



International Distribution Institute

Strategies for terminating distributorship agreements without losing control over the sales network

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A business oriented strategy

- Scenario: Automotive sector (commercial vehicles and trucks).
- highly professional dealers, significant investments in premises, tools and training
- Great focus on after-market (customers fidelity through service)

- Contracts:
 - Long term agreements, qualitative criteria (image but also professionalism and training)
 - Difficult to interrupt the relationship, and quite rare



A business oriented strategy

- In such scenario exit strategy at termination needs to match business continuity and control over the network with the need to prevent dramatic interruption and avoid post-termination litigation (huge damages requests)
- Including since the beginning (in the dealership contracts) fair and detailed rules on post-termination commitments is certainly of support for a smooth termination and even facilitates mutually agreed termination, and even to get control over the network
- Which kind of areas to cover? Non-compete obligation after-termination (with some constraints), but not only

Non compete obligation

- Block Exemption Regulations (Reg.1475/95 and 1400/2002) : non-compete obligation forbidden, either directly or indirectly.
- No provision into the dealership contracts, even post-termination.
- Nevertheless, a non-compete obligation has been negotiated in the framework of a termination agreement devoted to settle any issue with the exiting dealer.
- A partial solution but useful: a non-compete obligation limited to Contract Products
- Reg. 330/2010: non-compete obligation available at certain conditions



Non compete obligation

To protect the know how transferred by Manufacturer to the Dealer under this Agreement, upon termination of this Agreement for any reason Manufacturer may ask to the Dealer to (i) not manufacture, purchase, sell , resell or service products [that compete with Contract Products/ in the market of Contract Products]. The obligation under this Paragraph shall (i) be limited to the premises and land from which the Dealer operated to performance of this Agreement and (ii) limited up to a period of one year from the termination. Manufacturer shall have the right but not the obligation to ask the above, and to this purpose Manufacturer shall send its written request to the Dealer, with reasonable prior notice before termination of the Agreement, and shall offer a compensation that shall be determined by applying the criteria set forth by Annex X. Should the Parties not agree about the amount of such compensation, the matter may be referred to arbitral procedure as per Article N of this Agreement.



Rules on termination

- Out of non-compete obligation, which are the further main areas to cover?
- Very simple approach:
- Article X - Post-Termination Obligations

Upon termination of this Agreement the Dealer shall cease to represent itself as a Dealer of the Principal and to use any trade mark of the Principal, and, upon request of the Principal, shall immediately return any and all the technical manuals, sales literature and advertising documentation delivered by the Principal for the purposes of, and in accordance with, the provisions of this Agreement.

Termination of this Agreement shall not affect the rights and liabilities of either Party already accrued at the date of termination.



Rules on termination

- A more structured approach may take in consideration – to our purposes – at least the following areas:
- **terminate the use of the designation “X Dealer”**
- **remove immediately and terminate any use of the name of the Manufacturer and all Manufacturer signs and trademarks**
- **stop the use of any material that carries the Manufacturer trademarks;**
- **within X days after termination to forward to Manufacturer the customers’ names and their unexecuted orders;**
- **inform immediately its own organization and any agent on the termination of this Agreement;**
- **cease to carry out Manufacturer services (warranty)**
- **assign the existing sub-network contracts**
- **assign the existing contract with customers**

Rules on termination - contracts assignment

- In a selective distribution system a terminated dealer in theory may hardly continue to buy elsewhere contract products, nevertheless in practise it may be crucial to be able to assign the existing contracts (even for the customer's benefit)
- assignment of sub-network agreements
- assignment of orders
- assignment of long term maintenance contracts



Contracts assignment – sub-network

- Dealer agreement:

Upon termination of this Agreement, the Dealer shall, if so requested in writing by Manufacturer, assign to Manufacturer or to Manufacturer's nominee, all contracts in force between the Dealer and its Authorised Repairers and/or Sub-Dealers [and/or agents].

To re-inforce the remedy, it should be very important to drive the sub-network contracts drafting as well to tentatively prevent obstacles to the assignment (necessary agreement of the sub-dealer, *intuitu personae*)



Contracts assignment – sub-network

- Second level contract (such as sub-dealer or authorised repairer):

This Agreement will automatically terminate in the event that the Dealership Agreement in force between Manufacturer and the Dealer is terminated or no longer in force unless the Dealer expressly waives the benefit of this Article in writing to the [Sub-Dealer/Authorised Repairer]. The effective date of termination shall be the effective date of termination of the Dealership Agreement.

Notwithstanding the above, if for any reason, the Dealership agreement between the Dealer and Manufacturer ceases, the Dealer shall be entitled, by waiving the application of Article x above, to assign this Agreement to Manufacturer or to an other person indicated by Manufacturer.



Contracts assignment – customers

In the event that this Agreement is terminated for any reason whatsoever:

- (a) all orders submitted to Manufacturer by the Dealer for Contract Products, whether accepted by Manufacturer or not, shall be cancelled, and Manufacturer shall have no obligation with respect to those orders or subsequent orders for Contract Products submitted to Manufacturer by the Dealer;*
- (b) the Dealer shall provide Manufacturer with information and full details on all unfulfilled customer orders for Contract Products placed with the Dealer;*
- (c) to the extent agreed by the ordering Final Customer, the Dealer shall, if so requested in writing by Manufacturer, assign to Manufacturer or to Manufacturer's nominee, all unfulfilled customer orders placed with the Dealer for Contract Products and shall pay to Manufacturer or to Manufacturer's nominee all sums paid by customers in connection with those orders, whether or not Manufacturer has fulfilled any corresponding order placed by the Dealer with Manufacturer for the Contract Products in question.*



Contracts assignment - customers

A softer approach:

In the event that this Agreement is terminated:

(i) all orders submitted to Manufacturer by the Dealer prior to the date of termination shall be effective only in relation to quantities of Contract Products not exceeding three times the average of the number of outstanding Dealer orders at the end of each of the previous twelve months for the relevant category of Contract Products as determined pursuant to the terms of this Agreement shall be fulfilled by Manufacturer;

(ii) to the extent required by the ordering Final Customer, Manufacturer shall accept the assignment by the Dealer to Manufacturer or to Manufacturer's nominee of all unfulfilled customer orders placed with the Dealer for Contract Products.



Contract assignment – after-market

- *For warranty work performed after termination of this Agreement with respect to any Products, the Dealer shall not be eligible to receive reimbursement from the Manufacturer unless specifically authorized by the Manufacturer in writing to perform such work and then only in the manner and for the period of time set forth in such authorization.*
- *The Dealer shall, if so requested in writing by Manufacturer, assign to Manufacturer or to Manufacturer's nominee, all maintenance & repair contracts in force between the Dealer and the customers. The Dealer shall endeavour to obtain the authorisation from the customer if needed.*



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Trade marks and trade names

It is of utmost important to be firm in pretending the immediate ceasing of manufacturer's trademarks.

A proper information to the customers will be also be useful.

Upon termination of this Agreement, the Dealer shall remove all signs erected or used by the Dealer bearing any trademark or trade name to which Manufacturer or any Manufacturer Company is entitled or any word indicating that the Dealer is an Authorised Dealer.

The Dealer shall erase or obliterate from stationery, forms and other papers used by the Dealer all trademarks and trade names to which Manufacturer or any Manufacturer Company is entitled and all words indicating that the Dealer is an Authorised Dealer.



Trade marks and trade names

- *terminate the use of the designation “X Dealer”;*
- *return all Contract Products and/or material given in deposit by Manufacturer in good condition;*
- *remove immediately the name Manufacturer and all Manufacturer signs, Manufacturer Trademarks, get-up from the area and premises; all the above mentioned material shall be returned to Manufacturer free of charge. Should this not be immediately done, the Dealer accepts that such material may be removed by Manufacturer that shall be entitled to recover from the Dealer the costs thus incurred;*
- *terminate the use of the name Manufacturer and of any Manufacturer Trademarks and prevent their further use by its own agents;*
- *stop the use of stationery, printed matter, forms, brochures, posters and other material or get up in any dealing or correspondence with any third party, where such material carries the Manufacturer Trademarks;*

Termination agreements

- When is not possible to fix any remedy ‘a priori’, termination agreements to be negotiated in advance to the termination should be the solution (especially if there are long prior termination notices). A well tailored termination agreement is of utmost importance.
- Main contents: waiver to any claim etc., settlement of any issue on the bonuses, incentives, warranty claims; payment arrangement of the outstanding amounts from the dealer; retiring stocks (parts and vehicles); remind of the main obligation post-termination (no more signs etc).
- Sometimes this may be the occasion to ask for a non-compete obligation (eventually limited to sell Contract vehicles)