



Hamel-Smith

ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

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DISTRIBUTION AGREEMENTS: WRITTEN AGREEMENTS TALK AND ORAL ASSERTIONS WALK

Tiffanny Castillo and Colin Sabga



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As the economy continues to climb out of the downturn, there has been an increase of foreign suppliers entering into distributorship agreements with local distributors for the local distribution of foreign goods and services. Before entering into a distribution agreement parties should give serious consideration to a recent decision in the Commercial High Court, *Ghanem Al-Thani Holdings WLL v Jaguar Cars Exports Ltd* [2012] EWHC 856 (Comm) (the 'Ghanem case'), which highlighted some fundamental issues in relation to the supplier-distributor relationship.

The Court in the Ghanem case found that the supplier could terminate an English-law governed distribution agreement which contained a termination 'without cause' clause, provided that the supplier made no promise or misrepresentation to the distributor. The Ghanem case underscores the importance of a thoroughly negotiated and documented distribution agreement in protecting the rights of both parties.

This article will highlight some practical tips for both suppliers and distributors in order to assist in achieving mutual benefit, maximum profitability and to avoid the unpleasantness of litigation, bearing in mind that Trinidad and Tobago has no legislation dedicated to regulating distribution agreements.

Factual Matrix

Ghanem Al-Thani Holdings WLL (the 'Distributor'), was a Qatari company which sold and maintained new cars in Qatar through its local branch. Jaguar Cars Exports Ltd (the 'Supplier') was an English company supplying Jaguar cars and spare parts to the Middle East Market, including Qatar, through local agents and distributors.

The Distributor and Supplier entered into a written distribution agreement (the 'Agreement') under which the Supplier appointed the Distributor as its sole distributor of Jaguar vehicles and parts in Qatar. The Agreement provided that at least 12 months' prior notice of termination by either party was required. In addition, the Agreement stated that upon the expiration or termination of the Agreement for whatever reason,

the Distributor shall have no claim against the Supplier for compensation for loss of distribution rights, loss of goodwill or any similar loss.

The Supplier terminated the Agreement with notice after eight and a half years at which time the Distributor had not yet recouped its investment. In fact, the Distributor made no profit during that period but a loss as at termination of about seven million pounds. The Distributor claimed damages in tort for misrepresentation and for breach of a collateral contract not to terminate the Agreement. The Distributor alleged that, prior to signing the Agreement a representative of the Supplier made an oral assurance (collateral contract) that it would only terminate after the Distributor had recouped its investment and upon a material breach of contract by the Distributor. In addition, the Distributor's main assertion at trial was that it was induced to enter into the Agreement by the Supplier's representations about its usual practice with respect to termination, and further, that this was a main consideration in entering into the Agreement. The Supplier disputed having made such assurances and

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further asserted that its agent never had the authority to make any such assurance in the first place.

The Decision

On the evidence, having regard to the commercial probabilities and the witness evidence, it was held that the Supplier's representative had not made any assurances that had contractual force and that there was no misrepresentation of fact (whether of intention or state of mind) of any kind.

In dismissing the Distributor's case, the Court considered the following:

- The Supplier would never have agreed to such a condition which would deviate from its standard contract and practice in the Gulf;
- Even though the Distributor's legal adviser was present at the meeting, there was a lack of any record of an intention to alter the Agreement in the form of any minutes of the meeting, a side letter or notes of any form. This was further elicited by the vague and inconsistent testimony of the Distributor's witnesses. The Distributor's lawyer was aware that the Agreement was a standard agreement which could not be negotiated or changed; and
- The Distributor did not raise the alleged 'warranty' upon the supplier's termination and only referred to it in correspondence some time after as an expectation based on the Supplier's words of comfort and usual business practice. The Distributor did not rely on it as a contractual provision and binding commitment until issuing the pleaded particulars of claim.

Position regarding local law

In Trinidad and Tobago, as mentioned earlier, there is no legislation dedicated to regulating distribution agreements. Consequently, there are no statutory provisions, restrictions or regulations governing the period of notice required for termination or any terms of same. Thus, parties are free to negotiate the terms of the distribution agreement provided that such terms are not in breach of public policy regarding restraint of trade.

Under this doctrine, such covenants are *prima facie* unenforceable at common law as being in breach of public policy and enforceable only if they are reasonable with reference to the parties concerned and not injurious to the public interest.

Top Tips For Distributors And Suppliers

Five major tips that distributors and suppliers should consider before entering into distribution agreements are:

Conduct proper due diligence

It is essential for both the distributor and the supplier to conduct investigations and retain competent legal counsel to conduct the necessary due diligence. The details of the arrangement should be carefully scrutinized, especially in relation to sales targets, capital expenditure and return on investment. Both parties should make a realistic assessment of the prospects and clearly define the terms governing the relationship.

Keep Meticulous Records

The parties should keep a meticulous record of every aspect of a transaction. For example, in the Ghanem case, based on the fact that the Agreement was concluded 14 years prior to trial and terminated over 5 years before trial, the live witness evidence was somewhat vague. In that regard, the Judge placed a greater amount of emphasis on what the common ground between the parties was and the commercial realities and probabilities of what had happened. It is to be noted that, in the absence of records of the meetings held and documentary evidence of what the Distributor had alleged, the Judge was reluctant to accept the Distributor's interpretation of what was said, as opposed to what was actually intended by the Supplier's oral representations.

Generally, parties to a distributorship agreement do not usually enter into the agreement contemplating a breakdown in negotiations or even worse, an abrupt termination thereof. However, commercial realities have proven that such distribution agreements do not always unfold in the manner originally intended and parties may end up in some form of legal action or dispute resolution. A properly documented account of the relationship will strengthen the relative parties' bargaining position, if not avoid the dispute altogether.

Retain competent legal counsel to advise on the appropriate choice of law and jurisdiction

In many circumstances, the laws on distribution agreements in the countries of the supplier and the distributor are different. In Trinidad and Tobago, the parties are free to choose the governing law and jurisdiction of the distribution agreement. Generally, the party with the stronger bargaining position usually insists on a choice of law and jurisdiction clause that is most suitable to protecting and enforcing its rights under

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the distribution agreement. The parties should also exercise caution in ensuring that the clauses within the distribution agreement are valid and enforceable both in the jurisdiction and under the law governing same.

For instance, in the Ghanem case, Qatar law provided that an indefinite contract could not be terminated without the agreement of both parties or a judgment of the court and compensation was payable regardless of any agreement to the contrary. However, the Agreement provided that it would be governed by English Law. As such, the Distributor was not entitled to the relief under the laws of Qatar as it might otherwise have expected.

Seek competent advice from experts

We recommend that both parties seek advice and recommendations from experts such as lawyers, bankers, accountants, investment planners and project managers in order to be fully aware of the commercial environment and the relevant rights and liabilities of the parties under the different aspects of the distribution relationship.

Negotiate the terms, agree the facts and put it in writing

In order to minimise the potential for economic harm to either party, both the supplier and the distributor should always seek to enter into a written agreement that specifically addresses fundamental issues such as:

- Identifying information regarding the supplier, the distributor, the product and/or service;
- The type of distribution agreement (exclusive, sole, non-exclusive or selective);
- The rights and responsibilities of the supplier and the distributor;
- The basis upon which the agreement may be terminated;
- The requisite amount of notice required for termination;
- Territory and the limits on the distributor's freedom to supply goods and services outside of the specified territory and any charges if distributor sells outside of the territory;
- The length of the contract, any renewal clause or minimum period;
- The extent of the distributor's protection from competition from products and services supplied by the supplier to others;
- The level of commission required to be paid;
- Obligations of the supplier, e.g. to supply products, information on the products and training and technical support with respect to the product and/or service;

- Rights of the distributor to use supplier's trademarks and other intellectual properties;
- Terms of sale and price of products;
- Warranty of the products;
- Defects of products;
- Tax liabilities of the parties; and
- Governing law and jurisdiction for enforcement in the event of a dispute.

Conclusion

Both a distributor and supplier invest substantial time and money in the creation and development of a distribution relationship. As such, it is well worth allocating some resources in the preliminary stages to ensuring that the relevant footwork is completed prior to entering into the formal agreement. In particular, the parties should:

- Conduct proper due diligence;
- Keep meticulous records of the transaction and negotiations;
- Retain competent legal counsel to advise on the choice of jurisdiction and choice of law governing the distribution agreement;
- Retain experts in all other fields as necessary; and most importantly
- Negotiate the terms, agree the facts and put it in writing.

In light of the absence of specific legislation dedicated to regulating distribution agreements in Trinidad and Tobago, it is crucial to set out in writing, in as much detail as possible, the fundamental terms of a supplier-distributor relationship. In the course of negotiations, the parties may make oral assertions, which one party or the other may seek to later enforce in the onset of a commercial dispute. Whereas our Courts in some circumstances will acknowledge the validity of such oral assertions as a fundamental term of the agreement, this is not always a certainty as the Ghanem case evidences. In the interest of protecting your rights, both parties should err on the side of caution and spell all terms out in writing in the distribution agreement.

Tiffany Castillo is a Senior Associate and Colin Sabga is an Associate in Hamel-Smith's Transactional Department.

OUR RIGHT TO PRIVACY: A REVIEW OF THE DATA PROTECTION ACT

Aisha Peters



In a previous article we looked at the importance of the Freedom of Information Act (FOIA), which created a general right of access to official documents kept by the State, by removing the veil of secrecy often associated with information held by public bodies. In this article we look at the parts of the Data Protection Act (DPA) which have now become law and how the partial enactment of the DPA will affect the ability of others to access one's personal information. The purpose of the DPA is to regulate the disclosure and access to an individual's personal data, which includes for example information relating to the race, political affiliation, education, medical or criminal background of the individual.

General Privacy Principles

Part I of the DPA, which is now law, establishes twelve (12) General Privacy Principles, which provide guidelines for the handling, processing and dissemination of an individual's personal information. It applies to all persons who handle, store or process personal information belonging to another person.

A summary of the principles show that:

- an organisation is responsible for the personal information under its control;
- the purpose for collecting the personal information must be identified at the time of collection;
- knowledge and consent of the individual are required for the collection, use or disclosure of personal information;
- collection of personal information must be lawful and limited to what is necessary;
- personal information is not to be kept for longer than necessary and not to be disclosed without the prior consent of the individual;
- personal information must be accurate, complete and up-to-date;
- personal information is to be protected by appropriate safeguards;
- 'sensitive personal information' is protected from processing. This includes information on a person's racial or ethnic origins, political affiliations or trade union membership, religious beliefs, sexual orientation or sexual life, criminal or financial record;

- an organization must disclose their policy on the management of personal information;
- an organization must disclose to the individual their personal information so that they can challenge the accuracy of the information;
- an individual can challenge the organization's compliance with the principles;
- personal information disclosed outside of Trinidad and Tobago must only be to countries with comparable safeguards as those contained in the DPA.

The Information Commissioner- Role and Functions

In order to ensure compliance with the General Privacy Principles, section 7, 8 and 9 of the DPA, which establishes the Office and powers of an Information Commissioner, have been brought into effect. The Office of the Information Commissioner is to be held by an Attorney-at-Law who has been admitted to practise for at least ten years. The Office of the Information Commissioner is also intended to be an independent body, as the holder of that office will be appointed by the President.

An important power of the Information Commissioner is the power to conduct audits and investigations. Where an Information Commissioner exercises his or her powers of investigation, section 23 (which is in force) provides that a statement made to, or an answer given by a person during an investigation or enquiry by the Information Commissioner, is generally not allowed as evidence in court or any other proceedings. However, such statements or answers will be admissible as evidence:

- (i) where the person is subject to prosecution for perjury in respect of sworn testimony made before the Information Commissioner;
- (ii) where the person is subject to prosecution for an offence under the DPA; or
- (iii) where there is an application for judicial review under the DPA or an appeal from a decision with respect to that application.

Another key power of the Information Commissioner under the DPA, is the power in

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(cont' from page 4)

section 9 to order a public body or organization to cease collection practices or destroy the collection of personal information that contravenes the DPA. Additionally, the Information Commissioner can authorise the collection of personal information otherwise than directly from the individual in appropriate circumstances and can permit 'data matching' by a public body. Data matching means comparing data that contains personal information of individuals with other documents containing personal information about individuals in order to produce new forms of information about individuals.

All information obtained by the Information Commissioner and anyone acting under his/her direction in performing their duties under the DPA is confidential.

Impact of DPA on the Management of Information in the Private and Public Sector

Whistleblowing

The DPA, once it is proclaimed in its entirety, will apply not only to public bodies but to the private sector. One of the novel aspects of the DPA is that it will offer whistleblowing protection to employees in both the private and public sector. However, that protection will be only limited to those instances where the employee discloses breaches of the DPA which have been committed by his or her employer or another person.

Establishing Guidelines/ Code of Conduct for Industries

The Information Commissioner currently has the power to publish various guidelines regarding compliance with the Act which would apply to both public bodies and organizations. In England, where legislation similar to the DPA is in effect, the impact of such guidelines has had far reaching consequences on data management and record keeping, particularly in the private sector. For example, there have been guidelines related to the operation of CCTV cameras in businesses and how to control the storage and disclosure of the images captured by them. Data captured by CCTV cameras on individuals are considered to be personal data under those guidelines. In England,

detailed guidelines to control marketing have also been made which affect the ability of businesses to conduct electronic mail marketing and gather online information about customers. In fact, separate marketing guidelines for political campaigning have also been developed in England.

In Trinidad and Tobago, given the growing use of Information and Communication Technologies (ICT) and social media by both the State and private sector (which has made it easier to access and disseminate information to the public) it is evident that clearer guidelines on the regulation of personal information will be welcomed. Sectors likely to be initially targeted include banking, debt collection agencies, security firms and advertising companies involved in bulk telemarketing or electronic marketing.

Organizations would be well advised to use the delayed implementation of the entire DPA as an opportunity to review their internal mechanisms for the protection of personal data of clients and employees. Given the potential impact on the State as well as businesses in Trinidad and Tobago in relation to the regulation, control and transmission of data used or stored by them, the DPA is clearly a significant piece of legislation which will have to be carefully monitored pending its full implementation.

Aisha Peters is an Associate in Hamel-Smith's Dispute & Risk Management Department.

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Tel: 1(868) 821-5500 / Fax: 1(868) 821-5501

E-mail: mhs@trinidadlaw.com / Web: www.trinidadlaw.com
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