



## **DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING**

### **INTERNATIONAL DISTRIBUTION FROM A TO Z**

#### **DISTRIBUTION LAWS - CENTRAL, LATIN & SOUTH AMERICA**

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Below is a brief summary of some of the dealer protection laws and contractual restrictions in various countries in Latin, South and Central America as they effect the planning process when considering a dealer/distributor relationship in these locations. This summary is not legal advice and is not a complete analysis of the laws in these countries but is intended only to be a starting point of reference as you approach transactions in certain locations.

Also included in these materials are four sample agreements: The agreement for use in Brazil is designed for a country with dealer protection legislation and a direct distribution relationship is contemplated. The sample sub-distribution agreement for Costa Rica is for use in a country which has active dealer protection legislation and for which a sub-distribution approach is used. The "Buy/Sell" agreement for Colombia is a sample agreement in which the purchaser is not appointed as a "dealer" or "distributor". The agreement for use in Trinidad and Tobago is a sample for use in a country that does not have any type of dealer protection legislation.

#### Summary and Highlights of Selected Provisions of Dealer/Distribution Laws

##### BRAZIL

- Can't have territory restrictions for non-export, can export outside of Brazil unless the contract provides that any sales outside of Brazil are turned over to Manufacturer as the dealer's export agent.
- Strong consumer protection laws, warranty limitations may not be recognized if claim brought by consumer.
- To enforce in court, need the agreement translated into Portuguese, notarized and legalized at consulate, etc. Agreement does not have to be registered unless there is a need to enforce in the local courts.
- Must register trademarks and any license to use same in Brazil

- Successive renewals of same agreement may turn the contract into a contract of indefinite duration.
- Termination without cause will require indemnification payments to dealer for losses and damages sustained.
- Contract should specify that Manufacturer can appoint new dealers if the dealer is in default to permit it to do so and reduce potential monetary damages.
- Arbitration enforceable but may want to have a separate arbitration agreement; for collection issues, consider using Brazilian law for easier enforceability and collection.

## CHILE

- No dealer protection statute.
- Consumer protection laws may not permit Manufacturer to avoid warranty claims, including refunds, etc., from end-users.

## Colombia

- Colombia has a Commercial Agency Agreement statute which provides that, upon termination of a distributor, the manufacturer (seller) must pay to the terminated dealer 1/12 of the average of the last three years' profits.
- Unless specified in the agreement, a manufacturer is only permitted to have one "agent," i.e., one dealer, in Colombia.
- If the agreement has a specific term, it can trigger this payment obligation sooner. Therefore, may not want to specify a term in the agreement but provide for termination for cause.

## Costa Rica

- Costa Rica has a restrictive dealer protection statute, Law 6209.
- Remedies include mandatory payments to a terminated dealer including repurchase all of the dealer's inventory at dealer's cost plus 10%; and payment to the dealer of a termination payment calculated by multiplying the dealer's average monthly gross profits by the number of years the contract was in place times four.
- These payment requirements would exist even if the dealer was terminated for cause and would not be related to the amount of product directly purchased from Manufacturer.
- One option is to form a Panamanian corporation, legal ownership of the shares would be held by nominees, Beneficial ownership would be held by Manufacturer. This Panamanian corporation would own the shares in the Costa Rican subsidiary which then, in turn, would enter into the contract with the local distributor.

## Dominican Republic

- Highly restrictive dealer protection statute which can create exclusive dealer relationships and substantial financial liability in the event of termination of the dealer relationship.
- To avoid impact of statute, use of a local subsidiary company is an option; Manufacturer would

contract with that subsidiary and, the subsidiary would have a sub-distribution agreement with the local dealer.

### ECUADOR

- Has a dealer protection statute (while it has been repealed, it is still being enforced by the courts and new legislation is being considered).
- For choice of law provision to be enforceable, contract must be signed outside of Ecuador, otherwise local law will be applied.
- To be enforceable in Ecuador, must be notarized and legalized before the consulate.

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### EL SALVADOR

- Has a dealer protection statute.
- Non-renewal or termination without just cause, must pay statutory compensation (includes non-recuperated expenses, value of investments in equipment, furniture, etc., value of merchandise in stock and 3 years gross profits).
- Once a judgment is entered against supplier, can't sell products or appoint a new dealer until the judgment is satisfied.
- Intellectual Property - all trademarks must be registered and any trademark licenses must be registered or the local dealer may obtain usage rights. Only registered trademarks are protectable.
- International arbitral award may be difficult to enforce.
- Spanish translation must be done before Salvadoran Notary Public.
- Can't cancel accepted orders.
- Local courts can only issue judgments in local currency, can have conversion mechanism into US dollars in contract.

### GUATEMALA

- Has a dealer protection statute (Public policy law) applies to local and foreign suppliers thus local subsidiary does not offer additional protection.
- Indemnification upon termination includes reimbursement of certain expenses and investments, repurchase of inventory at cost in good condition, 50% of gross profit on existing inventory, 3 years of gross profits, all costs which must be paid to dealer to its employees for termination of their employment.
- If contract was exclusive, once a judgment is entered against supplier, can't sell products or appoint a new dealer until the judgment is satisfied.
- Non-exclusive by contract is enforceable.

- Non-renewal at end of term is considered just cause, no payments required.
- Termination for cause must meet statutory tests.
- License agreement for intellectual property must be registered to be effective.
- Insurance policies can only be issued in local currencies.
- Local courts can only issue judgments in local currency, can have conversion mechanism into US dollars in contract.
- Bankruptcy/Insolvency not recognized as just cause.
- No warranty/products liability issues as yet (law not developed) so disclaimers may be valid.
- International arbitration is OK.
- If contract is signed (physically in Guatemala) must be in Spanish, if entered into and executed outside of Guatemala, can be in English as controlling version. To enforce in local courts, must be translated into Spanish and notarized as required by local law.

#### JAMAICA

- No Dealer Protection Statute.
- Member of the WTO.

#### PANAMA

- Dealer protection law has been declared unconstitutional.

#### PERU

- No Dealer Protection Statute.
- Civil Law Jurisdiction, documents and procedures must be followed or will not be enforced.

#### Puerto Rico

- Act 75 is the dealer protection statute that is applicable to foreign suppliers.
- Any termination must be for just cause, burden of proof is on the supplier.
- De facto exclusivity can be created by course of dealing between the companies.
- Local dealer can obtain injunction to prevent further distribution, whether directly or through appointment of new dealer, while litigation is pending.

#### Tahiti (While not in Central America, similar laws exist)

- Dealer protection statute requires, in the event of termination, payment to the dealer of the equivalent of four months of gross profit for each year of the dealer agreement, repurchase of inventory and

payment of a reasonable percentage of the dealer's investment in the business.

- If distribution rights are being terminated for cause, which is defined in the law, Manufacturer can avoid this type of payment

#### TRINIDAD AND TOBAGO

- No dealer protection law.
- Common law jurisdiction (most of South, Central and Latin America are civil law jurisdictions).
- Warranty limitation provisions may not be enforced by local court.
- Supplier still retains products liability.
- Need to register trademarks and other intellectual property by separate agreement.

#### Venezuela

- No dealer protection statute
- All distributor agreements must be registered with the Office of the Superintendent of Foreign Investment within sixty (60) days of execution to be enforceable in that country.

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