

Rogue Distributors and Hijacked Certificates – Preparing for the Worst From Your Local Agrochemical Partner

■ Written by: Alan Adcock

Foreign agrichemical companies usually opt to appoint their local distributors/agents/licensees as the local entity to apply for and maintain product registration and import licenses as usually required by Asian Ministries of Agriculture. Such appointments are normally set out in the distribution agreement. While on most occasions this is a mutually beneficial relationship, sometimes local partners who have built up the business for those products may begin to compete unfairly or commit other breaches that lead to difficulties in terms of terminating a partner who holds the keys to getting your agrochemical products into local markets. This is sometimes referred to a rouge distributor problem or a hijacked certificate.

HOW MUCH IS ENOUGH...TO TERMINATE?

All commercial relationships have their ups-and-downs, which may not reach a level of acceptable breach to warrant a termination. Economic turndowns, adverse weather conditions, livestock epidemics, increased competition and other situations are all reasonable events whereby your local partner may need to reposition itself and the parties revisit minimum sales targets and advertising spend.

However, the foreign partner should also look closely into the conduct of its local partner as soon as relations appear unstable and report unsatisfactory performance regularly in order to head off what may, in time, amount to warranted termination. Simple searching will reveal whether your partner has applied for a similar trademark as your own or has filed his own trademarks for similar products. It is also a pretty simple investigation to determine whether he is selling the same or similar products and in what type of packaging. Another step is to check whether the company (or its directors) may have recently re-registered its business as a manufacturing business and whether it has obtained a manufacturing license. If so, then you can easily discover if it has been approved

to manufacture products the same as or similar to yours. Checks like this can be made at the relevant Companies Registry, Ministry of Commerce, tax office, etc. Your distribution agreement likely also has a clause allowing you to visit unannounced to inspect. Exercise this important right.

AGREEMENT REVIEW IN PREPARATION FOR TERMINATION

If this type of due diligence results in disappointing news, your next step is to go through the terms of your agreement with the partner carefully to determine whether these may amount to a material breach and to pinpoint the consequences for such. Frequently observed examples of breaches are:

- Registration of a similar trademark for an identical product
- Manufacture and/or sale of a competitive product without authorization
- Non-observance of the target without any reasons/notification given
- Conspicuous decrease in sales of some products while maintaining adequate sales of others

Another important step is to clearly check the dispute resolution and termination process in the agreement to make sure you follow the process correctly. If arbitration is the stated dispute resolution procedure, check to see if there has been a carve out for court injunctive relief on the occurrence of IP infringement or breach of confidentiality. If so, you do not have to wait around until an arbitration panel makes a decision; you can go to court immediately to seek an injunction. Check to understand such important steps as whether termination is effective immediately on termination or after a prescribed period of days.

If there is a breach, the termination process should be clearly followed, as the local partner may deny any wrongdoing on his part (as is usually the case). Here, your paper trail of earlier warnings will be very

helpful. The termination notice should best include mention of all breaches in order to reduce the chance of the distributor thinking he can challenge the allegations. This also helps to reduce the likelihood of distributor's counsel dragging the process out longer by an unwarranted and lengthy exchange of letters.

The drafting of the Notification of Termination should be carefully worded as in the unfortunate case of litigation; the letter could be provided as evidence of defamation (particularly so here in Thailand) or unlawful termination, for example. The Notification of Termination should also list all documents to be returned for a clear termination of the relationship, such as the Certificate of Free Sale and cancellation of the Import License (or transfer back to you or a newly appointed distributor in jurisdictions where this is applicable) in order to discourage your local partners from pursuing further unauthorized sales of your products in the country.

REPLACEMENT PRODUCT REGISTRATION CERTIFICATES/ IMPORT LICENSES – AVOIDING INTERFERENCE

When a foreign partner discovers that the situation with his breaching distributor/agent/franchisee is at the point of no return, one of the main points to check in your agreement is the name under which products were registered. In most jurisdictions, products are required to be registered in the name of a local entity. In the absence of its own office at the time of the initial launch of the product, foreign companies often opt for their distributor/agent/franchisee as the Applicant for registering their products with the local Ministry of Agriculture or any relevant sub-department within that agency.

The first issue to determine is the particular process in the jurisdiction when a company wants to change the Registrant's name on a product registration certificate. In some countries, the change can be made directly on

the Application form. However, in numerous cases, the local partner will have to request such change since the products are not officially listed under the name of the foreign company. In other countries, such as Thailand, an amendment of the Application is not possible and the foreign company has to re-apply to obtain a new product registration certificate. The advantage of this method is that the local partner may not be aware of such new Applications. The inconvenience is that it may take few months before the new Product Certificate is granted, costs and sometime re-testing is required, especially if your Applications reach the desk of an overzealous examiner.

A second question arises: When should this change from the old distributor to your new distributor (or yourself) be made? This step is a bit trickier. On one hand, it is in the interest of the foreign company to have their complete process finalized as soon as the termination is effective. However, the company should first check whether an Application for the same product is contrary to the terms of the agreement, especially in regards to anti-competition rules or exclusivity granted to the distributor.

AVOIDING CUSTOMER DISRUPTION

Finally, after having carefully informed the local partner of the termination and having submitted new product registration applications, you will need to consider how to inform your valuable customers of the change in their normal supply expectations. Usually, this is done by way of simple announcement letters informing the customers that, owing to a change in your relationship with the former distributor, products will now be distributed by a new company and that there should be no unexpected disruptions. The agrochemical business is a relatively close knit community here in Asia and no doubt your customers will be aware of your new distributor. Be prepared to handle effectively any concerns they may have with your new appointee as they may have had dealings with the new distributor in the past or in other jurisdictions. So long as you can commit to business as usual, customers understand that commercial relationships change. ■

Alan Adcock, Deputy Director, Intellectual Property and Regulatory Affairs at Tilleke & Gibbins International Ltd., can be reached at: alan.a@tillekeandgibbins.com

U.S. Taxpayer Reminders

■ *Written by: John Andes*

For U.S. citizens or resident aliens living and working (or on military duty) outside the U.S. and Puerto Rico, generally, the 2009 Form 1040 (U.S. Individual Income Tax Return) is due to be filed no later than June 15, but can be extended until October 15.

An individual taxpayer that has an interest in certain foreign corporations may be required to file Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations) or Form 8621 (Return by Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund). Taxpayers that transferred property to a non-U.S. corporation during 2009 may be required to file Form 926 (Return by a

U.S. Transferor of Property to a Foreign Corporation). These filings should accompany the Form 1040.

Lastly, Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts) is required to be filed by June 30 if the U.S. person has a financial interest in, signatory authority, or other authority over one or more accounts outside the U.S., and the aggregate value of the accounts was at least U.S.\$10,000 last year.

Please consult with your tax advisor or the IRS (www.irs.gov) to ensure your tax reporting obligations are complete to avoid being assessed penalties. ■

John Andes, Tax Partner at KPMG Phoomchai Tax Ltd. and Co-Chair of the AMCHAM Tax Committee, can be reached at: jandes@kpmg.co.th

BOI Extends Measures for Sustainable Development

■ *Written by: Edward Strauss*

In March, the Board of Investment (“BOI”) approved a plan to launch new investment measures and to extend the Thailand Investment Year 2008-2009 promotion measures, which expired at the end of 2009, for certain businesses focusing on sustainable investment and development. The plan approved by the Board of BOI includes:

- (1) Extending measures under “Thailand Investment Year 2008-09” for energy conservation and alternative energy, manufacturing eco-friendly materials and products and high technology.
- (2) Promotion of machinery upgrading to conserve energy or reduce

environmental impact, technology upgrades for manufacturing of new products and investment related to environmental conservation.

- (3) Exemption of import duties on raw materials used to produce products for export and items imported for re-export for certain industries.

The official BOI notification setting forth procedures relating to the above-mentioned measures should be issued in very near future. ■

The BOI press release may be found on the BOI website.

Edward Strauss, a Partner of the Tax Advisory Services Group at Grant Thornton in Thailand, can be reached at: edward.strauss@gt-thai.com