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Dominican Distributor Protection Law No. 173

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1. LEGALFRAMEWORK

One of the various means of selling foreign goods or services in the Dominican Republic is by way of local agents or distributors, which act as local representatives of a foreign principal to promote the sale of the goods and services in question.

Selling through local agents or distributors has the advantage of establishing an effective sales apparatus at low cost. The downside, however, is the strong protection afforded to agents and distributors by the Dominican Law No. 173 of 6 April 1966, as amended (hereinafter “Law No. 173” or simply “the law”). As it will be further established, after an agent or distributor is appointed (what the law calls “concessionaires”), the foreign supplier may have very little flexibility in terminating the agent or distributor, even in the face of marginal performance.

Law No. 173 is considered to be a “public order law”, i.e., it supersedes contrary provisions in agreements between private parties.

As of the enactment of the Foreign Investment Law of 1995 (Law No. 16–95), which modified Article 12 of Law No. 173, foreign companies are free to act as distributors of goods and services in the Dominican Republic. The law struck down the former requirement of Law No. 173 that corporations engaged in the business of distribution in the Dominican Republic had to be incorporated in the Dominican Republic and have two-thirds Dominican ownership.

1.1 Courts and Administrative Agencies

There are no special courts or tribunals for Law No. 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 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 governmental agencies or authorities that regulate the appointment, use, and termination of commercial intermediaries. A very important aspect of Law No. 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 Foreign Exchange Department of the Central Bank. While non-registration generally bars a claim under Law No. 173, there have been a few cases where unregistered local companies have been able to successfully claim that circumstances outside their control prevented proper compliance with the registration requirement. Since agents and distributors sometimes fail to register their agreements with the Foreign Exchange Department of the Central Bank, it is useful 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 of local concessionaires.

In general, although there is a limited amount of reported case law interpreting Law No. 173, the courts in the Dominican Republic tend to interpret Law No. 173 in favor of the local concessionaires.



1.2 Choice of Law/Choice of Forum clauses

Dominican law would apply to an agreement with local concessionaires notwithstanding a choice of law clause in their agreement because of the “public order” nature of Law No. 173. Similarly, a choice of forum provision in an agreement would be rendered equally ineffective. The Dominican Supreme Court has interpreted Law No. 173 as precluding application of foreign law and jurisdiction. Hence, the choice of foreign law and submission to foreign courts or an arbitration panel will not prevent a Dominican court from applying Law No. 173. Nevertheless, it may be convenient for foreign manufacturers to include foreign Law as governing so as to strengthen its position in the event that its agents or distributors should attempt to seek enforcement of a Dominican Republic judgment in a foreign court. The imposition of Dominican Republic Law, substantially altering mutually agreed upon obligations of the parties in a situation where the parties previously have chosen a foreign law as governing, may be construed as repugnant to the public policy of the foreign court before which enforcement of the judgment is sought. Arbitration and other forms of alternative dispute resolution are not precluded under **Law No. 173, but there is no guarantee that a Dominican court would respect such a choice¹.**

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

1.3 Law No. 173 and CAFTA-DR

As has been mentioned, Law No. 173 is a “public order” law 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 1st, 2007, the law is no longer considered to have a ‘public order’ nature with regards to agreements with United States companies, thus permitting the will of the contracting parties to prevail over the provisions of the law. According to Chapter 11, Annex 11.13, Section B, of the CAFTA-DR, a contract between a United States company and a local concessionaire can be governed by Law No. 173 or civil law, whichever the parties choose. In that vein parties are able to established if the local concessionaire will be protected by Law No. 173 provisions or not. In case Law No. 173 is not applicable the relationship will be ruled by the freedom of contract principle and the Dominican Civil Code rules.

2. GENERAL CONCEPT: CONCESSIONAIRES

Law No. 173 makes no distinctions between agents or distributors. They are referred to as concessionaires. It is very broad in its application. It protects, *inter alia*:

Physical or juridical persons engaged in the promotion or negotiation of the importation, distribution, sale or lease of products or services, or any type of trade or

¹ Adding to this, recently a Dominican Courts of Appeals rendered a ruling, indicating in its motivation that Law 173 does not preclude the option of the parties to choose the forum, in specific declared valid a clause in an agency and distribution agreement where the parties chose the ICC as the forum to file their claims. The ruling, indicated that notwithstanding Law 173 ‘public order’, the election of an arbitration forum its valid, applying to said arbitration process Law 173 as the applicable law, and that the public order that Law 173 seeks to insure is the indemnification that should be granted, according to article 3 of Law 173, whether the dispute is presented in an ordinary court or an arbitration forum. [See Ruling No. 633-2010; File No. 026- 03-10-00100; Date: October 8th, 2010; Second Chamber of the Civil & Commercial Courts of Appeals of the National District]. Please note that this ruling is not necessarily bidding to a different court or to a different case.



exploitation of foreign merchandise or products and the services related thereto . . . Whether act [ing] as agent, representative, importer, commission merchant, franchisee, or under any other designation.

Under this broad statutory language, both agents and distributors would be construed as subject to Law No. 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 buy and resell on their own account and the profit results from the differential, which is received directly from the final customer. There are not many practical variations to those generalized concepts in the Dominican Republic.

2.2 Registration Obligation

As indicated above, registration with the Foreign Exchange 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 claim under Law No. 173.

2.3 General duties. Scope of its Powers

The duties of the concessionaires are those set forth in the agreement with the foreign supplier. There is no specific legal principle that defines the duties of agents or concessionaires in the absence of contractual understandings. 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.

On the other hand, the general duty of the foreign principal is to accept orders from its local concessionaire. Failure to accept such orders may be found a 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 No. 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, is there a provision concerning exclusive contracts. That section has been interpreted to mean that the Law does not exclude the existence of nonexclusive agreements. As a practical matter, the Foreign Exchange Department of the Central Bank registers exclusive as well as nonexclusive concession agreements. The parties therefore are free to negotiate on exclusivity. The Supreme Court has however determined that simple or reciprocal exclusivity is of the essence of a concession agreement and can only be limited by an express convention between the parties. It had also previously determined that a nonexclusive agreement could become exclusive through the course of dealings. In general, exclusivity is interpreted to mean that the foreign manufacturer or supplier is barred from appointing other concessionaires or from itself selling the product



within the assigned territory. The appointment of nonexclusive concessionaires is one of the foreign suppliers' best options for limiting the protective effect of Law No. 173. If a concessionaire performs poorly, the foreign supplier would then be free to appoint a new non-exclusive concessionaire.

2.5 Term and Renewal

Agreements with regards to term or expiration clauses will be rendered ineffective on account of the public order nature of Law No. 173. Article 2 of Law No. 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 . . . [principal] shall not terminate the relationship nor refuse to renew the contract upon its normal expiration, except for just cause.

While the term clause is ineffective under Dominican Law, its inclusion is nonetheless recommended. It sometimes happens that the concessionaire whose performance is marginal will allow an agreement to expire on the termination date without claiming compensation.

2.6 Termination

2.6.1 With Cause

Under Law No. 173, a distribution relationship can only be terminated by the licensor when "just cause" can be shown. Law No. 173 defines "just cause" as non-compliance with an essential provision of the distribution agreement. 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 occurred.

Hence, Law No.173 may provide sanctions against termination of concessionaires even if the concessionaire violates the terms of the agreement, unless failure to comply with these provisions are interpreted by Dominican courts as breaches of essential obligations, constituting "just cause" for a termination. Here again, there are few reported decisions provided for in the agreement as "essential elements" of the contract, 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 quota 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, such as upon a minimum notice, are ineffective under the provisions of Law No.173.



2.6.3 Non-renewal

Pursuant to Article 2 of Law No.173, non-renewal of distribution agreement is deemed equivalent to termination, and will hence carry all consequences of termination as will be set forth below.

2.6.4 Consequences of Termination

Article 3 of Law No. 173 sets forth, on the one hand, the circumstances when a concessionaire is entitled to indemnification upon termination and, on the other hand, the basis for calculating such indemnification. Such Article literally reads as follows:

ARTICLE 3. Every concessionaire shall have the right to sue the licensor in case of destitution, substitution or termination of the concession contract existing between them, or due to refusal to renew said contract, unilaterally or without just cause on the part of the Licensor, for the complete and just indemnification of the damages and losses caused by such reason, which amount shall be fixed based on the following factors:

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 compensations established by the labour laws. b- The present value of the investment in the acquisition or lease of the premises and its fitness, of the equipment, installations, furniture and fixtures, in case these were only used for the business he is deprived of. c- (Amended by Law No. 263 dated 31 December 1971) The value of the promotions of the services offered as per the commercial prestige of the agent, 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 dated 28 December 1971) 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 the commercial relationship has been for less than five years, five times the average annual gross profits obtained during the last years, irrespective of what they amount to. In case the concessionaire had represented the Licensor for more than five years, the latter shall pay, in addition, the amount resulting from multiplying the number of years in excess of five years by one tenth the average of the gross profits obtained during the last five years of representation.

A concessionaire's contractual waiver of his statutory right to indemnification is ineffective on account of the "public order" nature of Law No. 173.

On the other hand, Law No. 173 does not deal specifically with the issue of whether a terminated concessionaire has a right to continuing commissions with respect to orders solicited prior to termination. The parties may freely negotiate this issue in their agreement.

Lastly, to terminate the concessionaire's registration before the Foreign Exchange 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 a substantial amount to agree to termination, or through a court order declaring the rescission of the agreement.

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