



International Distribution Institute

IDI CONFERENCE 2015

CHARACTERISTICS AND ESSENTIAL CONTENT OF A TERMINATION AGREEMENT

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Introduction

- A termination agreement provides a termination of the contractual relation by agreement instead of a unilateral declaration of one of the parties.
- It will ensure that the rights and liabilities of the parties regarding the contract have been satisfied and fulfilled.
- It regulates the relation of the parties during and after termination.
- A termination agreement is subject to freedom of contract principle however, the applicable laws may provide restrictions.
- Content of the termination agreements depends on
 - the parties intention and the underlying contracts,
 - no exhaustive list of provisions to be agreed.

Essential Content

■ Termination Date

- The date on which the contract takes an end is a crucial point to be determined.
- The termination date can be set
 - ✓ as the signing date of the termination agreement or
 - ✓ as a specific date or occasion after the signing of the termination agreement or
 - ✓ as a date before the signing of the termination agreement
- It will depend on the conditions of the actual business between the parties.

Essential Content (cont.)

■ Usage and Repurchase of the Stocks

- The parties should agree on the usage or repurchase of the stocks
 - ✓ The stocks may be exhausted by the distributor or the franchisee
 - ✓ The supplier may chose to repurchase the stocks
 - ✓ In normal course of business the agents do not hold stocks

- If the parties agree on the repurchase of the stocks
 - ✓ the condition of the goods should be defined in the termination agreement
 - If they are in new condition and in original packaging or not
 - ✓ the repurchase price should also be determined in the termination agreement,
 - if not already provided in the contract
 - depends on the condition of the goods.

Essential Content (cont.)

■ Cancellation of Data and Confidentiality

- The termination agreement should contain a provision regarding the usage or cancellation of data obtained during the contractual relationship.
 - ✓ important information,
 - ✓ documentation/material

- At the termination of the legal relationship, the data and documentation in custody of the receiver should be:
 - ✓ cancelled or
 - ✓ returned to its owner

- The termination agreement may provide a confidentiality period after the termination
 - ✓ Competition rules may impose restrictions

Essential Content (cont.)

■ Non-Competition Obligation

- The termination agreement may provide a post termination non-compete obligation
 - ✓ Customary for the agency but subject to some restrictions for the distributorship

- While drafting a non-competition obligation clause, the following should be clearly defined in writing
 - ✓ the territory,
 - ✓ Duration (1 year for the distributor and related to know-how; 2 years for the agent) ,
 - ✓ product or service

- The governing law designated for the termination agreement may regulate:
 - ✓ a compensation right and/or
 - ✓ a limitation of the duration for such obligation.



Essential Content (cont.)

■ **Transfer of Customers**

- Different regimes for the agents and the distributors.
- Upon termination of the contract for any reason, the agent should:
 - ✓ Transfer the customers in the territory to the supplier/principle and
 - ✓ Co-operate with and assist the principal in effecting an orderly and efficient transition
- For the distributor it is not very usual, as the distributors are acting on their names and behalf
 - in principle not subject to any restrictions;
 - may also be provided as part of the non-compete clause;
- The agent or the distributor should discontinue:
 - ✓ all sales,
 - ✓ offers for sale,
 - ✓ advertisement and/or promotion of the products
 - ✓ representing the principal in the Territory

■ **Post Termination Commission**

- The agent may also be entitled to commission on transactions concluded after the contract has been terminated, if
 - ✓ There are pipeline orders that are mainly attributable to the agent's efforts during the term of the agreement and
 - ✓ The orders are placed within a reasonable period after the termination of the contract.

Essential Content (cont.)

■ Notice Periods

- Notice periods provided in the termination agreement may differ from the main contract because of
 - ✓ the governing law designated for the termination agreement and
 - ✓ international regulations

- Council Directive 86/653/EEC on the co-ordination of the laws of the Member States relating to self-employed commercial agents («Directive») contains minimum notice periods for termination of an indefinite term contracts.
 - ✓ one month for the first year of the contract,
 - ✓ two months for the second year of the contract and
 - ✓ three months for the third and subsequent years.

- National laws may provide longer periods
 - ✓ four months for the fourth year of the contract,
 - ✓ five months for the fifth years of the contract and
 - ✓ six months for the sixth and subsequent years.
 - ✓ Unless otherwise agreed, the end of the notice period must coincide with the end of a calendar month.

Essential Content (cont.)

■ Notice Periods (cont.)

- The contract is deemed to be indefinite, if
 - ✓ The contract does not provide any specific term; or
 - ✓ The contract with a fixed period continues to be performed by both parties following the expiry of its term

- The essential points to be highlighted regarding the notice periods:
 - ✓ The notice periods provided by the Directive are minimum periods and the parties are not allowed to agree on a shorter notice period,
 - ✓ A longer notice period can be agreed,
 - ✓ The principal may not have a shorter notice period than the agent and any attempted waiver of this right will be void.



Essential Content (cont.)

■ Indemnity and Compensation:

- The Directive provides compensation for termination to the benefit of the commercial agent.

- The Directive offers a choice to Member States between:
 - ✓ (goodwill) indemnity and
 - ✓ compensation

- UK decided to include both options.

- The parties cannot depart from the provisions relating to compensation to the detriment of the commercial agent before the expiry of the agreement.

- Conditions under which goodwill indemnity may be claimed are as follows:
 - ✓ The contract should be terminated by a contracting party, or may expire automatically
 - ✓ Principal should continue to derive benefits from business with new customers or the volume of business has been increased from existing customers
 - ✓ It is equitable having regards to all the circumstances and, in particular, the commission lost by the agent on the business transacted with those customers

Essential Content (cont.)

■ Indemnity and Compensation (cont.)

- The agent loses his entitlement to indemnity if, within one year following termination of the contract fails to notify the principal that he intends pursuing his entitlement (Article 17(5)).
- No indemnity shall be paid where;
 - ✓ default attributable to the agent justifies immediate termination of the agreement or
 - ✓ the agreement is terminated at the agent's initiative, unless the cause
 - is attributable to the principal or
 - is justified on grounds of age, infirmity or illness of the agent (Article 18).
- Conditions of agent's compensation for the damage
 - ✓ The agent has been deprived of the commission which a proper performance of the contract would have procured him/her
 - ✓ The agent has not been able to write off the debts (costs and expenses) incurred while carrying out his/her activities under the advice of the principal.

Essential Content (cont.)

■ Settlement Provision

- A discharge clause to release the parties from their reciprocal liabilities, if
 - ✓ both parties have fulfilled their obligations and
 - ✓ each party has been satisfied with the current situation.
- The settlement provision should be in compliance with the conditions required by the applicable law.

■ Applicable Law and Dispute Resolution

- Applicable law and dispute resolution may be different from the main contract
- Dispute resolution may provide for the jurisdiction of courts or arbitration
 - ✓ In some countries the courts may have jurisdiction even in the presence of an arbitration clause (i.e. Germany, Belgium)

Conclusion

- The termination agreement shall be tailored depending on the nature of the underlying agreement
- In practice the termination agreements provide a set of established clauses (such as term, stocks, notices, confidentiality, non-compete, indemnity, etc); these are not exhaustive.
- The termination agreement are subject to the freedom of contract.
- The requirements of the applicable laws have to be respected in particular for the notice period, goodwill indemnity or for the compensation.



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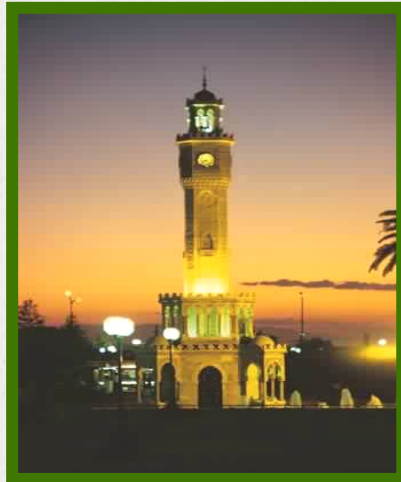
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