

Contractual provisions whereby the principal is allowed to terminate the agreement without cause are ineffective under Law 173.

2.6.3. Nonrenewal

Under Article 2 of Law 173, refusal to renew a concession agreement upon expiration requires just cause.

2.6.4. Consequences of Termination

Article 3 of Law 173 sets forth (1) the circumstances when a concessionaire is entitled to indemnification upon termination and (2) the basis for calculating such indemnification. An English translation of Article 3 follows:

"Article 3. Every concessionaire shall have the right to institute a lawsuit for damages against the Licensor in case of his removal, substitution or termination of the Concession Contract existing between them, or due to his refusal to renew said contract, unilaterally and without just cause on the part of the Licensor, for the complete and just indemnification of damages and losses caused by such reason, which amount shall be fixed based on the following formula:

a) All losses sustained by the concessionaire due to the personal efforts he has put in for the exclusive benefit of the business he is deprived of, including expenses for payment of the compensation established by the Labor Laws.

b) The present value of the investment in the acquisition or lease of the premises and their fitting-out, equipment, installations, furniture and fixtures, in case these were only used for the business of which he is deprived of.

c) (Amended by Law No. 263 of Dec. 31/71) - The goodwill value of the services offered, taking into account the agent's commercial reputation, of the merchandise and products, parts, spare parts, accessories and fixtures that he has in stock and from whose sale, lease or exploitation he shall cease to benefit from; this value shall be determined by the acquisition and transportation cost to his warehouse or office, plus taxes, duties, inland freight charges and any other charges caused by the delivery of the merchandise to his warehouse or office; and

d) (Amended by Law No. 622 of Dec. 28/73) - The amount of the gross profits obtained by the concessionaire from the sale of the merchandise, products or services during the last five years, or if commercial relationship has been for less than 5 years, five times the annual average gross profits obtained during the last years, irrespective of what they amount to. In case the concessionaire had represented the Licensor for more than 5 years, the latter shall pay, in addition, the amount resulting from multiplying the number of years in excess of five by one tenth of the average gross profits obtained during the last five years of representation.

Lastly, to cancel the concessionaire's registration before the International Department of the Central Bank, the agreement between the concessionaire and the principal must have been terminated. Such termination can be done amicably through a termination agreement, where the foreign supplier generally pays the concessionaire an agreed amount in connection with the termination, or through a definitive court order declaring the rescission of the agreement.

3. ADDITIONAL MATTERS

3.1. Tax Issues

The appointment and use of a local concessionaire by a foreign principal do not, by themselves, determine whether the principal is subject to local income taxation. Dominican-source income and permanent establishment rules must be considered in light of the principal's activities and the intermediary's role. An agent-principal relationship could be regarded as an employee-employer relationship only if the legal characteristics of the employee-employer relationship are found, such as subordination of the employee to the employer and payment of salary.

Commissions paid to the concessionaire must be reviewed under the applicable withholding, tax reporting and invoicing rules, which depend on the payer, recipient and nature of the payment.

3.2. Intellectual Property Issues

In order for the principal to protect its patents, trademarks, trade names, and other industrial property rights when selling through a concessionaire, the principal should register its rights to such intellectual property with the National Office of Industrial Property (ONAPI) of the Dominican Republic. There are no laws that specifically require the principal to indemnify the agent from infringement claims against the principal's products. Notwithstanding, violations of intellectual property rights duly protected are subject to sanctions, in accordance with Industrial Property Law 20-00.

3.3. Antitrust & Competition Law Issues

There are no specific competition laws concerning agency arrangements. Notwithstanding, there is an Anti-trust Authority (Pro-Competencia) and an Anti-trust Law (Law 42-08).

Pro-Competencia may, on an ex officio basis or by request of a legitimate, interested party begin an investigation and procedure to determine whether a transaction is in accordance with the antitrust regulations or not. In the event of wrongdoings, *Pro-Competencia* may issue fines under Article 61 of Law 42-08, with the applicable range depending on the infringement. Certain anticompetitive practices carry fines ranging from 30 to 3,000 "minimum wages."

As a contract condition, the licensor may prohibit the concessionaire from soliciting orders outside the assigned territory or from representing products that compete with those of the principal. These restrictions remain subject to the applicable competition rules and must be assessed in their market context.

3.4. Consumer Protection

Law 358-05, for Consumer Protection, is also considered a public order statute. Said law creates and establishes *Pro-Consumidor*, a governmental agency for the protection of

consumers with inspection and supervisory powers and the ability to adopt measures to protect consumers from harmful products. Under Constitutional Court decision dated November 28, 2024, *Pro-Consumidor* does not have the authority to impose fines.

Law 358-05 establishes the mandatory recall of products that are deemed to be harmful to consumers. The local supplier (in this case local distributor) has obligations in this respect; nonetheless, responsibility for defective products or consumer harm is not confined to the distributor. Article 102 provides for joint civil liability across the production and distribution chain in the circumstances covered by that provision.

Suppliers and distributors may delineate in the agreement the party responsible for carrying out and absorbing the cost of a recall. A supplier may limit the warranty provided to its distributor in an agreement between the parties. Nonetheless, under Article 72 of Law 358-05, authorised local suppliers of imported durable goods must grant the same warranty period as in the country of origin, subject to proof of legitimate acquisition and the warranty terms. Contractual allocations do not displace mandatory consumer rights or liability to third parties.

3.5. Data Protection

Suppliers and distributors may exchange information about customers and end users, subject to the applicable data protection requirements. Personal and financial data are protected in the Dominican Republic by Law 172-13. Any information regarding racial or ethnic origin, religious, political, and sexual preferences, union affiliation and health information is protected and may be processed or shared only with the required consent or under an applicable statutory exception. Cross-border transfers must also comply with the statutory rules.

RUSSIN, VECCHI
& HEREDIA BONETTI

OFFICES IN THE DOMINICAN REPUBLIC:

SANTO DOMINGO:
Pablo Iglesias Posse Street No. 2 (formerly El Recodo Street), Monte Mirador Building, 3rd floor, Bella Vista.
809-535-9511 info@rvhb.com

PUERTO PLATA:
Luis Ginebra Avenue, Plaza Turisol, Suite No. 11-A.
809-586-5535 contappo@rvhb.com

PUNTA CANA:
Boulevard 1ero. de Noviembre, Centur Building, 2nd. Level
Suite 201-A
809-535-9511 info@rvhb.com

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