



International Distribution Institute

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

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# Introduction

- In a scenario of long lasting dealership agreements and big size dealers, 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



# Introduction

Three types of clauses deal with the termination of a distributorship agreement and the control over the sale network.

1. Clauses providing the assignment of the existing contracts between distributor and sub distributors to the supplier

2. Clauses imposing on distributor a non compete or non (re) affiliation obligation

3. Clauses affecting the normal continuation of the distributor's activity

# 1. Contracts assignment

- In a 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

# 1. 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 (need agreement of the sub-dealer, *intuitu personae*)



# 1. 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terminate in the event that the Dealership Agreement in force between Manufacturer and the Dealer is terminated or no longer in force unless the Dealer expressly waives the benefit of this Article in writing to the [Sub-Dealer/Authorised Repairer].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.*



# 1. 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.*



# 1. 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.*





# 1. 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.*



## 2. Non compete clause

### Example:

*“The operating company is prohibited from directly or indirectly exercising a commercial activity similar to and/or concurrent with the one that it is operating, from the address of its principal establishment and within a radius of 15 km around the latter for a period of one year from the expiry of the effects of the agreement, for any reason whatsoever”.*



## 2. 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 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 at 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.*

## 2. Non compete obligation

- Automotive sector: non-compete obligation forbidden, either directly or indirectly, for many years.
- No provision into the dealership contracts, even post-termination.
- Sporadically: non-compete obligation in the framework of a termination agreement (even limited to Contract Products).
- Reg. 330/2010: non-compete obligation allowed at certain conditions



## 2. Non-(re)affiliation clause

*“The operating company is prohibited from directly or indirectly exercising a competing commercial activity under a trade name of national or regional renown and from offering for sale products whose trademarks are linked to that trade name, from the address of its principal establishment and within a radius of 15 km around the latter for a period of one year from the expiry of the contract, for any reason whatsoever”.*

## 3. Post termination obligation

### Trade marks

#### ***Obligation to :***

- *terminate the use of the designation “X Dealer”;*
- *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.*



## 3. Post-termination obligation

### Trade Marks

#### Example:

*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.*



## 3. Post-termination obligation

### Trade Marks

#### Example:

*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.*



## 3. Post-termination obligation

### Trade Marks

#### Example:

*« At the end of the present agreement, in all cases of termination, the Dealer shall immediately cease all use, whether direct or indirect, of the trade mark and eliminate any distinctive sign of the mark contained notably on its premises, commercial documents or on websites.*

*After a period of 15 (fifteen) days after the date of effect of the termination, this obligation will be accompanied by a penalty of 500 (five hundred) euros per day, multiplied by the number of places where those violations are committed ».*

## 3. Post-termination obligation

### Stock

#### Example:

« From the termination of the contract, and in all cases at the latest days after the termination of the contract, the Distributor:

*(a) Shall return to the Supplier or the third party designated by him all the contract products, at the Distributor's expense (including the costs for the determination of the repurchase price) and risk, on condition that the contract products:*

- Were purchased directly from the Supplier and delivered by the latter,*
- Are new, unused, not damaged and intact and*
- Have not been sold, and remain the unencumbered property of the Distributors or the Supplier and are in the Distributor's possession.*

*The repurchase price of the contract goods is equivalent to the distributor's net purchase price in force, after deduction of an appropriate amount for the condition and age of the contract goods. The distributor will have to demonstrate the proof of purchase and of the price paid ».*

## 3. Post-termination obligation

### Stock

#### Example:

*“If the present agreement is terminated before its term by the supplier or is not renewed at its expiry, the supplier reserves the right to repurchase without this right constituting an obligation on his part ... The goods that he deems to be a normal goods for sale and in perfect condition, figuring in his catalogue on the repurchase date ...”.*



## 3. Post-termination obligation

### Other obligations

The Distributor may be obliged to

- forward to supplier the customers' names and their unexecuted orders; within X days after termination;
- inform immediately its own organization and any agent on the termination of this Agreement;
- cease to carry out supplier services (warranty).

## 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 (products and parts); 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 Products) or to detail the conditions of a contract assignment