



303 International Distributor/Agency Commercial Contract Termination

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Faculty Biographies

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Armando J. Tirado is the general counsel for Latin America and Caribbean operations of Tyco International, located in Miami, Florida, and all of its business segments (electronics, engineered products and services, fire and security, healthcare, plastics, and adhesives). Prior to joining Tyco, Mr. Tirado worked as director and regional counsel for Ingram Micro, vice president and general counsel for DHL Worldwide Express, regional counsel for FedEx Express, and as chief legal officer for the predecessor of AT&T Latin America. He started practicing law as corporate counsel and afterwards as senior projects counsel for Petróleos de Venezuela. In private practice, he served his own clients as transactional advisor for international business transactions, and as coordinator of transnational litigation. He practiced in New Orleans as counsel to a conglomerate of international firms, and upon moving to Miami, with the Gunster Yoakley Valdes-Fauli & Stewart firm.

Mr. Tirado currently serves as co-chair of the corporate counsel section of the Inter American Bar Association and as a member of the steering committee of the South Florida Group of Regional Counsel. He also has the distinction of being the first (and only) Florida attorney at law to be certified by the Florida Bar as a Certified Foreign Legal Consultant.

Mr. Tirado has an LL.M. from Columbia University School of Law in New York, an LL.M. from London School of Economics, University of London, a J.D. with honors from Tulane University School of Law, and he is the holder of an LL.B. with honors from the UCAB-Catholic University Andres Bello.

SAMPLE TERMINATION WORDING

- 9. TERM AND TERMINATION**
- 9.1 This Agreement shall commence on the Commencement Date and shall continue for a fixed period of [()] year[s] from the Commencement Date whereupon it shall automatically terminate unless the parties have agreed to renew it.
- 9.2 Notwithstanding the provisions of Clause 9.1, the Principal shall be entitled to terminate this Agreement immediately on written notice at any time on the occurrence of any of the following events:
- (a) if the Agent commits a material breach of any of the terms of this Agreement and, where such breach is remediable, fails to remedy the same within [30 days] of being required by the Principal to do so;
 - (b) if the Agent becomes or is deemed to be insolvent or is unable to pay its debts (within the meaning of the Insolvency Act 1986) or a petition is presented or meeting convened or resolution passed for the purpose of winding up the Agent or the Agent enters into liquidation whether compulsorily or voluntarily or compounds with its creditors generally or has a receiver, administrator or administrative receiver appointed over all or any part of its assets or any proposal is made for a company voluntary arrangement in respect of the Agent or the Agent threatens to take or takes or suffers any similar action in consequence of debt or insolvency in any jurisdiction;
 - (c) [if the Agent fails to procure unconditional orders for the Products having an aggregate value (being the aggregate Net Sales Price of all such Products) in each year of not less than the amount set out in Schedule 5;]
 - (d) if at any time any of the representations or warranties given by the Agent in Clause 12 is, or proves to be, or becomes untrue or inaccurate;
 - (e) [if the Agent dies or, in the reasonable opinion of the Principal, is incapacitated through illness or otherwise from carrying out its obligations under this Agreement for a period of more than [] weeks or for an aggregate period of more than [] weeks in any period of six months;]
 - (f) [if there is any change in the composition of the board of directors of the Agent or its senior management or if there is a Change of Control.]
- 9.3 Every obligation of the Agent [under this Agreement][under Clause [] and Clause [] is a condition, breach of which by the Agent will entitle the Principal to treat the Agreement as repudiated by the Agent.
- 10. CONSEQUENCES OF TERMINATION**
- 10.1 On the termination of this Agreement for any reason the Agent shall at the request of the Principal forthwith return to the Principal or otherwise dispose of as the Principal may direct any and all samples, documents and papers whatsoever sent to the Agent and relating to the business of the Principal (other than correspondence between the Principal and the Agent) and any Products which (including samples) the Agent may have in its possession or under its control [and shall also deliver to the Principal a copy of all separate [books of account and] records relating to the agency kept in accordance with Clause 3.1(i) of this Agreement.]
- 10.2 The termination of this Agreement (for whatever reason) shall not affect the respective rights and liabilities of each of the parties accrued prior to such termination.
- 10.3 [To the extent that the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") apply to this Agreement and subject to the remainder of this Clause 10.3, the Agent shall be entitled to be indemnified as provided in Regulations 17(3) to 17(5) of the Regulations, unless any of the circumstances referred to in Regulation 18 of the Regulations is applicable. Accordingly, the Agent shall have no right to be compensated (as such term is

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defined in the Regulations) upon expiry or other termination of this Agreement howsoever the same arises. The Agent shall be entitled to be indemnified only if and to the extent that:

- (a) the Agent has brought the Principal new customers or has significantly increased the volume of business with existing customers and the Principal continues to derive substantial benefits from the business with such customers; and
- (b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the Agent on the business transacted with such customers.

The indemnity provided hereunder shall not exceed one year's average commission previously paid to the Agent, calculated in accordance with Regulation 17(5).]

Katharina Eikenberg
PPG Industries International, Inc.
Legal Counsel

Termination of Distribution Contracts in Europe

- *Outline* -

I. Introductory remarks:

- How the industry shapes the structure of distribution networks, contracts and termination clauses; distinction among selective/exclusive/open distribution networks
- The industry I work in: no strong brand differentiation, b2b environment, presence of players with large market shares;

II. Jurisdictional Overview

1. National versus European Approach

Unlike commercial agents (and competition law aside), termination of distribution contract has not been addressed so far at a European (EU) level, so the starting point tends to be national contract law. EU countries, with the exception of Belgium, do not have a codified law of distribution contracts. Case law however has set out various mandatory rules governing the termination of a distributor.

2. Distributor's rights to compensation upon termination: Major countries:

(a) Countries where distributors under certain circumstances have compensation claim upon termination

France:

There is generally no compensation for the loss of clientele at the expiry or termination of the distribution agreement, although, of late, case law has envisaged compensation for major investment realized by the distributor on behalf of the manufacturer.

Germany:

German courts have generally upheld compensation claims made by distributors provided the distributor appears in the market as a commercial agent does, i.e. if the distributor is integrated into the distribution system of the supplier, is

required to solicit business for the latter and the manufacturer benefits from the customers the distributor acquired after the contractual relationship ends.

Belgium:

Statutory law entitles an exclusive distributor to compensation *Spain:*

Spain's courts recognize the right of the distributor to compensation after the party terminates the contract if the distributor has increased the customer base and the supplier or a new distributor has taken advantage of the opportunities obtained by the dismissed distributor.

- The amount of compensation varies from country to country and depends on the circumstances of the specific case, but in general is comparable to the one of an agent.
- Compensation claims are not automatically precluded where the agreement is terminated for non material breach of contractual obligations by the distributor.
- Forum shopping, i.e. choice of other country's law, only allows within certain limits evading compensation claim.

(b) Countries where termination does not entitle the distributor to compensation claim

England, Italy and Scandinavian countries

3. Notice Period

Mandatory minimum notice periods exist in most jurisdictions depending on the lengths of the relationship.

III. Some Practical Guidelines:

1. Questions to address with outside counsel

- (a) Determine whether the local law of the distributor is mandatory. If so, can you avoid it by adapting your agreement? (e.g. exclusive v. non-exclusive? fixed term v. indefinite term?)
- (b) If you have a choice, make the right choice.
- (c) If the application of local law is unavoidable, to what will local law apply, i.e., advance notice? termination? indemnities?

2. Avoid litigation with distributor

Be aware of the potential bad publicity – trade press has a habit of picking up on disputes. If your German distributor thinks that you have terminated unfairly by not giving it the chance to recoup its investment, it may well decide to take you to court. If this happens, your relationship will be closely scrutinized and, if the court rules

in favor of your distributor, very soon all your other distributors will know that you have broken the law.

3. “Best of” Termination Clauses and their Downside: Some examples

(a) Termination for convenience:

Pro: Allows for termination at any time without justification
Contra: Difficult to negotiate, in particular where distributor is required to make significant initial investment

(b) Termination for missing agreed target sales (Quota clause):

Pro: Objective criteria; efficient performance control of the distributor
Contra: European Antitrust Law (Article 82 EU Treaty) prohibits companies in dominant position to set sales targets

(c) Termination for breach of non Compete Clause

Pro: Efficient performance and trust criteria breach of which quite easy to prove
Contra: European Antitrust Law (Article 81 EU Treaty) prohibit a company with a market share of more than 30 % to impose non compete obligations on its distributors

(d) Termination for breach of territorial restrictions:

Pro: territorial protection often essential when distributor is required to make upfront investment
Contra: European Antitrust Law (Article 81 EU Treaty) prohibits full territorial protection and even partial territorial protection where the company's market share is above 30 %

This Agreement takes effect on the Effective Date and will continue until June 30th, 2006.

(a) **Termination**

(i) **Termination Without Cause:** Either party will have the right to terminate this Agreement at any time, without cause and without the need of a court declaration to that effect, on the delivery of ninety (90) calendar days' prior written notice. Neither party will be responsible to the other for any costs or damages resulting from the termination of this Agreement under this section.

(ii) **Immediate Termination**

MANUFACTURER: Without prejudice to MANUFACTURER's other rights or remedies, MANUFACTURER will have the right to immediately terminate this Agreement upon written notice to COMPANY, and without the need of a court declaration to that effect, in the event that any of the following occurs:

(A) COMPANY makes any assignment for the benefit of creditors, files a petition in bankruptcy, or is adjudged bankrupt or becomes insolvent (*concurso*), or is placed in the hands of a receiver. The equivalent of any of these proceedings or acts, though known and/or designated by some other name or term in the Territory, will likewise constitute grounds for termination of this Agreement.

(iii) **Immediate Termination - Company:**

Without prejudice to COMPANY's other rights or remedies, COMPANY will have the right to immediately terminate this Agreement upon written notice to MANUFACTURER in the event that MANUFACTURER makes any assignment for the benefit of creditors, files a petition in bankruptcy, or is adjudged bankrupt or becomes insolvent, or is placed in

the hands of a receiver. The equivalent of any of these proceedings or acts, though known and/or designated by some other name or term in the Territory, will likewise constitute grounds for termination of this Agreement.

(iv) **Termination With Cause:** Without prejudice to MANUFACTURER's other rights or remedies, MANUFACTURER will have the right to terminate this Agreement immediately upon written notice, without the need of a court declaration to that effect, if COMPANY breaches any of the terms or conditions of this Agreement, and such breach is not cured to MANUFACTURER's reasonable satisfaction for thirty (30) calendar days after COMPANY receives written notice of such breach.

(b) **Rights Upon Termination/Expiration**

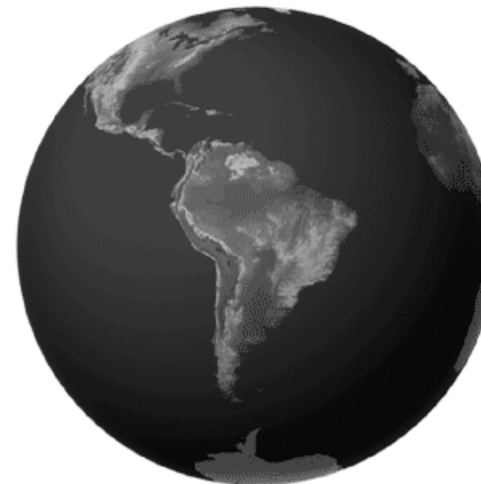
(i) Termination or expiration of the Agreement terminates any applicable addenda and amendments.

(ii) Any amounts that have accrued prior to termination or expiration will be due and payable within thirty (30) calendar days of the expiration or earlier termination of this Agreement. MANUFACTURER will issue the purchase credits due under this Agreement within fifteen (15) calendar days of the expiration or termination to enable COMPANY to calculate a net amount owed to MANUFACTURER for COMPANY's final payment. Any Home Product acquired by COMPANY pursuant to this Agreement which is in resaleable condition and which is in its possession as of the termination or expiration of this Agreement, at MANUFACTURER's option, may be returned to MANUFACTURER within sixty (60) calendar days after the effective termination or expiration or, if MANUFACTURER chooses not to take any Home Products returns, must be distributed by COMPANY subject to the terms of this Agreement until liquidated. The returns provision of this section overrides any other returns provisions in this Agreement. Additionally, all

orders received from COMPANY but not shipped by MANUFACTURER prior to the effective date of expiration or termination shall be shipped unless either party notifies the other within ten (10) Business Days of the expiration or termination of its election to cancel such orders. COMPANY will deliver a final inventory and sales report to MANUFACTURER within ninety (90) calendar days of the termination or expiration of this Agreement.



Focus on Latin America



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Termination: easy way out?

- *For cause: Examination of bad faith*
- *For convenience:*

*Protection by way of “compensation”
is likely by virtue of judicial
interpretation of provisions deemed
applicable by “analogy”*

Termination: easy way out?

*Subjective vs. objective cause in
terminations for cause:*

*Sometimes courts will read into the contract
an objective standard even though this
was not intended by the parties*



Terminated distributors change their business model to “litigation”

This “business model change” is a result of the fact that the business was not sustainable without the distribution contract



Terminated distributors change their business model to “litigation”

Theories and clause content count for little if it can be ignored or interpreted in an arbitrary way by a judge or arbitrator

Never underestimate the effect of preliminary injunctions (“temporary” only in name)

Escalation of hostilities in litigation is almost always a certainty



Terminated distributors change their business model to “litigation”

Things to worry about: filings in remote areas, default judgments in the face of fraudulent service of process, multiple actions based on the same grounds

Escalation includes the “criminalization” of civil litigation proceedings (starting with the investigation by authorities)

Take into account the different rules by which the game is played in certain LA&C jurisdictions



What do we do now?

Courts will look at the statute to give meaning to the words in a contract and fill the void

Usefulness of an agreement directly proportional to the degree it modifies and supplements local law

Key provisions should mirror the local law and attempt to adapt to the local legal and contractual concepts

Look for self sustaining partners

Review your existing contracts

Never, ever, do this (or anything) without local counsel



Ministerio de Comercio, Industria y Turismo
República de Colombia

MESA DE CONTRATOS DE DISTRIBUCION

Durante la primera y segunda ronda de negociaciones se inició un intercambio de información entre EE.UU. y Colombia respecto a los contratos de distribución y específicamente sobre los contratos de agencia comercial. Durante la tercera ronda, EEUU realizó varias preguntas sobre los contratos de agencia comercial en Colombia y entregó información sobre leyes relacionadas con distribución para los estados de California, Florida y Nueva York, (estados que Colombia identificó preliminarmente como de nuestro interés para conocer su legislación en materia de distribución). Esta legislación entregada por EE.UU. esta siendo objeto de estudio por parte de Colombia y durante la próxima ronda esperamos recibir más información sobre su legislación en esta materia. Aunque EE.UU. no ha manifestado aun cuales son sus intereses específicos en relación con este tema, nos informo que su sector privado identifico preliminarmente los siguientes puntos que considera sensibles respecto al contrato de agencia comercial en Colombia:

- Indemnizaciones derivadas de la terminación del contrato de agencia comercial
- Presunción de exclusividad dentro del contrato de agencia
- Agencia comercial de hecho y su termino de duración

Durante la siguiente ronda se continuara con el intercambio de información sobre la figura de la agencia comercial en Colombia y sobre la legislación relacionada con agencias y distribución en EE.UU.



Argentina

Agency: Labor law benefits for terminated individual 'agents' under specific circumstances

Sales are not conducted on own behalf but 'for' principal

Commercial terms are imposed by the principal

Elements such as a salary, per diems, or other compensation

Activity performed within a specific area

Risks borne by the principal



Argentina

Distribution: same regime as Agency

Termination needs to be covered in the contract, otherwise it will be treated as agency

Wrongful termination is a recognized cause of action

Compensation due to terminated distributor equivalent of 25% of lost earnings

Distinction “commercial distribution” and “concessions” (required to follow principal’s orders)

Foreign law selections and place of execution may be denied enforcement by local courts

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Brazil

Agency: If contract is for an indefinite term, notice of at least 30 days is required – otherwise compensation is due equivalent to one third of the earnings accrued during the last three months prior to termination

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Brazil

Distribution: termination of an indefinite agreement entitles the distributor to

Redemption of inventory and equipment at market prices

Compensation: 4% of projected revenues for 18 months plus 3 months for every 5 years of the agreement

Termination of a definite term agreement entitles the distributor to same damages accruing until the end of the agreement and other damages to sub-distributors

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Mexico

UN Convention on International Sales of Goods is applicable unless excluded by the contract (whether a lower court will enforce it is another matter)

Wrongful or premature termination of an agent generates liability for damages

Labor benefits accrue if agent is paid a salary, per diems, or other compensation, and is subject to supervision, subordination and a full time commitment

No indemnity regime for distribution terminations and performance clauses are permitted

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