

Dominican Republic

Georges Santoni Recio

Managing Partner – Russin Vecchi & Heredia Bonetti

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DOMINICAN REPUBLIC

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1. LEGAL FRAMEWORK

There are various means of selling foreign goods or services in the Dominican Republic. Dominican law does not require that foreign suppliers have an agent or distributor in the Dominican Republic. 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 obvious advantage of direct sales is its simplicity and its low cost. There are no commissions to be paid to local agents or distributors. The downside is that the foreign suppliers would not have a local representative to promote the sale of the goods or services in question. Since Dominican income tax is applied on a territorial basis, the income generated by direct sales outside the Dominican Republic would not be, in principle, subject to Dominican income tax.

The advantage of the second alternative is that by creating a subsidiary, branch, or sales office, the sale and marketing of the goods and services in question is improved. Establishing and maintaining such an entity, however, would require an investment in time and effort (and naturally some costs). The income generated by the entity would be subject to Dominican income tax.

The third alternative, which is to sell through local agents or distributors, has the advantage of establishing an effective sales apparatus at low cost. The downside is the strong protection afforded to agents and distributors by Dominican No. Law 173, of April 6, 1966, as amended (hereinafter “Law 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.

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 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. While nonregistration generally bars a claim under Law 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 International Department of the Central Bank, in the past to avoid having to exchange their hard currency commissions, it is useful for foreign suppliers to submit a formal request to the Central Bank seeking

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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 173, the courts in the Dominican Republic tend to interpret Law 173 in favor of the local concessionaires.

1.2. Choice of Law/Choice of Forum Clauses

Although in the past, Dominican law and Dominican courts would apply to an agreement with local concessionaires notwithstanding a different choice of law and forum clause in their agreement because of the “public order” nature of Law 173, currently Dominican courts tend to respect foreign choice of law and forum provisions, as well as arbitration clauses.

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 court-appointed interpreter however is required.

1.3. Law 173 and CAFTA-DR

As has been mentioned, Law 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 1, 2007, the Law is no longer considered to have a “public order” nature with regards to agreements with United States companies and is not automatically applied, 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 is governed by Law 173 only when the parties specifically choose it, otherwise the contract will be ruled by general contract law, which means that term and termination provisions are enforceable.

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 provenance foreign currency 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 would be construed 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 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, 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 concessionaire 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.

The general duty of the foreign principal is to accept orders from its local concessionaire. Failure to accept such orders 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, 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 International 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. Some courts have considered 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 173. If a concessionaire performs marginally, the foreign supplier would then be free to appoint a new nonexclusive concessionaire. In this regard, it is vital to include in the wording of the agreement whether the intention is for the agreement to be on an exclusivity basis or not.

2.5. Term and Renewal

The main effect of Law 173 on a concession agreement is that it renders term or expiration clauses ineffective on account of the public order nature of Law 173; 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.

While the term clause is ineffective under Dominican law, its inclusion may be recommended nonetheless. 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

Law 173 defines "just cause" as noncompliance with an essential obligation 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.

Law 173 may provide sanctions against termination of concessionaires even if the concessionaire violates the terms of the agreements unless failure to comply with these provisions are interpreted by Dominican courts as breaches of essential obligations, constituting “just cause” for termination. Here again, there are few reported decisions regarding what constitutes “just cause.” It seems, however, that if the distributors’ obligations are designated 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 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, such as upon a minimum notice, are ineffective under Law 173.

2.6.3. Nonrenewal

Pursuant to Article 2 of Law 173, nonrenewal of a concession agreement is deemed equivalent to termination.

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. Such Article literally reads as follows:

Article 3. Every concessionaire shall have the right to institute a damage suit against the Licensor in case of his destitution, substitution or termination of the Concession Contract existing between them, or due to his refusal to renew said contract, unilaterally or 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 compensations established by the Labor Laws.
- b- The present value of the investment in the acquisition or lease of the premises and its fitness, 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 promotion value of the services offered according to 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

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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 of Dec. 28/71) - 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.

A waiver of his statutory right to indemnification in the agreement is ineffective due to the “public order” nature of Law 173.

However, Law 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 negotiate this issue in their agreement.

Lastly, to terminate 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 a substantial amount to 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 will not subject the principal to local income taxation. 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.

Other than those indicated above, there are no withholding or reporting requirements that would apply to commissions paid to the concessionaire.

3.2. Intellectual Property Issues

In order for the principal to protect its patents, trademarks, trade names, and other intellectual property rights when selling through a concessionaire, the principal should register its rights to such intellectual property with the Ministry of Industry and Trade 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 Intellectual 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 ranging from 30 to 3,000 “minimum wages” in cases of antitrust violations.

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.

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 ability to order products recalls, establish fines and destroy harmful products.

ADDITIONAL MATTERS

Law 358-05 establishes the mandatory recall of any products that are deemed to be harmful to consumers. The cost and sanctions associated with a product recall shall be the responsibility of the local supplier (in this case local distributor); nonetheless Law 358-05 has a long reach, and in recalls based on harm to the public health, it may reach the manufacturer, as the courts have ruled before (First Instance District Court of the National District, date August 15, 2002).

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 as per Law 358-05, local distributor must grant the end user a warranty for the same length as provided in the country of origin of the products.

3.5. Data Protection

Suppliers and distributors may exchange information about customers and end users, provided such data is not protected by the law. 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 cannot be revealed or shared without the consent of the owner of such data.