



International Distribution Institute

Other typical termination clauses: Insolvency/Bankruptcy; Change of control

June 14, 2019

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Insolvency/Bankruptcy

- Termination of Distribution/Franchise Agreements
 - Not common to be able to terminate without cause
 - Often a long list of reasons listed why the contract may be terminated for cause

Insolvency/Bankruptcy

- If Termination for cause is available, what are the ramifications of cause?
 - Termination With Notice but without Time to Cure
 - Termination With Notice and Time to Cure
 - Termination Without Notice

Insolvency/Bankruptcy

- A properly crafted Distribution/Franchise Agreement will distinguish between those events of default that lead to any of:
 - Termination With Notice but without Time to Cure
 - Termination With Notice and Time to Cure
 - Termination Without Notice

Insolvency/Bankruptcy

- Where does Insolvency/Bankruptcy fit in?
 - Typically viewed as incurable, although not always as these are different things:
 - Insolvency
 - Petition into bankruptcy; and
 - Bankruptcy (reorganization vs. liquidation).
 - If it can or cannot be cured, how should it be treated?

Insolvency/Bankruptcy

- Termination with or without Notice?
 - Does it really matter upon a bankruptcy?
 - In common law countries, a formal bankruptcy acts as a “stay”, and so no one is permitted to terminate a contract with a bankrupt contracting part, including a franchisee
 - In civil law countries...?

Insolvency/Bankruptcy

- So what to do practically?
 - Terminate before bankruptcy if possible
 - Use other inevitable defaults to terminate with or without notice and time to cure (i.e.: default in payment of money)
 - But need to stay on top of situation –reporting, inspections, audits
 - If you find out last minute, often too late
 - Work with trustee or other secured creditors to find a new distributor

Change of Control

- On the list of Defaults that can lead to Termination is “change of control”
 - How it is defined can be important.
 - Direct and Indirect?
 - How far up the ownership/organizational chart does one look?
 - Should be carefully and broadly defined
 - Too often that is not the case

Change of Control

- Change of control should be an event for which consent is required,
 - A change of control is just like a proposed transfer or assignment of the Distribution Agreement, or sale of the business
- Because change of control is, of course, just another way to change ownership of the business

Change of Control

- So a change of control undertaken without consent of the counter party is:
 - usually an incurable default, and
 - terminable immediately without time to cure
- Because once a transfer is complete, how can it be undone?

Change of Control

- Before one has to consider termination for breach...contract should be clear that any conditions of consent apply on a change of control
- So franchisor should be in a position to decide if proposed transferee meets their standards, etc.

Change of Control

- Also consider...Is change of control the proper standard or line?
- If your contract prohibits change of control, what about lesser changes in ownership?
- Can they be completed without it being a default or even in need of consent?