

Legal Developments and Recent Brazilian Case Law on Distribution

José Carlos Vaz e Dias LLM/PhD Kent – UK

Professor of the State University of Rio de Janeiro (UERJ)

Attorney at VAZ E DIAS ADVOGADOS LAW Firm

THE YEARS IN REVIEW 2019/2022

➤ What Does Recent Development Mean?

- ☐ Due to COVID-19 and Trade Decrease = The Term “Recent” Encompasses the Period Between January 2019 through 2022.

NOVELTIES IN COURT:

- ☐ Pandemic Law (Law 14,010/2020). Virtualization of the Courts. Videoconference Through Digital Platforms in Hearings and Sessions. Digital Conversion of Case Files.

➤ HOWEVER, COURTS FLOADED WITH BANKRUPTCY AND REVISION OF LEASE AGREEMENTS CASES.

LEGAL DEVELOPMENTS AFFECTING DISTRIBUTION

ECONOMIC FREEDOM LAW (LAW 13,874/2019):

- Declaration on Free Market and the free Exercise of Economic Activities.
- Reinforced the **Pact Sunt Servanda Principle** - The Agreement is Law Between the Parties.
- Attempted to Limit the Revision of the Clauses by the Courts.
- The Good Faith and Social Function Principle Still Apply to Commercial Agreement with Less Strength.

LEGAL DEVELOPMENTS AFFECTING DISTRIBUTION

ECONOMIC FREEDOM LAW Art. 421-A Civil Code:

- ☐ Presumption that the Contractual Relationship is Equal Between the Parties.
- ☐ The Contractual Revision is an Exceptional Measure.
- ☐ The Parties should Set Objective Parameters and Events for the Contractual Revision.
- ☐ The Parties Should set Parameters for the interpretation of the Clauses.

LEGAL DEVELOPMENTS AFFECTING DISTRIBUTION

- In Practical Terms to Distribution Agreements:
 - ✓ Focus on the Contractual Term and Conditions and Leave Little Room for Broader Court Interpretation.
 - ✓ Risk Allocation and the peculiarities of the Transactions are Important Subject matters for the Recitals.
 - ✓ Set specific Rules for Contractual Amendments and Termination.
 - ✓ General Clauses are of Importance: Severability, Novation and Acknowledgements.

RECENT DECISION ON DISTRIBUTION

- ✓ Special Appeal no. 1.780.396/MG (Decision STJof 18/02/2020).
- Appellant Party: **GENERAL MILLS BRASIL ALIMENTOS LTDA.**
- Appealed Party: **BROKER DISTRIBUIDORA E COMERCIO LTDA.**

Principal Resolved Matter:

- ✓ Is the Business Relationship a Distribution Agreement? Requirements.
- ✓ No Agreement. BROKER Acquired and Sold the Products. Distribution.
- ✓ For GENERAL MILLS. Simple Supply of Products.

RECENT DECISION ON DISTRIBUTION

- ✓ The Freedom to Contract and Lack of Legal Definition: Blurred the Concept of Distribution Agreement.

Distribution X Agency X Simple Supplying???????

- a) Distributor Holds the Products at Hands to be Transacted and Delivered.
- b) Agency Promotes the Transaction but Does not Hold the Promised Products for Delivery.
- c) Simple Supplying. Random Sales. Transfer of the Dominium on the Acquired Product. Price and Product. There is no Product Promotion.

RECENT DECISION ON DISTRIBUTION

- For the Superior Court of Justice: Relationship Between GENERAL MILLS and BROKER is of Distribution:
 - 1) It Promoted the Foodstuff Products not Only Bought Them.
 - 2) Evidence of GENERAL MILLS Directing BROKER's Sales of the Products.
 - 3) Marketing Goals and Strategies.

RECENT DECISION ON DISTRIBUTION

4) Territorial Delimitation and Set Product Acquisition (No Choice)

5) **MOST IMPORTANTLY**, Pricing Mechanism Evidenced that BROKER acquired the products with a discount of 25% on the Wholesale Price and Used this Discount to obtain Profits on the Commercialization.

APPEAL DISMISSED

BROKER is entitled to Losses and Damages for the 90-day Period Prior to termination Under Art. 720 of the Civil Code.

Thank you!

JOSÉ CARLOS VAZ E DIAS

jose.dias@vdav.com.br

www.vdav.com.br