



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

**Baker & M<sup>c</sup>.Kenzie**

**Dallas**

**MEMORANDUM**

**TO**

**[U.S. PRINCIPAL]**

**RE:**

**DEALER PROTECTION LAWS IN LATIN AMERICA**

**AND OTHER JURISDICTIONS IN THE WESTERN HEMISPHERE**

**May 27, 1999**

[U.S. Principal] has entered or is preparing to enter into distribution agreements with local distributors throughout Latin America and other jurisdictions in the Western Hemisphere. Many of these jurisdictions have enacted and have currently in effect laws that provide for the award of extra-contractual indemnification to a commercial agent, sales representative or distributor ("dealer") in the event of termination, modification or non-renewal of the relationship by the principal without "just cause" (as defined under such laws), even when such termination, modification or non-renewal is done strictly in accordance with the terms of the agreement ("Dealer Protection Laws"). Generally, these Dealer Protection Laws are of mandatory application as a matter of public policy, and as such, may not be waived in advance by agreement between the parties. In the jurisdictions where there are no Dealer Protection Laws, the termination or non-renewal of a dealer agreement is generally governed by the terms of the agreement itself.

Accordingly, we have prepared this memorandum in order to provide [U.S. Principal] with a summary of the main provisions of the Dealer Protection Laws currently in effect in Latin

America and other jurisdictions in the Western Hemisphere. In preparing this memorandum we have reviewed the laws of the jurisdictions listed in the following table, which divides such jurisdictions between those where there are Dealer Protection Laws currently in effect or where Dealer Protection Laws have been recently repealed ("Dealer Protection Jurisdictions") and those where there are no Dealer Protection Laws currently or as of recently in effect:

<p><u>Dealer Protection Jurisdictions:</u>                  Dealer is entitled to statutory indemnification upon termination or non-renewal without "just cause." The Dealer Protection Laws of the jurisdictions marked with an asterisk have been repealed. The corresponding summary indicates whether each of them continues to apply to relationships entered into prior to the date of their repeal.</p> <p>-</p> <p><u>Dealer Protection Jurisdictions (cont.)</u></p>	<p><u>Jurisdictions without Dealer Protection Laws:</u></p> <p>[U.S. Principal] may terminate or non-renew the distribution agreement in accordance with its terms without incurring any extra-contractual liability</p> <p><u>Jurisdictions without Dealer Protection Laws (cont.)</u></p>
<p>Brazil</p>	<p>Argentina</p>
<p>Colombia</p>	<p>Aruba</p>
<p>Costa Rica</p>	<p>Bahamas</p>

Dominican Republic	Barbados
Ecuador*	Belize
El Salvador	Bermuda
Guatemala*	Bolivia
Haiti	Bonaire
Honduras	Cayman Islands
Nicaragua*	Chile
Paraguay	Curacao
Puerto Rico	Dominica
	French Guiana
	Grenada
	Guadalupe
	Guam
	Guyana

	Jamaica
	Martinique
	Mexico
	Panama
	Peru
	St. Lucia
<u>Dealer Protection Jurisdictions</u> (cont.)	<u>Jurisdictions without Dealer</u> <u>Protection Law (cont.)</u>

	St. Marteen (Dutch)
	St. Martin (French)
	St. Vincent
	Surinam
	Trinidad
	Uruguay
	Venezuela

The following is our summary of the status and main provisions of the Dealer Protection Laws of the Dealer Protection Jurisdictions.

## 1. Brazil

### (i) Date and Retroactivity of Legislation.

Brazil's Law No. 4866 of December 9, 1965, as amended by Federal Law 8420/92 (the "Dealers' Act") regulates the activities of sales agents and commercial representatives. It is clear from various provisions of the Dealers' Act that it applies retroactively to agreements and relationships entered into prior to its effective date.

### (ii) Definition of "Dealer"

The Dealers' Act defines dealers (autonomous commercial representatives) as individuals or legal entities who, without the existence of an employment relationship, directly intermediate for the account of one or more persons in the realization of commercial transactions, promoting proposals or orders, in order to transmit the same to their principals. Thus, the Dealers' Act applies to commission agents, but does not apply to distributors who purchase products and sell them for their own account.

(iii) Written Agreement and Registration.

The Dealers' Act requires registration of dealers, but not of the corresponding dealership agreements. Failure to register under the Dealers' Act, however, would not appear to preclude a dealer from seeking termination indemnification under the law. In addition, the Dealers' Act requires the inclusion of specific provisions in written dealership agreements. If the dealership agreement is not in written form or does not contain the provisions required under the Dealers' Act, said provisions are deemed included in the agreement.

(iv) "Just Causes" for Termination.

A dealer is entitled to termination indemnification except in the case of termination by the principal for just cause, or the expiration of the term of the agreement in the case of an agreement for a definite term. It should be noted, however, that continuous renewals of a definite term agreement may result in such an agreement being considered an indefinite term agreement. In such a case, refusal to renew the agreement by the principal without just cause may give rise to liability for Dealers' Act indemnification. "Just causes" for unilateral termination of a dealership agreement by the principal are defined as:

- (a) Lack of due care on the part of the dealer in the performance of its contractual obligations;
- (b) Acts by the dealer that adversely affect the commercial standing of the principal;
- (c) Failure by the dealer to perform any obligations inherent to the dealership agreement;
- (d) Definitive conviction of the dealer for a crime involving moral turpitude; and
- (e) Force majeure.

In addition, the Dealers' Act provides the following "just causes for termination of a dealership agreement by a dealer, pursuant to which the dealer would be entitled to the termination indemnities provided for in the law.

- (a) Reduction of the scope of the dealer's activities without regard to the provisions of the dealership agreement;
- (b) Direct or indirect violation of the exclusivity of the dealership agreement, in the case of an exclusive agreement;
- (c) Abusive establishment of prices by the principal for the sole purpose of impairing the dealer's ability to perform its activities;

(d) Failure to pay, as due, compensation owed to the dealer; and

(e) Force majeure.

(v) Termination Indemnification.

The amount of the indemnification cannot be less than 1/12 of the total compensation earned by the dealer over the period during which the agreement has been in effect since the effective date of the Dealers' Act. In addition, termination by the principal without just cause of a dealership agreement entered into for an indefinite term, which has been in force for more than six (6) months, requires the principal, in the absence of a written contractual guarantee, to give the dealer at least 30 days advance notice of termination, or to pay the dealer an amount equal to 1/3 of the commissions earned by the latter during the three months immediately preceding termination.

## 2. Colombia

(i) Date and Retroactivity of Legislation.

Colombia's dealer legislation was enacted as Articles 1317-1331 of the new Colombian Commercial Code, which went into general effect on January 1, 1972. The provisions applicable to dealers (the "Dealers Act"), however, became effective on the date of issuance of the new Commercial Code, March 27, 1971.

While the Dealers' Act clearly applies to dealership agreements executed after its effective date, it is unclear whether the legislation applies retroactively to agreements entered into before March 27, 1971. In an opinion letter issued in 1971, Colombia's Superintendency of Companies asserted that the Dealer Legislation does not apply to dealership agreements entered into prior to March 27, 1971, regardless of the date of their performance. The Superintendency opined that to apply the new Commercial Code to such agreements would violate Article 30 of the Colombian Constitution, which generally guarantees contractual rights. Nevertheless, in a case before the Colombian Supreme Court (Cacharrería Mundial, S.A. v. Jorge Ivan Merizalde Soto, et al., hereinafter "Merizalde"), the lower courts applied the Dealers' Act retroactively. As indicated below, the Supreme Court dismissed the case on other grounds. Thus, Merizalde did not settle the issue, but suggests that dealership agreements entered into before March 27, 1971, may be subject to the Dealer Legislation.

(ii) Definition of "Dealer".

The Dealers' Act defines a dealer (actually "commercial agent") as any merchant who promotes sales "as the representative or agent of a local or foreign principal, or as the manufacturer or distributor of one or more products of the same." (Commercial Code, Article 1317.) In Merizalde, the Court interpreted this definition narrowly to exclude a merchant who acquired title to products which it purchased and then resold for its own account. However, under more recent interpretations of the Dealers' Act, Colombian courts have applied the Dealers' Act to buy-sell distribution arrangements when the relationship includes elements of commercial agency, such as an obligation on the part of the distributor to promote or advertise the products subject to the relationship in the local market or an obligation on the part of the distributor to provide reports or other records to the principal regarding sales of products in the local market. Therefore, although in general the Dealers' Act should only apply to commission agents, it may also apply to buy-sell distributors if the distributor is imposed obligations, such as those referred above, that may be considered commercial agency elements.

(iii) Written Agreement and Registration.

The Dealers' Act provides that a written agreement must be registered at the appropriate Commercial Registry in Colombia. Nevertheless, the Dealers' Act expressly recognizes de facto agreements. Hence, registration is not required for purposes of seeking the protection of the Dealers' Act. Failure to comply with the registration requirements simply prevents the enforcement of the agreement as against third parties.

(iv) "Just Causes" for Termination.

The Dealers' Act provides the following "just causes" for unilateral termination of a dealership agreement by the principal:

- (a) Serious breach by the dealer of a legal or contractual obligation;
- (b) Any act or omission of the dealer which seriously affects the interests of the principal;
- (c) Bankruptcy or insolvency of the dealer; and
- (d) Dissolution or termination of the dealer's activities.

In addition, the Dealers' Act provides for the following "just causes" for unilateral termination of a dealership agreement by the dealer:

- (a) Breach by the principal of a legal or contractual obligation;
- (b) Any act or omission of the principal which seriously affects the interests of the dealer;
- (c) Bankruptcy or insolvency of the principal; and
- (d) Termination of the principal's activities.

(v) Termination Indemnification.

Under Article 1324 of the Commercial Code, a principal may be required to make a termination payment and pay an equitable indemnification to the dealer on termination of the dealership agreement. The principal must make a termination payment on termination of the dealership agreement for any reason, except if the dealer has given the principal "just cause" for termination. The amount of this payment is one twelfth (1/12th) of the average annual commission or profit received by the dealer over the last three (3) years, multiplied by the number of years during which the agreement was in effect. If the agreement was in effect for less than three (3) years, the dealer is entitled to an amount equal to one-twelfth (1/12th) of



all commissions and profits it received in connection with the dealership agreement.

The "equitable" indemnification is payable by the principal when (i) the principal terminates the dealership agreement without "just cause," or (ii) the dealer terminates the dealership agreement with "just cause." The equitable indemnity is intended to compensate the dealer for developing a market for the principal's products. The amount of the equitable indemnification is determined by experts based on the duration, volume, and importance of local sales promoted by the dealer under the dealership agreement.

It is unlikely that the dealer can waive the termination payment by prior agreement. In Merizalde, the Supreme Court stated, in dictum, that a dealer may waive its right to the termination payment only after the right has vested (i.e., on termination of the dealership agreement). Thus, Colombian courts presumably will not enforce any advance waiver of the termination payment, despite the opinion of the Superintendency of Companies and several Colombian legal commentators that such waivers are enforceable.

It is even more improbable that the equitable indemnification can be waived by prior agreement. Unlike the termination payment, the equitable indemnification is payable only when the principal commits an unjustifiable act (i.e., terminates the dealership agreement without "just cause" or gives the dealer "just cause" for termination). By waiving the equitable indemnity in advance, the dealer in effect consents to the unjustifiable act before it has been committed. Such waivers are presumably void under Article 1522 of the Colombian Civil Code, which prohibits any person from agreeing to condone a future intentional act which involves the risk of injury or damage.

### **3. Costa Rica**

#### **(i) Date and Retroactivity of Legislation.**

Costa Rica's dealer legislation was enacted by the Costa Rican Congress pursuant to Law 4684 of November 27, 1970, and subsequently amended by Law 6,209 of March 9, 1978 (hereinafter collectively referred to as the "Dealers' Act"). Regulations to the Dealers' Act were issued by the Ministry of Economy, Industry and Commerce pursuant to Resolution No. 8599 of said Ministry, on May 5, 1978.

The Dealers' Act specifically provides that the length of service for existing dealership agreements is to be computed from the date of execution of said agreements. As such, the Dealers' Act has retroactive application.

#### **(ii) Definition of "Dealer".**

The Dealers' Act applies to representatives, distributors and manufacturers of foreign enterprises. The Dealers' Act broadly defines a representative as any individual or legal entity who, in a continuous and autonomous manner, with or without legal representation, prepares, promotes, facilitates or performs the sale of goods or services sold or rendered by foreign firms. Distributors are defined as individuals or legal entities who, by means of a contract with a foreign firm, import or manufacture products in the country for distribution of the same in the Costa Rican market, acting for their own account and risk. Manufacturers are defined as individuals or legal entities who, with the authorization of a foreign firm, prepare, package or manufacture in the country products with the trademark of the foreign firm, using raw materials and technology indicated by the foreign firm.

#### **(iii) Written Agreement and Registration.**

The Dealers' Act does not require registration of dealership agreements and does not expressly require that said agreements be in writing. Thus, it appears that dealership arrangements

may be created by course of conduct.

It is important to note that under Decree 23 of June 2, 1974, Costa Rican individuals and legal entities are required to secure licenses from the Ministry of Economy, Industry and Commerce in order to act as representatives of foreign companies. It is not clear, however, whether failure to obtain such a license would preclude a dealer from seeking termination indemnification under the Dealers' Act. The Act itself does not expressly require the license for purposes of obtaining protection under the Dealers' Act.

(iv) "Just Causes" for Termination.

Except in the case of just cause, as hereinafter defined, if a principal unilaterally terminates or refuses to renew a dealership agreement, it will be liable to the dealer for the termination indemnities discussed below. The following are considered just causes for termination or non-renewal of a dealership agreement.

- (a) Crimes committed by the dealer against the property and goodwill of the principal;
- (b) Judicially declared ineptitude or negligence of the dealer, as well as prolonged and substantial decreases or stagnation of sales for reasons imputable to the dealer;
- (c) Breach by the dealer of obligations of secrecy and faithfulness to the principal through disclosure of facts, knowledge or techniques concerning the organization, products and operation of the principal; and
- (d) Any other serious breach by the dealer of its contractual or legal obligations to the principal.

The following are considered just causes for termination of a dealership agreement on the part of the dealer:

- (a) Crimes committed by the personnel of the principal against the property and goodwill of the dealer;
- (b) Cessation of activities by the principal, except in the case of force majeure;
- (c) Unjustified restrictions on sales imposed by the principal, that result in a reduced volume of transactions carried out by the dealer;
- (d) Failure to pay on a timely basis commissions or fees earned by the dealer;
- (e) The appointment of a new dealer, when the existing dealer acted in an exclusive manner;
- (f) Any modification of the dealership agreement, unilaterally introduced by the principal, that prejudices the rights or interests of the dealer; and,
- (g) Any other grave breach by the principal of its contractual or legal obligations to the dealer.

In the event of termination by the dealer with just cause, the principal would be liable for the termination indemnification discussed below.

(v) Termination Indemnification.

Unilateral failure to renew or termination of a dealership agreement on the part of a principal without just cause renders the principal liable to the dealer for an indemnification equal to four months' gross profit per year or portion thereof of service, for a maximum of nine years of service, (i.e., a maximum indemnity of 36 months' gross profit). As noted earlier, the principal would also be liable to the dealer for this indemnification, if the dealer terminated the dealership agreement with just cause.

In the case of a representation or manufacturing agreement, the gross profit per month is determined by taking the average monthly gross profit for the last four years of the relationship or for such shorter period of time that the relationship has been in existence. In the case of a distribution contract, gross profit per month is calculated by taking the average monthly gross profit for the last two years of the relationship or for such shorter period of time that the relationship has been in existence.

In addition, in the event of cancellation of a dealership agreement, the principal is required to repurchase its products in the dealer's inventory at a price which would include the cost of the same, direct local and storage expenses, plus ten percent (10%) of said amount.

#### **4. Dominican Republic**

(i) Date of Legislation.

The Dominican Republic enacted dealer legislation pursuant to Law 173 of April, 1966, which was subsequently amended by Laws 263 of 1971, 622 of 1973 and 664 of 1977, and the Foreign Investment Law of November 1995 (collectively, the "Dealers' Act").

The Dealers' Act is not explicit with respect to retroactivity. However, based on the formula for computing the fourth element of indemnification (see discussion below), it is reasonable to conclude that the Dealers' Act is to be applied retroactively.

(ii) Definition of "Dealer".

The Dealers' Act defines a dealer (actually concessionaire) as a natural or legal person who acts as an agent, representative, broker or concessionaire, or in any other capacity in the Dominican Republic in the promotion, importation, distribution or sale of products or services, or in the lease or other trading or exploitation of merchandise or products of national or foreign origin, or in the performance of related services. The definition clearly is broad enough to cover both buy-sell distributors and commission agents

(iii) Written Agreement and Registration.

The Dealers' Act requires that dealers register the dealership agreements with the Exchange Department of the Central Bank of the Dominican Republic within 60 days of execution of the same in order to be entitled to the protection of the Act. Consequently, absent registration, a principal may terminate or refuse to renew a dealership agreement without payment of the termination indemnification discussed below.

(iv) "Just Causes" for Termination.

"Just cause" is defined to include noncompliance by the dealer with any of the essential obligations of the dealership agreement, or any act or omission of the dealer which adversely and substantially affects the principal's interests in the promotion, importation, distribution, sale, lease or any other kind of trading or exploitation of the principal's merchandise, products or services.

A principal is not entitled to terminate or refuse to renew a dealership agreement, unless the principal either has (a) "just cause," or (b) pays the termination indemnification discussed below to the dealer.

(v) Termination Indemnification.

In the event of a principal's dismissal unilateral or replacement of a dealer, or cancellation of or refusal to renew the dealership agreement without just cause, the dealer is entitled to demand from its principal equitable and full compensation for the losses or damages the dealer may have suffered. The amount of this indemnification is computed on the basis of the following factors:

(a) All losses incurred by the dealer as a result of the personal efforts it may have expended for the exclusive benefit of the business of which it has been deprived, including disbursements with respect to payments to its employees for compensation required under the Dominican Republic labor laws;

(b) The present value of investments made by the dealer for the acquisition or leasing, and preparation of premises, equipment, installations, properties and accessories, to the extent that the same may be used only in the business of which the dealer has been deprived;

(c) The value of the promotion of services developed on the basis of the commercial prestige of the dealer, the value of the merchandise or products, spare parts, accessories and goods in the inventory of the dealer and from the sale, lease or exploitation of which the dealer will not be able to benefit; said value is to be determined on the basis of the cost of acquisition of the same and transportation costs to the premises of the dealer, plus charges, taxes, assessments and expenses which may have been incurred in order to acquire the same, and any other expenses; and

(d) The gross profits obtained by the dealer from the sale of the merchandise, products or services during the previous five years, or, if the dealership agreement has been in effect for less than five years, five times the average annual gross profits realized during the existence of the relationship. If the dealer has represented or distributed the principal's products or services for more than five years, the principal is to pay the dealer, in addition, the sum resulting from multiplying the number of years in excess of five by 1/10 of the average total gross profits realized during the last five years of the relationship.

## 5. Ecuador

### (i) Date of Legislation.

Ecuador enacted dealer legislation on December 31, 1976, by means of Law 1038-A. Law 1038-A was amended on June 28, 1996, by Law 125 (collectively, the Dealers' Act). The Dealers' Act was subsequently repealed pursuant to Law 22, which became effective on September 19, 1997. Law 22 does not specify whether the Dealers' Act would apply to the termination of a distribution relationship entered into prior to September 19, 1997. The question is one of first impression.

In our view, there will be no statutory liability under the Dealers' Act for wrongful termination if [U.S. Principal] were to terminate a distributor in accordance with the distribution agreement between the parties, regardless of when such agreement was entered into. Law 22, in our view, governs any termination of a distribution agreement occurring on or after September 19, 1997. Law 22 allows parties to a distribution agreement to terminate the distribution agreement in accordance with its terms without incurring extra-contractual liability. Even if otherwise, in our view, the amendments to the Dealers Act made pursuant to Law 125 would be applicable, so as to relieve [U.S. Principal] of statutory liability for wrongful termination if it gave twelve months notice of termination, provided this is permitted under the distribution agreement. Our views are shared by Dr. Alejandro Ponce Martinez, our Ecuadoran counsel, and Dr. Milton Alava Ormaza, Attorney General of the Republic of Ecuador. The views of Dr. Alava Ormaza are contained in official letter number 9863 of March 23, 1998 addressed by Dr. Alava Ormaza to Ing. Benigno Sotomayor Jaime, Minister of Foreign Commerce, Industrialization and Fisheries of the Republic of Ecuador.

The following is a summary of the provisions of the Dealers' Act.

### (ii) Definition of "Dealer".

The Dealers' Act provides that a dealership agreement exists when a foreign enterprise not domiciled in Ecuador contracts with either: (a) an Ecuadorian individual or a foreign individual with uninterrupted residence in Ecuador in excess of one year, or (b) an enterprise organized in Ecuador (except for foreign enterprises as defined in the Ecuadorian foreign investment legislation, i.e., an enterprise with 51% or more foreign ownership), for the representation or distribution of, or maintenance of a commercial agency for, products manufactured abroad. Thus, the Dealers' Act applies both to buy-sell distributors and commission agents.

### (iii) Written Agreements and Registration.

The Dealers' Act requires the existence of a written document as evidence of the dealer relationship. However, it does not require registration of formal dealership agreements. Therefore, it would appear that invoices for products sold (i.e., a "written document") could serve as evidence of the existence of a dealer relationship, under appropriate circumstances.

### (iv) "Just Causes" for Termination.

Neither party to a dealership agreement can unilaterally terminate, modify, or refuse to renew the agreement, except in the case of "just cause" duly substantiated before a judge.

The following are considered just causes for the unilateral termination of or refusal to renew a dealership agreement by a principal, without incurring liability for termination indemnities under the Dealers' Act.

- (a) Serious breach by the dealer of its contractual or legal obligations;
- (b) Any act or omission of the dealer which seriously affects the interests of the principal;
- (c) The bankruptcy or insolvency of the dealer; and
- (d) The liquidation or termination of activities of the dealer.

The following are considered just causes for the unilateral termination of a dealership agreement by the dealer, entitling the dealer to seek payment of the termination indemnities provided for in the Dealers' Act.

- (a) Breach by the principal of its contractual or legal obligations;
- (b) Any act or omission of the principal which seriously affects the interests of the dealer;
- (c) The bankruptcy or insolvency of the principal; and
- (d) Termination of activities by the principal.
- (v) Termination Indemnification.

If a principal unilaterally terminates or refuses to renew a dealership agreement without just cause, or if the dealer terminates the agreement with just cause, the principal must indemnify the dealer for the damages incurred by the latter. The Dealers' Act provides for the amount of said damages to be determined by taking into account the following factors:

- (a) the current cost of investments made by the dealer to acquire and adapt premises, installations, furniture, equipment, and tools, to the extent these may not be easily and reasonably used for other activities in which the dealer is normally engaged;
- (b) the current level of profits on the sale or distribution of the merchandise which is subject to the contract, and the proportion they represent of the total amount of profits of the business of the dealer.
- (c) the current cost of the merchandise, and/or raw materials, parts, replacements, accessories and advertising material, which the dealer may have acquired and which the dealer has not been able to sell or distribute; and
- (d) the goodwill of the dealer's business, or of that part of the dealer's business attributable to the activities covered by the dealership agreement. Goodwill is determined by taking into account the number of years of the dealer relationship, the current volume of sales or distribution of merchandise covered by the dealership agreement and the proportion that this volume represents in the business of the dealer, the proportion of the market that the dealer has acquired in Ecuador for the merchandise covered by the dealership agreement and the volume that

this market share represents, and such other factors as may reasonably assist in determining the value of the goodwill.

(vi) Maximum Indemnity.

The Dealers' Act provides that the indemnification provided thereunder shall not exceed the value resulting from the application of the following two formulae:

(a) The value resulting from the product of the monthly average of net profits in the last 36 months, which the dealer would have obtained as a result of the sale or distribution of the merchandise which is subject to the contract, times the number or years of duration of the contract; or

(b) The value resulting from the addition of the total amount of non-amortized investments referred to in (v)(a) above plus the 50% of the profits calculated taking as a basis the formula established in (vi)(a) above, which would have been obtained if the contractual term agreed upon would have been respected.

(vii) Termination Upon Notice.

The Dealers' Act also provides that the dealer would not be entitled to any indemnification if the contract provides for termination upon notice and such notice is given at least twelve months in advance of the termination.

## 6. El Salvador

(i) Date and Retroactivity of Legislation.

El Salvador originally enacted dealer legislation pursuant to Decree No. 61 of 1970. Said Decree remained in effect only up to December 31, 1970, after which time the new Commercial Code of El Salvador came into effect and governed, *inter alia*, the protection afforded to dealers. Pursuant to Decree Law No. 247 of 1973, El Salvador amended the articles of the new Commercial Code concerning dealer protection (Articles 392 through 399B, hereinafter the "Dealers' Act").

Although the Dealers' Act does not expressly provide for retroactive application of its provisions to contracts in existence at the time of its enactment, based on several provisions of the Dealers' Act it appears that it will be applied retroactively.

(ii) Definition of "Dealer".

The Dealers' Act is expressly intended to protect agents, representatives and distributors from unjustified unilateral termination by the principal. It applies to any individual or legal entity who in a continuous manner and through an agreement has been designated by a principal to represent or distribute given products or services in El Salvador. Thus, it applies to both buy-sell distributors and commission agents.

(iii) Written Agreement and Registration.

The Dealers' Act does not require registration of dealership agreements or dealers. In addition, the Act does not expressly require that dealership agreements be in writing. Therefore, it would appear that for Dealers' Act purposes, a dealer relationship can be established by course of conduct.

(iv) "Just Causes for Termination.

The Dealers' Act defines "just cause" for termination or modification of, or refusal to renew, a dealership agreement by a principal without incurring liability for termination indemnities as follows:

- (a) Non-compliance by the dealer with the terms of the dealership agreement;
- (b) Fraud on the part of the dealer;
- (c) Serious ineptitude or negligence of the dealer;
- (d) Continuous decrease in the sale or distribution of the corresponding products for reasons imputable to the dealer;
- (e) Disclosure of confidential information by the dealer; and
- (f) Acts imputable to the dealer which prejudice the introduction, sale or distribution of the products covered by the dealership agreement.

In addition, the Dealers' Act provides that a dealer has just cause to terminate a dealership agreement and claim termination indemnities from the principal, if the latter unilaterally introduces a modification to the dealership agreement that prejudices the rights or interests of the dealer.

(v) Termination Indemnification.

A dealership agreement may be terminated by either party with three months' prior notice. However, if the principal terminates, modifies or refuses to renew the agreement without just cause, or if the dealer terminates the agreement with just cause, the dealer is entitled to termination indemnities computed on the basis of the following factors:

- (a) Expenses incurred by the dealer for the benefit of the business of which the dealer is being deprived, to the extent that said expenses may not be recouped on account of the unilateral termination of the agreement;



- (b) The value of investments in plant, equipment, installations, movables and tools to the extent that the same may only be used in the business of which the dealer is being deprived;
- (c) The value of the dealer's inventory of merchandise and parts, to the extent that the dealer may not continue to sell the same or the sale thereof becomes especially difficult due to the termination of the agreement; the value of said merchandise is to be calculated by taking into account the purchase cost, plus freight charges to the dealer's establishment, and taxes and other charges which the dealer has been required to pay in order to obtain the merchandise; upon payment of said amount, the principal is entitled to repossess the merchandise;
- (d) The amount of gross profits obtained by the dealer as the result of the dealer relationship during the last three years of the same, or during such lesser period of time that the relationship may have been in effect; and
- (e) The value of the credits that the dealer may have granted to third parties for the purchase of the merchandise which the dealer distributes. Upon payment of said amount, the principal is subrogated to the rights of the dealer with respect to such credits.

## 7. Guatemala

Guatemala originally enacted dealer legislation pursuant to Decree 78-71 of 1971 (the "Dealers' Act"), which came into effect on October 2, 1971. The Dealers' Act was subsequently repealed pursuant to Decree 8-98, which came into effect on March 12, 1998. The repeal of the Dealers' Act, however, does not have retroactive effect. This means that all distribution relationships entered into prior to March 12, 1998 will continue to be governed by the provisions of the Dealers' Act.

Decree 8-98 also amended the Guatemalan Commercial Code to include many new provisions affording protection to local distributors and representatives in the event of unilateral termination by their principals, similar to those provisions previously established under the Dealers' Act. All distribution relationships entered into on or after March 12, 1998 will be governed by these new provisions of the Guatemalan Commercial Code. The following summarizes both the Dealers' Act and the dealer provisions of Decree 8-98.

### A. Dealers' Act

#### (i) Definition of "Dealer".

The Dealers' Act defines an agency, distribution or representation agreement as one by which a principal, whether Guatemalan or foreign, designates an individual or legal entity "exclusively" for the sale, distribution, promotion or placement in Guatemala of services or products, whether the same are manufactured locally or abroad. The meaning of "exclusively" in this context is not clear. We do not believe it is intended to imply that non-exclusive dealers are not protected. Rather, we believe that the "exclusivity" is meant to distinguish dealers from other merchants who, in addition to distribution or marketing of products, undertake other activities on behalf of a principal (e.g., licensees, contract manufacturers, assemblers, etc.).

#### (ii) Written Agreement and Registration.

The Dealers' Act does not require registration of dealership agreements and/or dealers. Dealership agreements entered into after October 1, 1971, must be made by means of a public deed or an authenticated (i.e., notarized) private document. Nonetheless, as noted above, the existence and validity of dealership agreements entered into before the effective date of the Dealers' Act may be established by means of other evidence.

(iii) "Just Causes" for Termination.

The Dealers' Act provides that a dealership agreement may only be terminated in the following manner:

- (a) By mutual consent of the parties;
- (b) By expiration of the term in the case of a fixed-term agreement;
- (c) Upon the occurrence of a "just cause" for termination;
- (d) By three months' prior notice on the part of the dealer; and
- (e) By decision of the principal at any time, provided that the principal pays the corresponding termination indemnities to the dealer.

As noted above, expiration of the term of a definite term agreement does not give rise to termination indemnification. However, it should be noted that continuous renewals of a definite term agreement may result in said agreement being considered an indefinite term agreement. In such a case, a principal may be liable for termination indemnification to the dealer if the principal refuses to renew the agreement without just cause.

The Dealers' Act provides the following just causes for unilateral termination of a dealership agreement by a principal without incurring liability for termination indemnification:

- (a) Unauthorized disclosure by the dealer of the principal's confidential information;
- (b) Decrease in average sales or placements of products or services, if the decrease is attributable to ineptitude or negligence of the dealer proven in court;
- (c) Breach by the dealer of its contractual obligations;
- (d) Commission by the dealer of a crime against the property or person of the principal; and
- (e) Refusal by the dealer to render reports or to make payments as agreed upon in the dealership agreement.

The following are considered just causes for termination of a dealership agreement on the part of the dealer:

- (a) Acts on the part of the principal that directly or indirectly impair or tend to impair performance of the dealership agreement by the dealer;
  - (b) Breach by the principal of its contractual obligations;
  - (c) Commission by the principal of a crime against the property or person of the dealer; and
  - (d) Refusal by the principal to render reports or to make payments as agreed upon in the dealership agreement.
- (iv) Termination Indemnification.

Termination of a dealership agreement by the principal without just cause as defined above requires payment of the following items of indemnification to the dealer:

- (a) Direct and promotional expenses incurred by the dealer during the last year of the dealership agreement;
- (b) Investments made by the dealer in the course of performance of the dealership agreement, provided that said investments cannot be recouped or utilized for other purposes;
- (c) Cost of inventory, at wholesale price, purchased from the principal which cannot be sold by the dealer on account of the termination; the goods must be merchantable, but defects not caused by the dealer will not prevent a finding of merchantability;
- (d) Fifty percent (50%) of the gross earnings that the dealer may have realized from the inventory mentioned in (c) above, absent termination of the dealership agreement;
- (e) An amount equal to the gross earnings realized by the dealer during the last three years of the dealership agreement, or if the agreement has been in effect for less than three years, an amount equal to the total gross earnings realized by the dealer; and
- (f) Any termination benefits required by Guatemalan labor law for employees and workers of the dealer who are discharged as a result of termination of the dealership agreement.

In addition, a dealer would be entitled to the above noted indemnification if the principal carries out any acts that directly or indirectly impair or tend to impair the dealer's performance under the dealership agreement or the dealer's rights under the same.

## **B. Decree 8-98**

### (i) Definition of "Dealer"

The Dealers Act applies to agents, which may be dependent or independent, buy-sell distributors and sales representatives. Agent is defined to include any person or entity that acts for the benefit of one or more principals to promote and execute commercial contracts in the name and on behalf of such principal(s). Dependent agents act for the account of the principal and have an employer-employee relationship with such principal. Independent agents act for their own account, but have a contractual relationship with the principal. Distributors and

representatives act through a contractual relationship with the principal to sell, distribute, promote, expand or place goods or services of such foreign or domestic principal in Guatemala.

(ii) "Just Causes" for Termination

Either party will have "just cause" to terminate the agreement upon the happening of the following events:

- a. The other party fails to fulfill or violates any its obligations set forth in the agreement;
- b. The other party committed a crime against the party now wishing to terminate the agreement; or
- c. The other party unjustifiably refuses to provide reports and accounts or make payments related to the business in the time and manner set forth in the agreement.

The principal will have "just cause" to terminate the agreement upon the happening of the following events:

- a. The dealer breaches any agreement of confidentiality in the agreement; or
- b. The negligence or ineptitude of the dealer causes a decrease in the average sales or market share of goods or services to be proven in a judicial proceeding. In the event that the principal fails to prove this, it will be liable for termination indemnities to the dealer.

The dealer will have "just cause" to terminate or rescind the agreement when the principal acts in a manner that directly or indirectly impedes or tends to impede the dealer's ability to fulfill its obligations under the agreement.

(iii) Indemnification for Termination

Indemnification is payable only upon termination of an indefinite term agreement. It is equal simply to the damages proven by the dealer to have derived from the termination.

It is unclear whether one or more renewals of a definite term agreement may result in such an agreement being considered an indefinite term agreement.

## 8. Haiti

### (i) Date and Retroactivity of Legislation.

Haiti has Dealer Protection Law in effect, which was enacted by Decree of October 6, 1986 (the "Dealers' Act"). It is not clear whether the Dealers' Act applies retroactively to agreements entered into before its effective date.

### (ii) Definition of "Dealer".

The Dealers' Act defines a dealer ("commercial agent") as any person or entity which, on a regular and independent basis, promotes and eventually executes purchase, sale, lease or service agreements on behalf of Haitian or foreign producers, cooperatives, manufactures or merchants. This definition has been interpreted by local courts to include buy-sell distributors. Under the Dealers' Act, the dealer, if an individual, must be a Haitian national. However, it is unclear whether the dealer, if a legal entity, can be a company owned in whole or in part by non-Haitian nationals.

### (iii) Written Agreement and Registration.

The Dealers' Act requires the dealer agreement to be in writing and to contain the qualification of the parties, the term of the agreement, and clauses providing for or disallowing exclusivity of the dealer and providing for the amount of commissions to be paid. Nevertheless, the Dealers' Act does not require the agreement to be registered.

On the other hand, the Dealers' Act requires the dealer to be registered with the special registry of the Court of First Instance. Said registration is valid for a two-year period and must be renewed at the end of each period. Also, the Dealers' Act requires the dealer, as a merchant, to be registered with the Ministry of Commerce and Industry and with the Chamber of Commerce.

### (iv) "Just Causes" for Termination.

The Dealers' Act provides that an agreement can be for a definite or indefinite term. The definite-term agreement terminates at the expiration of its term, except if renewed by agreement between the parties, which renewal may be implied from the conduct between the parties. The repeated renewal of a definite-term agreement does not transform it into an indefinite-term agreement.

The Dealers' Act also provides that the principal can terminate a definite-term agreement prior to its expiration date by giving a three-month advance notice to the dealer. Nevertheless, as an exception, the principal is not required to give such advance notice in case of early termination of the agreement for just cause. The Dealers' Act, however, does not define what is considered just cause for purposes of termination of the agreement. On the other hand, it is not clear under the Dealers' Act whether the principal is required to give any advance notice to the dealer for termination of an indefinite-term agreement.

(v) Termination Indemnification.

The Dealers' Act entitles the dealer to receive a termination indemnity for any losses incurred in the event the principal unilaterally terminates the agreement without just cause, regardless of receipt of advance notice. It is not clear under the Dealers' Act whether the termination indemnity applies to definite-term agreements as well as to indefinite-term agreements. The amount of such termination indemnity is determined based on (i) the term of the agreement, (ii) volume of transactions realized during the term of the agreement, and (iii) the investments that the dealer made to promote the principal's products. If the parties cannot agree on the amount of the indemnity, they may refer their dispute to an arbitration commission composed of three members (one appointed by each party, and the third appointed by common agreement). Finally, the decision granted by the arbitration commission on the termination indemnity can be appealed to the Supreme Court of Haiti.

## **9. Honduras**

(i) Date and Retroactivity of Legislation.

Honduras' dealer legislation was enacted by its National Congress pursuant to Decree No. 50 of October 1970, subsequently replaced on December 7, 1977, pursuant to Decree Law 549, as amended on September 10, 1979, pursuant to Decree No. 804 (hereinafter collectively referred to as the "Dealers' Act"). Regulations to the Dealers' Act were issued pursuant to Resolution 669-79 of the Military Junta on November 16, 1979.

The Dealers' Act provides that pre-existing agreements are covered, as long as application of the Dealers' Act is not retroactive. While this provision is extremely ambiguous, the Dealers' Act has been interpreted to entitle dealers appointed prior to the enactment of the Act, who are thereafter terminated without just cause, to termination indemnification under the Act. Our Honduran correspondent is also of the opinion that the Dealers' Act applies to existing dealers appointed prior to the enactment of the Dealers' Act.

(ii) Definition of "Dealer".

The Dealers' Act defines dealers (actually "concessionaires") as those individuals or legal entities of Honduran nationality (legal entities are considered to be of Honduran nationality if owned 51% or more by Honduran citizens), who, by "contract or conduct", represent, distribute or act as agents for the products or services of a national or foreign principal, on an exclusive or non-exclusive basis for all or part of the Honduran territory.

(iii) Written Agreement and Registration.

Dealers are required to be licensed by the Secretariat of Economy. Furthermore, dealers must be affiliated with their corresponding Chamber of Commerce.

The Regulations to the Dealers' Act establish the procedures for obtaining said license and registering the license with the General Directorate of Internal Commerce. Unregistered dealers cannot invoke the protection of the Dealers' Act.

Since the definition of dealer contained in the Dealers' Act refers to persons who act by contract or conduct," it appears that written agreements are not required for purposes of the Dealers' Act. For purposes of obtaining the license referred to above, the regulations only require the presentation of any document that evidences the rendering of representation or distribution services by the dealer.

(iv) "Just Causes" for Termination.

A principal may unilaterally terminate, modify, or refuse to renew a dealership agreement without liability for termination indemnification only in cases of just cause. Just cause is defined as follows:

- (a) Breach by the dealer of the essential obligations of the dealership agreement or of the contractual relationship;
- (b) Fraud or abuse of confidence in the business entrusted to the dealer;
- (c) A continuous decrease in sales or placement of the goods and services covered by the dealership agreement, provided that said decrease results from the negligence or ineptitude of the dealer;
- (d) Groundless refusal by the dealer to provide information on accounts or to settle the same at the time and in the manner agreed upon or established by commercial custom or usage.
- (e) The disclosure of previously established confidential information concerning the industry, business or trade covered by the dealership agreement;
- (f) Bankruptcy, insolvency, suspension of payments or any other legal inability to engage in commerce; and
- (g) Any other act imputable to the dealer which damages the market introduction or sale of the products or services covered by the agreement.

(v) Termination Indemnification.

A dealership agreement may be terminated by the mutual agreement of the parties without incurring liability. If a principal terminates, modifies or refuses to renew a dealership agreement without just cause, as defined above, the dealer will be entitled to receive termination indemnification. The amount of said indemnification may be mutually agreed to between the parties, provided such amount is not deemed unconscionable ("*leonina*"). However, in the absence of a mutual agreement, the Dealers' Act provides that the dealer will be entitled to receive an amount computed on the basis of the following factors:

- (a) Expenses incurred by the dealer which cannot be recouped due to the modification, refusal to renew or termination of the dealership agreement or contractual relationship;
- (b) The value of the investments made for the benefit of the principal, to the extent that the dealer cannot make use of said investments; the value of the investments is determined in accordance with the percentage table for depreciation or machinery and movable goods in effect for income tax purposes;
- (c) The value of the inventory or merchandise when, due to the modification, refusal to renew or termination of the dealership agreement the dealer cannot make use of the same in the performance of its commercial activities; this amount is to be computed by taking into account the cost of acquisition, freight charges to the dealer's establishment, taxes, expenses and services which the dealer had to pay for in order to obtain said inventory;
- (d) An amount equal to the gross profits obtained by the dealer in the exercise of the dealership, through the sale of the merchandise or services during the last five year, or if the dealership agreement has been in effect for less than five years, five times the average annual gross profits earned during the duration of the agreement;
- (e) The value of credits which the dealer granted to third parties in carrying out the dealership. In this regard, the principal will become subrogated to the rights of the dealer. However, the principal is not obligated to pay for credits which are more than six months overdue at the time of initiation of the corresponding judicial action.

In addition, a dealer will be entitled to terminate the corresponding dealership agreement without liability and to claim the termination indemnification described above, if the principal unilaterally modifies, replaces or increases the contractual obligations of the dealer or if the principal violates or breaches the dealer's rights under the dealership agreement.

## 10. Nicaragua

A Dealer Protection Law was first enacted in Nicaragua pursuant to Law 287 of February 2, 1972. Law 287 was repealed by the Somoza government in 1979. However, pursuant to Decree No. 13 of December 22, 1979 (the "Dealers' Act"), the succeeding Nicaraguan government reenacted the prior dealer legislation with some changes.

On June 6, 1997, the Nicaraguan legislature repealed the Dealers' Act, effective July 1, 1998. As a result of this repeal, the relationship between a foreign principal and a local distributor (even those established prior to July 1, 1998) is currently governed by the general principles of Nicaragua's contract law, which allow the parties to an agreement to freely agree on the terms and conditions for termination or non-renewal of their agreement.

## 11. Paraguay

### (i) Date and Retroactivity of Legislation.

Paraguay enacted dealer legislation pursuant to Law No. 194 of June 17, 1993 (the Dealers' Act"), which amended and restated Decree Law No. 7 of March 7, 1991. It is not clear whether the Dealers' Act applies retroactively to agreements entered into before its effective date.

### (ii) Definition of "Dealer".



The Dealers' Act applies to both sales representation and distribution relationships. The Dealers' Act defines "representation" as the authorization granted by contract, properly documented, in order that a legal or natural person, domiciled in Paraguay, may administer and carry out commercial transactions for the promotion, sale or placement, within the country or any other designated area, of products or services provided by a foreign firm or manufacturer. "Distribution" is defined as the contractual relation, properly documented, between a foreign firm or manufacturer and a legal or natural person domiciled in the Republic for the purchase or consignment of products for the purpose of reselling such products within the country or any other designated area.

(iii) Written Agreement and Registration.

In order to enjoy protection under the Dealers' Act, the dealer must register the dealership agreement with the Public Registry of Commerce, which has opened a section for that purpose. However, the dealer can register at any time prior to the termination of the relationship, and before the Dealer takes active steps to enforce its rights under Dealers' Act.

There is not requirement that the dealership agreement be embodied in a single written document. The above-referenced registration may be obtained by the dealer showing any documents (e.g., invoices, purchase orders, letters or faxes) that evidence the dealership relationship.

(iv) "Just Cause" for Termination.

The following are considered just unilateral termination of causes for the modification of, or agreement by the principal without liability for termination indemnification under the Dealers' Act:

- (a) A breach of the contract by which the representation, agency or distribution was granted;
- (b) Fraud or abuse of confidence in the activities entrusted to the refusal to renew, a dealership incurring under the clauses of Representative, Agent or Distributor;
- (c) Negligence or ineptitude of the dealer in the corresponding sale of products or rendering of services;
- (d) Continuous decrease in the sale or distribution of the articles for reasons imputable to the dealer; however, the dealer is not responsible for the decrease in sales when import quotas or restrictions are established and the sales are inevitably affected by Acts of God or force majeure, duly justified;
- (e) Any act imputable to the dealer which prejudices the good progress of introduction, sale, and distribution of products rendering of services which are the subject matter of the relation; and
- (f) Conflicts of interest by reason of the representation, agency or distribution of products or the rendering of services which compete with the products or services that are the subject matter of the relation.

(v) Termination Indemnification.

Unilateral termination or modification of, or refusal to renew, a dealership agreement by a principal without just cause renders the principal liable to the dealer for the termination indemnification discussed below. The amount of indemnification is fixed on the basis of the average annual gross profit obtained by the dealer during the existence of the dealership agreement.

If the dealership has been in effect for less than two years, the amount of indemnification will be equal to the average annual gross profits realized by the dealer during the corresponding period. If the agreement has been in effect for more than two years, the amount of indemnification is to be calculated by multiplying the average gross profits realized by the dealer over the last three years of the agreement by the following:

- (a) If the agreement has been in effect for more than two years and up to five years: 1x
- (b) If the agreement has been in effect for more than five years and up to ten years: 2x
- (c) If the agreement has been in effect for more than ten years and up to twenty years: 3x
- (d) If the agreement has been in effect for more than twenty years and up to thirty years: 4x
- (e) If the agreement has been in effect for more than thirty years and up to fifty years: 5x
- (f) If the agreement has been in effect for more than fifty years: 6x

In addition, upon unilateral termination or modification of, or refusal to renew the dealership agreement by the principal without just cause, the principal is required to repurchase the dealer's inventory at an amount equal the cost of the merchandise plus the normal profit based on market price.

## **12. Puerto Rico**

### **(i) Date and Retroactivity of Legislation.**

The Commonwealth of Puerto Rico first enacted dealer legislation pursuant to Act No. 75 of June 24, 1964. This Act was subsequently amended by Acts No. 105 of June 23, 1966, No. 17 of May 24, 1971, and No. 75 of June 23, 1978 (hereinafter collectively referred to as the "Dealers' Act"). The Dealers' Act has been incorporated into Title 10, Chapter 14, Sections 278 through 278d of the Laws of Puerto Rico, 10 L.P.R.A. 278-278d. The Supreme Court of Puerto Rico has held that any retroactive application of the Dealers' Act would be unconstitutional.

### **(ii) Definition of "Dealer"**

A dealer is defined as a person who is effectively in charge of the distribution, agency, concession or representation of specific merchandise or the rendering of a service in Puerto Rico, regardless of how the parties characterize the relationship in the corresponding agreement. Both buy-sell distributors and commission agents are clearly within the scope of the Dealers'

Act.

(iii) Written Agreement and Registration.

The Dealers' Act does not require that dealership agreements be in written form or that said agreements and/or dealers be registered. Consequently, a dealer relationship can be established by course of conduct.

(iv) "Just Causes" for Termination.

Notwithstanding the existence in a dealership agreement of a clause which reserves to the parties the unilateral right to terminate the relationship, the principal may not terminate, refuse to renew, or directly or indirectly perform any act detrimental to the established relationship without incurring liability for termination indemnification except in the case of just cause.

"Just cause" is defined as non-performance by the dealer of any of the essential obligations contained in the dealership agreement, or any act or omission of the dealer which adversely and substantially affects the interests of the principal in promoting the market for or distribution of the merchandise or services.

(v) Termination Indemnification.

If a principal terminates, refuses to renew or undermines an established dealer relationship without just cause, the principal must indemnify the dealer to the extent of damages incurred by the dealer. The amount of this indemnification is to be fixed on the basis of the following factors:

(a) The actual value of the amounts expended by the dealer in the acquisition and adaptation of premises, equipment, installations, furniture and utensils to the extent that these are not easily and reasonably useful in any other activity in which the dealer is normally engaged;

(b) The cost of the goods, parts, pieces, accessories and utensils that the dealer may have in stock, and from the sale or exploitation of which the dealer is unable to benefit;

(c) The goodwill of the business, or such part thereof attributable to the distribution of the merchandise or to the rendering of the pertinent services, said goodwill to be determined by taking into consideration the following:

1. Number of years of the dealer relationship;
2. Actual volume of the distribution of merchandise or the rendering of services, and the proportion said volume represents in the dealer's business;
3. Proportion of the Puerto Rican market that the above noted volume represents; and
4. Any other factor that may help establish in an equitable manner the amount of said goodwill.

(d) The amount of the profit obtained in the distribution of merchandise or in the rendering of services, as the case may be, during the last five years of the dealer relationship, or if said relationship has been in effect for less than five years, five times the average annual profit obtained by the dealer during the entire term of the relationship.

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Please call us if you have any question or comments whatsoever.

Respectfully submitted,

BAKER & McKENZIE

SAL/JAG

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