IMPACT OF FREE TRADE AGREEMENTS IN THE APPLICATION OF DOMINICAN LAW 173

The distribution and representation of foreign-made goods and services in the Dominican Republic is governed by Dominican Law 173 of 6 April 1966, as amended, on protection of local agents and distributors of merchandise ("Law 173").

This law has been greatly discussed and evaluated, since it grants extraordinary protection to the local agents and distributors, in case of unilateral termination by licensor. The salient features of Law 173 are the following: *(a)* is a so-called "public order" statute, i.e., its provisions cannot be superseded by private contract. Hence an arbitration clause, or any other clause which established a jurisdiction other than the Dominican Republic, would not be valid and enforceable [B.J. 708.7201]. However, in the practice most claims are settled.; *(b)* a distribution relationship can only be terminated by the licensor when "just cause" –as defined by law- can be shown; *(c)* when the "just cause" is not demonstrated, the terminated local agent or distributor is eligible for substantial indemnities; *(d)* the indemnity consists of five years' worth of pre-termination gross profits, plus ten percent of the average yearly gross profits for every year of the relationship in excess of five. Likewise, the indemnity can be engrossed with any losses suffered by the agent, the value of the agent's current investment and the value of the promotion the agent has undertaken for the licensor's products; *(f) a*ny newly-designated distributor is jointly and severally liable with the licensor for any indemnities due to the terminated agent or distributor; *(g)* in order for a licensee to qualify for protection under Law 173, it must have registered its agent or distributor status –as exclusive or non-exclusive- with the Central Bank of the Dominican Republic, within 60 days following the affective date of the agreement entered between the parties (the Central Bank, however, accepts registration at any time as long as the current status of distributor is documented).

The Dominican Republic has entered into three relevant Free Trade Agreements ("FTA") in all of which Law 173 has been a sensitive issue for the inconsistencies of its dispositions with the spirit and purpose of free trading: (i) the FTA with Central America (April 16, 1998); (ii) FTA with CARICOM (August 22nd, 1998); and, (iii) the DR-CAFTA (August 6, 2004). These agreements have the objective of facilitating free trade, by eliminating the existing trade barriers with Central America, the CARICOM countries, and USA and Central America, respectively.

The **FTA DR-Central America**, does not address Law 173, notwithstanding the efforts made by Central America. Hence, there are no current provisions that may vary in any way the application of said Law from this standpoint. Despite the ongoing discussions regarding the effect of the multilateral nature of the subsequently entered DR-CAFTA Agreement, Annex 11.3 of such instrument only provides an specific commitment in connection to Law 173, pursuant to which it applies exclusively to the United States, and cannot be extended to any other of the parties to the DR-CAFTA Agreement. As a result, the situation with respect to Central American countries remains unchanged.

In the case of the **FTA DR-CARICOM**, Article IV of the Protocol Implementing the Agreement Establishing the Free Trade Area between the Caribbean Community and the Dominican Republic, establishes that "[…] Law 173 will not apply when the parties expressly agree that it will not." This disposition is contrary to the nature of the law. As of the agreement, CARICOM entrepreneurs may contractually agree with their Dominican counterparts to waive the application of Law 173. Although no implementing legislation has been enacted to this effect, we have been informed that the Central Bank is not registering agency or distribution agreements involving a Caricom national or entity, when such agreement expressly waives the application of Law 173, and the relationship began after the date of effectiveness of the DR-CARICOM treaty. As indicated earlier, without a registration it is not possible to obtain protection under Law 173.

On another hand, the **DR-CAFTA** states in its Annex 11.13 that "The Dominican Republic shall not apply Law No. 173 to any covered contract signed after the date of entry into force of this

Agreement unless the contract explicitly provides for the application of Law No. 173". The amendment introduced to Law 173 consists on the absolute variation of the nature of the law. Instead of a *public order* statute [that can not be superseded by private contract], it becomes an exception that can only apply if explicitly agreed by the parties. As of the agreement, United States entrepreneurs are not subject nor compelled to negotiate a waiver clause (as the Caricom entrepreneurs have to) for the application of Law 173, since the waiver is the general rule. The DR-CAFTA is pending its implementation, including the approval of a Bill of Law that incorporates the amendment stated in the Agreement.

Despite this blurry scenario, Law 173 has not been a major problem for doing business in the Dominican Republic. Business relationships among foreign companies and local distributors and agents has not been diminished by the application of this law. Nonetheless, it's our understanding that some practical saveguard tips can be considered, such as:

1. Create a corporate structure in the Dominican Republic that prevents local distributors to register under Law 173.

2. In the absence of a corporate structure or during its creation, and prior to have a defined contractual relationship with a Dominican agent or distributor:

a) Avoid any written correspondences that in any way indicate the existence of an authorized distributor in the Dominican Republic.

b) Avoid the issuance of certifications to any Dominican government agency that evidences the authorized import or distribution of goods in favor of a Dominican Distributor.

c) Avoid the placement of information regarding the presence of an authorized distributor in the Dominican Republic, through accessible means such as websites, advertising, etc.