



ALAN ADCOCK
Deputy Director, Intellectual Property
alan.a@tillekeandgibbins.com

ROGUE DISTRIBUTORS AND HIJACKED CERTIFICATES

Foreign agrochemical companies usually opt to appoint their local distributors, agents, or licensees as the local entity to apply for and maintain product registration and import licenses as required by many Ministries of Agriculture in Asia. 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. This can lead to difficulties in terms of terminating a partner who holds the keys to getting your agrochemical products into local markets,

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which is sometimes referred to as a rogue 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 its own trademarks for similar products. It is also a pretty simple investigation to determine whether your partner 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 carefully to determine whether any of your partner's acts or omissions 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
- » Nonobservance of the target without any reasons or 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 the 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 because 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 partner from pursuing further unauthorized sales of your products in the country.

Avoiding interference with replacement Product Registration Certificates/Import Licenses

When a foreign partner discovers that the situation with its breaching distributor, agent, or franchisee is at the point of no return, one of the main points to check in the agreement is under which name the products were registered. In most jurisdictions, products are required to be registered in the name of a local entity. In the absence of

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their own office at the time of the initial launch of the product, foreign companies often opt for their distributor, agent, or franchisee as the applicant for registering their products with the local Ministry of Agriculture or any relevant subdepartment 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 the 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 reapply 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 a few months before the new product certificate is granted, costs will be incurred, and sometimes retesting may be required, especially if your application reaches 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. 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 regard to anticompetition 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, the products will now be distributed by a new company and 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. 🛠️