LeadingLines
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# An Interview on Distributorship Agreements in Singapore

## Law on Distributorship Agreements

1. We understand that there is no specific legislation, case law, or customary practices that specifically regulate distributorship agreements in order to protect distributors (Laws governing the sale of goods and the conduct of business in general will regulate the distribution of goods in Singapore). Is our understanding correct?

1.1 For purposes of and in our responses to the questions below, a "distributorship agreement" is one which sets out a framework for the future supply of goods by the Supplier to the Distributor, but is not itself a contract for the sale of goods (where the seller transfers or agrees to transfer property in goods to the buyer for a money consideration), and whereby neither the Supplier nor the Distributor deals as a consumer.

1.2 Such a distributorship agreement does not attract, and we therefore do not consider laws relating to the sale of goods and consumer protection, such as the following:
- *Consumer Protection (Fair Trading Act)* (Chapter 52A, 2009 Revised Edition);
- *Sale of Goods Act* (Chapter 393, 1999 Revised Edition);
- *Sale of Goods (United Nations Convention) Act* (Chapter 283A, 2013 Revised Edition); and

1.3 Further, there is no specific legislation, regulation or case law which exists in order to protect the Distributor. Instead, the common law enunciated or established by case law, as well as the *Unfair Contract Terms Act* (Chapter 396, 1994 Revised Edition) ("UCTA") would apply to a distributorship agreement.

## Termination; Damages

2. Is there any specific legislation or case law based on which termination-related provisions in the distributorship agreement (listed below) will be found void or unenforceable?

- A provision specifying the bases for termination (termination with cause)
- A provision regarding termination at will (termination without cause)
- A provision allowing either party to refuse renewal by giving prior notice

The case of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and Another Appeal [2007] 4 SLR 413* (which was endorsed by the Court of Appeal in *The "STX Mumbai" and another matter [2015] SGCA 35*) made it clear that:

2.1 where an agreement clearly and unambiguously states that a party is entitled to terminate it if certain events occur, and those events in fact occur, that party will be entitled to terminate the agreement;

2.2 whether or not a distributorship agreement expressly provides for its own termination, either party ("Innocent Party") may nevertheless have the right to terminate the agreement where -

(i) the other party ("Breaching Party") by its words or conduct, clearly conveys to the Innocent Party that the Breaching Party will not perform its contractual obligations at all; or

(ii) the Breaching Party breaches -
- a *condition* of the agreement, which is a term that the parties intended to designate as so important that its breach would entitle the Innocent Party to terminate the agreement (such intended importance being considered at the time of contracting or entry into the agreement, rather than after the breach has occurred); or

- a warranty of the agreement, and the breach of which deprives the Innocent Party of substantially the whole benefit which was intended to be obtained by the Innocent Party from the agreement.

3. Is the Supplier required to pay the distributor compensation for terminating the distributorship agreement? If so, how is the compensation determined and what is the basis for the determination.

3.1 Unless otherwise expressly provided in the distributorship agreement, if the Supplier terminates the distributorship agreement on any of the grounds stated in paragraph 2.1 or paragraph 2.2 above, the Supplier would not be required to pay the Distributor any compensation for the termination.

3.2 However, if the Supplier terminates the distributorship agreement without the right to do so, i.e. outside the scope of paragraph 2.1 and paragraph 2.2 above, the Supplier's act of termination would be a breach of contract for which the Supplier would be liable to pay to the Distributor, damages as follows:

(i) where the distributorship agreement contains a provision stating the amount (or the formula for calculating the amount) of damages payable in the event of such breach of contract by the Supplier, and this amount is a genuine pre-estimate of the loss suffered by the Distributor ("Liquidated Damages Provision"), then this would be the amount payable by the Supplier to the Distributor; or

(ii) where the distributorship agreement does not contain a valid Liquidated Damages Provision, then damages payable by the Supplier to the Distributor would be determined under the common law
- based on the principle that the Distributor is to be put in as good a position as it would have been had the distributorship agreement been performed; and
- which, according to the case of *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd [2016] SGCA 18*
  - are *ordinarily* assessed in terms of the Distributor's expectation loss, which is the value of the benefit that the Distributor would have obtained if the Supplier had not caused the breach; or
  - may be *alternatively* quantified in terms of the Distributor's reliance loss, which is the costs and expenses the Distributor incurred in reliance on the Supplier's contracted-for performance, but which were wasted because of the Supplier's breach of contract.

4. If the agreement has a limitation of liability clause that provides that the Supplier will not be liable for any damage incurred by the distributor as a result of the termination of the distributorship agreement, will that clause [be] valid and enforceable?

4.1 A clause in the distributorship agreement that seeks to completely exclude the Supplier's liability ("Exclusion Clause") or to limit the Supplier's liability ("Limitation Clause") for the Supplier's termination in breach of the agreement would not be valid if:

(i) the agreement represents the Supplier's written standard terms of business; and

(ii) the Exclusion Clause or Limitation Clause, as the case may be, does not meet the requirement of "reasonableness" under the UCTA, which
- requires the Exclusion Clause or Limitation Clause, as the case may be, to have been fair and reasonable, having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the agreement was made;
- states that where the Exclusion Clause or Limitation Clause, as the case may be, restricts the Supplier's liability to a specified sum of money, the following would be relevant considerations in the assessment of "reasonableness"
  - what resources the Supplier could expect to be available to him for the purpose of meeting the liability should it arise; and
  - how far it was open to the Supplier to cover himself by insurance.

4.2 In the assessment of the required "reasonableness" of the Exclusion Clause or Limitation Clause:

(i) the Singapore Court has assessed based on factors borrowed from the Second Schedule to the UCTA (in the context of a contract that did not involve the sale or hire-purchase of goods even though that Schedule was not applicable in such context), such as the following (which for illustration, have been contextualised in relation to the Exclusion Clause or Limitation Clause in the distributorship agreement under discussion)

- the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the Distributor's requirements could have been met;
- whether the Distributor was induced to agree to the Exclusion Clause or Limitation Clause, as the case may be, or in accepting it, had an opportunity of entering into a similar contract with other persons without having to accept a similar Exclusion Clause or Limitation Clause, as the case may be;

(ii) it may be useful to note that the other factors stated in the Second Schedule of the UCTA for the assessment of "reasonableness" in the context of contract for the sale or hire-purchase of goods (although the distributorship agreement is not such a contract) include
- whether the Distributor knew or ought reasonably to have known of the existence and extent of the Exclusion Clause or Limitation Clause, as the case may be (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- where the Exclusion Clause or Limitation Clause, as the case may be, operates to exclude or restrict liability if some condition were not complied with, whether it was reasonable at the time of the agreement to expect that compliance with that condition would be practicable.

4.3 In addition, to effectively rely on the Exclusion Clause or Limitation Clause to exclude or limit its contractual liability to the Distributor, the Supplier will have to show that:

(i) the Exclusion Clause or Limitation Clause, as the case may be, has been properly incorporated into the agreement between the Supplier and the Distributor; and

(ii) as a matter of construction, the scope of the Exclusion Clause or Limitation Clause, as the case may be, in fact covers the liability arising from the Supplier's termination of the distributorship agreement, bearing in mind the following case law
- *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another [2013] 1 SLR 1* which is a reminder that the Exclusion Clause and Limitation Clause would be construed strictly, so that to be effective, its wording must clearly and unambiguously show that parties, at the time they entered into the agreement, intended for it to be applicable in the particular circumstances;
- *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, third party) [2006] 2 SLR(R) 268* which pointed out that a Limitation Clause would be construed less stringently as compared to an Exclusion Clause;
- *Rubycon Singapore Pte Ltd v Setron Limited and Another [1998] SGHC 199* (following the case of *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361)* which stated that in general, when discerning the contracting parties' intent regarding an Exclusion Clause or Limitation Clause, "*[o]ne may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent*".

4.4 For the reasons given above, the validity and enforceability of an Exclusion Clause or a Limitation Clause would depend largely on its exact wording and the prevailing circumstances in which it is sought to be applied.

## Registration Requirements; Protection of Distributor

5. We understand that the agreement does not need to be registered with the government. Is our understanding correct?

Based on our research, some countries require distributorship agreements to be registered with the government (including customs) in order for a distributor to engage in distribution activities, and this registration may prevent the supplier from terminating the distribution relationship. For instance, imagine that a Japanese company appoints Singapore Company A to be its distributor. Company A, in order to obtain an import license, registers its distributorship agreement with the Japanese company. After a while, the Japanese company tries to replace Company A with Singapore Company B, and terminates the distributorship agreement with Company A in accordance with the agreement. Although Company A needs to be deregistered in order to register the new distributor (Company B), Company A refuses to give its consent, which is required for deregistration. Under this scenario, it would in practice be impossible (or at least extremely difficult) to terminate the distribution relationship as provided in the distributorship agreement. We would like to know whether there is anything similar in your jurisdiction that may prevent a supplier from replacing the distributor. There may be special regulations for

certain products like medical devices. However, we would like you to focus on systems/regulations that apply generally to all distributorship agreements.

Distributorship agreements need not be registered with the Singapore government. There is no Singapore equivalent to the scenario you described above.

6. Are there any other restrictions in your jurisdiction that are designed to protect the distributor? If so, please provide us with a brief summary of those restrictions.

There are no statutory or regulatory restrictions specifically designed to protect the Distributor.

## CONTACT

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