August 1, 2017

NEWS ABOUT TOWN

We are pleased to announce that since our conference in Carlsbad, California in May, the firm of Jaburg & Wilk located in Phoenix, Arizona have joined our organization. Gary Jaburg and Larry Wilk will be our contacts at their firm. Gary can be reached at 602.248.1020 or gjj@jaburgwilk.com and Larry can be reached at 602.248.1000 or lew@jaburgwilk.com.

We look forward to seeing everyone at our upcoming fall member conference scheduled to take place on October 13 ï 14, 2017 at the Inn at Bay Harbor located in Petoskey, Michigan. Please let me or Marion know if you should have any corporate guest you wish to invite to our upcoming conference. We would like to send out our letters of invitation to any potential guests not later than August 15th.

We are also pleased to announce that our spring of 2018 Member Conference will take place at the Wyndham Rio Mar Resort in San Juan, Puerto Rico on April 26 ï 28, 2018. Our 2018 fall conference will be our 20th Anniversary celebration and we will be returning to the venue of our very first member meeting which took place in September of 1998. We are in the planning stages for this celebration which will take place at the Marriott Sawgrass Resort located in Ponte Vedra, Florida on September 20 ï 22, 2018. Stay tuned for more information and events regarding our celebration!

As follow-up to our request for referral information, reports indicate that many of our member firms have experienced referrals-in as well as sent referrals-out. We need to keep this effort going by continuing to encourage our members to take advantage of the experience, wisdom and esprit de corps that exists within the organization and to make our colleagues in our respective firms aware of who Business Counsel is and how it can be of assistance to clients in many locations.

News to Share

Many of our member firms reported several items of interest and we have noted them below for your information.

Berwin Leighton Paisner ï Our firm has recently expanded our offices in Asia, UAE and Manchester. Please see articles attached for more information.

Casellas Alcover ï Please see Ricardo Casellas and Carla S. Loubriel Carrion article regarding "Litigating Dealer Termination Cases in Puerto Rico" attached hereto.

DibbsBarker ï has a strong international focus and regularly provides advice to overseas clients in a number of practice areas. The Intellectual Property team works with a number of US Biotech Companies to establish Australian subsidiaries. A full service is provided to US clients setting up in Australia and advises companies regarding on-going contractual and compliance matters working closely with Deloitte in relation to the R&D tax incentive. The Commercial team has assisted a number of multinationals to set up and do business in Australia. The Product Liability team advises international companies and their insurers in the management of their product liability risks, including compliance with legislative and reporting obligations of product liability claims.

Lind Jensen ï Just a reminder that the 2018 Super Bowl will be held in Minneapolis. While Rick Lind has indicated he is not certain tickets can be obtained, he has offered to assist member firms and clients of member firms if you are visiting Minneapolis. In addition, please note that Lind Jensen can assist with matters in western Wisconsin, North and South Dakota and Iowa.

Montgomery Andrews ï Health care law is booming and the firm is adding lawyers as they can find them.

Oldham Li & Nie ï Our firm is being instructed on a regular basis not only by overseas clients but also by Hong Kong clients who are the victims of cyber fraud, where monies are being transferred into the Hong Kong banking system. This in part means reporting to the Hong Kong Police and or obtaining injunctive relief in the Court system, typically on an ex-parte basis in the High Court to freeze monies and return to the rightful owners. We see this as an indication of the level of fraudulent cyber activity worldwide and is an area where OLN has the necessary expertise, experience and man power to assist on a prompt and efficient basis.

Since the Carlsbad Member Conference our Business Development Team has reached out to the Business Development Teams of other Business Counsel Member Firms. We suggest that Member Firms' Development Teams be in contact with one another to increase referrals between member firms.

Perlman Vidigal - Our firmôs different practice areas and partners have been recently recognized by the publications Chambers and Partners: Global and Leaders League, and Luciano Godoy, co-head of litigation, were nominated as one of Brazil's best arbitrators by Leaders League.

UQBAR, a reputable local publication in the structured finance and securitization markets, has recently issued its receivables fund ranking and recognized our firm as first nation-wide in number of transactions and 4th in financial volume;

Our partner Matheus Bueno de Oliveira, head of the firm's tax practice, was recently elected by the academic board of the renowned UK-based Chartered Institute of Taxation (CIOT) to develop the Brazilian section of the ADIT ("Advanced Diploma in International Taxation") professional credential.

Rubens Vidigal Neto, head of the firm's capital markets and banking practices, was one of the key speakers at the 9th edition of the Investment Funds Summit organized by ANBIMA, the national association of financial and capital markets entities, one of the largest and most relevant events in the annual calendar of the Brazilian capital market.

An article on the effects of judicial reorganizations on the accelerated maturity of company debts in Brazil, written by Marcelo Perlman, head of the firm's corporate and M&A practice areas, and Tatiana Flores G. Serafim, one of our associates and a director of the Brazilian Institute for Studies in Corporate Reorganization, was featured in the April 2017 issue of Insolvency and Restructuring International, a bi-annual publication of the Insolvency Section of the International Bar Association.

Potter Anderson ï The overwhelming number of incorporations in Delaware, plus the frequent use of Delaware alternative entities, gives rise to jurisdiction not just for corporate matters but for all manner of litigation generally (patent, bankruptcy, contract, etc.), providing access to a court system consistently ranked among the best in the country. Our firm offers expertise in all of these areas.

Rousaud Costas ï David Villa has been promoted as a new Innovation and Entrepreneurship partner. He is an expert in corporate, M&A and IP law and his practice features advising start-ups and entrepreneurs, advice on the sale of companies, the design of restructuring and internationalization operations, legal advice on corporate venturing programs, the drafting and implementation of protection policies of intangible assets, and the negotiation of agreements to lease IP rights (especially software and patents licensing).

Our firm advised the Farga Group on the purchase of the ice cream company Kalise la Menorquina in one of the most important transaction in recent years in the food sector in Spain.

Solcargo ï Our firm recently received a referral for a new transaction from Locke Lord. We assisted the client in the cross-border acquisition of a major Mexican distribution company. We provided general legal services which included structuring and negotiation of the Master Stock Purchase Agreement ("MPA") and ancillary documents to ensure compliance with Mexican laws and regulations. We also conducted the due diligence process on the target company, including review of corporate, real estate, import/export issues and customs, environmental, labor and tax matters. We worked closely with associates and partners of Locke Lord and actively participated in negotiations with opposite US and Mexican counsel. We are currently assisting the client in the implementation and execution of the MPA in Mexico and the structuring of all relevant documents to ensure compliance with Mexican Law.

Turner Padget ï Our firm has recently launched a program ("Palmetto Propelling") to provide free legal services to startups and small businesses in South Carolina. We have pledged $1 million over 5 years in free legal services. Our attorneys are dedicated to assisting businesses achieve success by providing legal services at no cost through our statewide referral partners. We know South Carolina business, and as a full service law firm, we know how to meet business needs with practical, straightforward advice and strategies to propel a business forward.

Williams Mullen ï Our firm had the pleasure of representing a high profile client from West Virginia and his coal related companies in a week-long trial in the US District Court in Delaware. We worked with John Sensing of the Potter Anderson firm as our local counsel. We are now in the process of post-trial briefing in this matter.

COMMENTS:

DibbsBarker ï Suggested holding targeted cross-selling and profile raising session at conferences. It would be worthwhile to increase awareness of the BCI organization amongst partners and senior lawyers within the respective member firms. The DibbsBarker partners and marketing team have been exploring the concept of intranet sharing with BCI firms. Each member firm would need to create an information sheet containing a brief introduction of the firm and an overview of the firmôs expertise and experience which could be uploaded onto the internal networks of other BCI firms.

Montgomery Andrews ï Suggests that BCI should consider having more programming around how to network and market for the younger firm members could be helpful.

Perlman Vidigal ï Suggests that we consider increasing efforts to expand the organizationôs international base of firms; organizing meetings in different countries; adopting initiatives to spread out information about BCI and its coverage within member firms in their various locations so that partners (even if not actively involved with the organization) know of the multi-state/jurisdictional legal resources that may be available to them and their clients. Initiatives could include:

1. Developing informational and marketing materials to be circulated within partners of member firm in the various locations;
2. Adding more content and resources to the BCI website;
3. Having BCI leadership and personnel visit member firm in their various locations (i.e., not necessarily where the most active partners reside) and make a presentation about the organization to partner in general;
4. Stimulating firms to bring to meetings previously uninvolved partners, particularly those active in cross-border matters;
5. Stimulating an associate secondment program between firms;
6. Fostering separate meetings of partners of BCI member firms at other legal conferences (e.g., IBA, ABA, etc.);
7. Structuring meetings around lectures and workshops by participating partners or outside consultants focused on matters such as business developments, legal marketing, legal tech, human resources, training, pricing, etc.;
8. Keeping track of member firm referrals; and
9. Reporting to members on an annual or bi-annual basis on the progress of BCIôs initiatives.

Rousaud Costas ï Taking into consideration that this firm is the only Spanish firm of the network, we are a bit surprised that we have not received any referrals from BCI in 2016. We are sure that BCI member firms have clients with interests in Spain, perhaps BCI should encourage its member firms to promote the alliance among its members so partners in each firm are aware of the network coverage. It goes without saying that we would be more than happy to assist any member firmôs clients with interests in Spain though our extensive list of services.

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Business Counsel will be sending emails on a regular basis to all our members to continue the effort of constant contact and dialogue between our members. We want to be sure to keep Business Counsel in the spotlight to make all members and their colleagues aware of who we are and what we can do to assist all member firms cross-market their practices and firms across our organization.

I look forward to seeing you all at our upcoming conference scheduled to take place on October 13 - 14, 2017 at the Inn at Bay Harbor located in Petoskey, Michigan.

Safe travels!
~Ken

J. Kenneth Carter, Chair
Business Counsel, Inc.

Litigating Dealer Termination Cases in Puerto Rico

Ricardo F. Casellas Sánchez and Carla S. Loubriel Carrión

Mr. Casellas

Ms. Loubriel

Puerto Rico has two special laws that govern relationships between principals or suppliers and their dealers or sales representatives: the Dealer's Contract Act of 1964, commonly known as Law 75,[1] and the analogous Sales Representative Act of 1990, known as Law 21.[2] These relationship laws are remedial statutes that provide for preliminary injunctive relief and compensatory damages to qualified dealers, distributors, franchisees, wholesalers, sales representatives, and other agents down the distribution chain for an unjustified termination, refusal to renew, or impairment of the existing relationship or contract. Although these laws are similar to relationship statutes in many states, Puerto Rico's civil law tradition and court system make the litigation of dealer disputes unique in this jurisdiction.

This article begins by providing an introduction to those aspects of the Puerto Rico legal system and culture that have the most bearing on this type of commercial litigation. It then highlights some of the ways in which the federal and local courts have diverged in their analysis and application of Laws 75 and 21, specifically in the context of preliminary injunctions and forum selection clauses, and how that may influence a dealer or manufacturer's litigation strategy. After providing a substantive overview of the most important provisions of Puerto Rico's special laws protecting dealers and sales representatives, this article concludes by delving into recent experiences litigating dealer termination cases in the U.S. District Court for

1. P.R. LAWS ANN. tit. 10, §§ 278 et. seq. (1964).
2. P.R. LAWS ANN. tit. 10, §§ 279 et. seq. (1990).

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the District of Puerto Rico, and provides some applied insights into local jury trial practice. The authors hope that this overview of the subject will provide a useful guide to practitioners in the field.

I. Puerto Rico's Unique History and Circumstances Influence the Litigation of Dealer Disputes

A. *The Civil Code As a Source of Law*

Unlike the states of the Union, except for Louisiana, Puerto Rico remains a civil law jurisdiction.[3] Tracing its roots to Spain, Puerto Rico's civil law system is characterized by an integrated system of laws regulating the conduct of natural and juridical persons or entities that is codified in civil and mercantile codes or statutes.[4] Unless an issue is controlled by a special law, the Civil Code, as the general law, supplements the interpretation of special laws and creates or defines the rights and obligations of persons or entities.[5]

There is a rich legal and cultural heritage in civil law jurisdictions. A distinctive feature of Civil Code jurisdictions is that courts place a "heavier reliance" on the opinion of learned commentators in their law review articles, treatises, and publications.[6] Another feature is that Civil Code jurisdictions use comparative law to search for persuasive authorities in other jurisdictions, including the common law and foreign states.[7] In this regard, because the Puerto Rico Civil Code was originally modeled after the Spanish Civil Code of 1888, courts interpreting the Puerto Rico Civil Code or any related

3. *See* P.R. LAWS ANN. tit. 31, §§ 1 et. seq. (1930); Laubie v. Sonesta Int'l Hotel Corp., 752 F.2d 165, 167 (5th Cir. 1985) ("In Louisiana, a civil law jurisdiction, the legislative will, as expressed in the articles of the Code, is supreme. Case law, although valuable, is of secondary importance."); Matos-Rivera v. Flav-O-Rich, 876 F. Supp. 373, 377 (D.P.R. 1995) ("In a civil-law jurisdiction, case law can be primary if it is presented as such a long line of precedents that the case law has become customary law. Otherwise, case law is secondary authority. And either as customary law or as a single case, precedent is imperative to filling in the gaps or making up for the deficiencies of the legislation in a civil-law jurisdiction.").

4. *See* P.R. LAWS ANN. tit. 31, §§ 1 et. seq. (1930); P.R. LAWS ANN. tit. 10 §§ 1002 & 1301 (1932).

5. *See* P.R. LAWS ANN. tit. 31, § 12 ("In matters which are the subject of special laws, any deficiency in such laws shall be supplied by the provisions of this title."); Computec Sys. Corp. v. Gen. Automation, Inc., 599 F. Supp. 819, 825 (D.P.R. 1984).

6. *See* V. Suárez & Co. Inc. v. Dow Brands, Inc., 337 F.3d 1, 8 (1st Cir. 2003) (citing J.H. MERRYMAN, THE CIVIL LAW TRADITION 56–57 (2d ed. 1985) ("The civil law is a law of the professors. . . . The common law is still a law of the judges.")).

7. Valle v. Am. Int'l Ins. Co., 8 P.R. Offic. Trans. 735, 737–38 (1979). Of course, comparative law is not foreign to decision-making in the common law approach or by federal courts, particularly on constitutional issues. "[A] U.S. Court interpreting a federal statute or constitutional provision can look at the reasoning of a foreign or international tribunal on similar issue." Al-Bihani v. Obama, 619 F.3d 1, 33 n.18 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (citing Ruth Ginsburg, A Decent Respect to the Opinions of [Human] Kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address to the International Academy of Comparative Law (July 30, 2010)). While foreign decisions do not rank as precedent, they can be informative and just as persuasive as reasoned law review articles or commentators on the subject matter. *Id.*

doctrines may primarily look for guidance in Spanish Supreme Court decisions and treatises analyzing analogous code provisions or statutes, but these sources of comparative law are by no means exclusive.[8]

These observations are relevant because Laws 75 and 21 have been found not to provide exclusive remedies for violations by dealers or their principals.[9] This means that the Civil Code applies as a supplemental source of authority when not inconsistent with the special laws themselves.[10] In addition to actionable claims for termination or impairment of contract under Laws 75 and 21, a dealer or sales representative can also assert claims sounding in tort (usually described as extra-contractual claims) or in contract that arise from the Civil Code, the Mercantile Code, and their interpretive jurisprudence.[11] The Civil Code provides defenses that may relieve or excuse compliance with an obligation in a contract when one of the parties has breached an essential and reciprocal obligation.[12] Rules of interpretation governing civil contracts also apply to the construction of mercantile contracts, such as those governed by Laws 75 and 21.[13]

There are also instances when the Civil Code does not apply. For example, because Laws 75 and 21 specifically prescribe three-year limitations periods for filing claims, those dispositions govern in breach of contract claims arising from protected relationships rather than the fifteen-year statute of limitations established in the Civil Code for regular claims of breach of contract.[14] Recently, in *Trafon Group, Inc. v. Butterball, LLC*,[15] the First Circuit affirmed both an order denying a preliminary injunction and the ensuing judgment dismissing a Law 75 action as time-barred, based on its interpre-

8. *See Matos-Rivera*, 876 F. Supp. at 376 n.1, 381.

9. *See Computec Sys. Corp*., 599 F. Supp. at 826; Homedical Inc. v. Sarns/3M Health Care, Inc., 875 F. Supp. 952, 953 (D.P.R. 1995); Matosantos Commercial Corp. v. SCA Tissue of N. Am., LLC, No. 02-2661, 2004 WL 1778279, at * 2–3 (D.P.R. June 21, 2004).

10. *See Computec Sys. Corp*., 599 F. Supp. at 826.

11. *Id.*

12. *See, e.g.*, Fabregas v. Mayaguez Light, 43 P.R. Dec. 207 (1932) (holding that, under Art. 1077 of the Puerto Rico Civil Code, P.R. LAWS ANN. tit. 31, § 3052, a creditor that failed to fulfill an essential obligation to repair a structure quickly as required by the contract cannot demand the debtor to pay an outstanding balance for services rendered and stipulated in that contract); Mora Dev. v. Sandín, 118 P.R. Dec. 733, 742 (1987) (applying same principle).

13. Pursuant to the Civil Code, if the literal terms of an agreement, its conditions, and its exclusions are clear and specific, leaving no room for ambiguity or for diverse interpretations, they must be applied. Unisys v. Ramallo, 128 P.R. Dec. 842, 852 (1991) (citing P.R. LAWS ANN. tit. 31, § 3471). "If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail." *Id.* But, if there is an ambiguity in the contract, the interpretation must not favor the party occasioning the ambiguity. *See* P.R. LAWS ANN. tit. 31, § 3478; *see also* Grifols, Inc. v. Caribe RX Serv., Inc., 2016 TSPR 147, at *7–8 (P.R. 2016) (Rodríguez, J., concurring).

14. Usually, contract claims that are covered by the Commerce Code, but are not designated for specific prescriptive treatment, fall under the Civil Code's fifteen-year catchall provision. *See* Caribbean Mushroom Co., Inc. v. Gov't Dev. Bank of P.R., 102 F.3d 1307, 1312 (1st Cir. 1996). Although Law 75 is part of the Commerce Code, it specifically designates a three-year statute of limitations for termination and impairment claims. *See* Inst. of Innovative Med., Inc. v. Lab. Unidos, 613 F. Supp. 2d 181 (D.P.R. 2009); *see also* P.R. LAWS ANN. tit. 10 § 279h.

15. 820 F.3d 490 (1st Cir. 2016).

tation of Puerto Rico law regarding when such claims for impairment of contract accrue and, hence, when the three-year statute of limitation begins to run.[16] This holding is likely to spawn litigation.[17]

In sum, a risk assessment of dealer disputes in Puerto Rico may require an overview of not only the text of those two special laws applying to Puerto Rico dealers and sales representatives, but also the Civil Code; the Commerce Code; the writings of learned commentators; and interpretive judicial decisions of the Supreme Court of Puerto Rico, the U.S. District Court for the District of Puerto Rico, the U.S. Court of Appeals for the First Circuit, the federal courts in other jurisdictions that have decided Law 75 or Law 21 claims in diversity cases,[18] the common law, and on occasion the Supreme Court of Spain.

B. *Procedural Considerations of Litigating Dealer Disputes in Puerto Rico*

Procedurally, litigation of dealer disputes in Puerto Rico involves important differences from litigation in the United States. As in many states, Puerto Rico has a three-tier judicial system: a unified court of first instance with general jurisdiction, an intermediate appellate court, and a supreme court with review of final decisions by the U.S. Supreme Court.[19] However, unlike many states, local court judges are not elected, but appointed to their positions. Those appointments, including to the Puerto Rico Supreme Court,[20] are for definite terms—unlike Article III federal judges, who are

16. *Id.* at 494–95. The plaintiff Trafon was a Puerto Rico-based wholesale food distributor that had acquired certain assets, including an existing distribution agreement with Butterball for whole bird and turkey products, from Packers Provisions Company of Puerto Rico. The asset purchase agreement did not reference an alleged exclusive distribution relationship between Packers Provisions and Butterball. Nor did Trafon secure the manufacturer's consent, or a representation of exclusivity, prior to completing the asset purchase transaction. While Trafon may have believed that the distribution rights it had acquired were exclusive, Butterball disagreed and openly refuted the allegations of exclusivity in its counsel's letter of October 2009 and in disclaimers made in each subsequent invoice. Trafon sued Butterball in September 2013 after Butterball had made sales to Costco and refused to pay commissions to Trafon on such direct sales made during 2011 and 2012. Essentially, the legal issue on appeal centered on when the Law 75 claim accrued to start the running of the three-year limitations period. Did it begin to run in October 2009, when Trafon was on notice of Butterball's repudiation of the exclusivity allegation, or when the latter started to sell product directly in 2011? Applying *Basic Controlex v. Klockner Moeller Corp.*, 202 F.3d 450 (1st Cir. 2000), the First Circuit held that the limitations period began to run from Butterball's counsel's letter in October 2009, resulting in the action filed in September 2013 being time-barred. *See Trafon Grp.*, 820 F.3d at 494–95.

17. The First Circuit's holding in *Trafon Group* that a Law 75 impairment claim accrues when the dealer is on notice that the principal does not intend to respect an alleged exclusive distribution right, and not when the principal acts on it by selling product directly or through a competitor, *see id.*, puts a premium on the dealer to sue first and negotiate later or else face the risk of waiving the right to sue. This predicament is likely to strain business relations between dealers and manufacturers and put both sides on the offensive.

18. *See, e.g.*, Whirlpool Corp. v. U.M.C.O. Int'l, 748 F. Supp. 1557 (S.D. Fla. 1990); Caribbean Wholesales & Serv. Corp. v. U.S. JVC Corp., 101 F. Supp. 2d 236 (S.D.N.Y. 2000).

19. Cosme v. Hogar Crea, 159 P.R. Dec. 1, 7 (2003).

20. P.R. CONST. art. V, § 10.

appointed for life.[21] Further, litigation in the local courts is primarily conducted in Spanish, although the Puerto Rico Rules of Civil Procedure allow for proceedings and filings to be in Spanish or English.[22]

More importantly, there is no right to trial by jury in civil cases in the local Puerto Rico courts.[23] This reality influences the strategic decision of whether to initiate litigation in the local versus federal court or to remove a case to the federal court where there is a right to trial by jury.[24] Further, unlike a state, Puerto Rico is a territory under the plenary authority of the U.S. Congress.[25] Regardless, just as in the United States, federal laws apply to Puerto Rico unless locally inapplicable.[26] As an example relevant here, the Federal Arbitration Act applies to Puerto Rico.[27] There is also a Puerto Rico arbitration statute, and a strong public policy exists favoring arbitration of dealer disputes.[28]

C. *Litigation of Dealer Disputes in Federal Versus Local Court*

Litigation of dealer disputes also has different implications in Puerto Rico's local courts versus federal courts. Although the federal district court in diversity cases is bound to apply Puerto Rico's substantive law as would a local court,[29] the choice of forum (federal or local) can influence the outcome of a dealer dispute in some cases. In particular, divergent judicial interpretations or standards exist between the two courts in Law 75 cases when motions seek-

21. N. Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (discussing these institutional safeguards to the independence of the federal judiciary).

22. Rule 8.7 of the Puerto Rico Rules of Civil Procedure (2010), P.R. LAWS ANN. tit. 32, App. V; *see also* P.R. LAWS ANN. tit. 1, § 59 ("Spanish and English are established as official languages of the Government of Puerto Rico. . . ."). Nevertheless, as a practical matter, business in Puerto Rico is conducted largely in Spanish, and the language barrier can be of serious monetary consequence for litigants, even in the federal court. *See*, *e.g.*, Torres-Serrant v. Dep't of Educ. of P.R., 100 F. Supp. 3d 138, 139 (D.P.R. 2015) (noting that "although officially a bilingual jurisdiction with Spanish and English as its official languages, [Puerto Rico's] population is largely Spanish-speaking. Given said cultural reality, judicial and administrative proceedings in the Commonwealth courts and agencies are conducted in the language of Cervantes rather than that of Shakespeare, while those at the federal level are officiated in the latter tongue"; and holding that costs of translating administrative record would be borne by defendant) (internal footnotes omitted).

23. *See* Vera-Lozano v. Int'l Broad., 50 F.3d 67, 71 (1st Cir. 1995) ("It is well accepted that the Seventh Amendment affords litigants in federal courts in Puerto Rico the right to trial by jury, notwithstanding the fact that the Constitution of Puerto Rico does not allow for juries in civil cases.") (citing cases). Judicial attempts to establish that the Seventh Amendment right to a civil trial applies in the local Puerto Rico courts have not been successful. *See* González-Oyarzun v. Caribbean City Builders, Inc., 27 F. Supp. 3d 265, 275–81 (D.P.R. 2014), *rev'd* 798 F.3d 26 (1st Cir. 2015).

24. *Vera-Lozano*, 50 F.3d at 71.

25. Commw. of Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016).

26. United States v. Lebrón-Caceres, 157 F. Supp. 3d 80, 100–01 (D.P.R. 2016) (citing the Federal Relations Act, 48 U.S.C. § 734).

27. 9 U.S.C. § 1 (applies to interstate commerce involving a territory).

28. Puerto Rico Arbitration Act, P.R. LAWS ANN. tit. 32, §§ 3201 et seq.; S.L.G. Méndez Acevedo v. Nieves Rivera, 179 P.R. Dec. 359, 367 (2010); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

29. *See*, *e.g.*, Waterproofing Sys., Inc. v. Hydro-Stop, Inc., 440 F.3d 24, 33 (1st Cir. 2006).

ing to enforce forum selection clauses or requesting preliminary injunctions are at issue.

1. Does the Enforcement of a Forum Selection Clause Depend on the Court Deciding Its Validity?

Generally, as a matter of federal law, mandatory forum selection agreements are *prima facie* valid and enforceable.[30] However, the U.S. Supreme Court held in *Bremen v. Zapata* that the question whether a forum selection clause offends a forum state's public policy can be one of a number of grounds for invalidation of such a clause.[31] To that end, Law 75 has a provision at Section 278b-2 specifically providing that a forum selection clause mandating litigation or arbitration outside of Puerto Rico is null and void as against public policy.[32] Unlike Law 75, Law 21 does not expressly forbid the enforcement of a choice of forum clause.[33]

Despite the language of Law 75's Section 278b-2, decisions from the U.S. District Court for the District of Puerto Rico have for the most

30. M/S Bremen v. Zapata, 407 U.S. 1 (1972).

31. *Id.* at 15–16.

32. P.R. LAWS ANN. tit. 10, § 278b-2 ("Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void."). As for the prohibition against celebrating arbitration of dealer disputes outside of Puerto Rico, the Federal Arbitration Act has been found to preempt Section 278b-2 in that regard. *See* Medika Int'l, Inc. v. Scanlan Int'l, Inc., 830 F. Supp. 81, 84 (D.P.R. 1993). Concerning the validity of a choice of law clause providing for another state law to apply to a dealer contract governed by Law 75, the U.S. District Court for the Southern District of New York has generally held those clauses to be unenforceable as contrary to Puerto Rico's public policy. *See, e.g.*, Caribbean Wholesales & Serv. Corp. v. US JVC Corp., 855 F. Supp. 627 (S.D.N.Y. 1994) (applying New York choice of law rules, Law 75 held to govern despite choice of law clause specifying New York law); S. Int'l Sales Co. v. Potter & Brumfield Div. of AMF Inc., 410 F. Supp. 1339, 1342 (S.D.N.Y. 1976) (same, where choice of law clause specified Indiana law). It is an open question whether the outcome in those cases would have been the same under the choice of law rules of another state or had the clause in the Law 75 or Law 21 contract provided that state law governed without regard to conflict of law rules.

33. Law 21 provides in pertinent part that "[t]he sales representation contracts referred to in this chapter shall be construed pursuant to, and shall be governed by the laws of the Commonwealth of Puerto Rico, and any stipulation to the contrary shall be null. However, this nullity shall not include any arbitration clause agreed upon." P.R. LAWS ANN. tit. 10, § 279f. In *Barril v. Combraco Industries*, 619 F.3d 90 (1st Cir. 2010), the principal terminated a Law 21 agreement. After removal of the dealer's complaint to federal court, the district court enforced the choice of forum clause granting a Federal Rule of Civil Procedure 12(b)(6) motion and dismissed the action without prejudice. The First Circuit affirmed. The court followed the federal standard in *Bremen v. Zapata* and skirted the issue whether enforcement of a forum selection clause is procedural or substantive, noting that both Puerto Rico and North Carolina follow the *Bremen* standard. The appellant had argued that enforcement of the clause under *Bremen*'s fourth prong was invalid because it contravened the strong public policy of the forum behind Law 21. The court disagreed. The court noted that Law 21 does not by its terms forbid the enforcement of a choice of forum clause, but only a choice of law clause insofar as it "would prevent Law 21's substantive protections from being given effect." *Id.* at 94. The court rejected the argument that North Carolina law precludes courts from giving effect to the laws of another state or territory, so that North Carolina courts are just as capable of enforcing Law 21 to the extent that it otherwise applies, despite the choice of law clause. *Id.* at 94–95.

part[34] enforced forum selection clauses in dealers' contracts governed by the statute.[35] Federal courts have reasoned that important federal interests of respecting liberty of contract and freedom of commerce outweigh parochial provisions in legislation, such as Law 75, requiring litigation of dealer disputes in home courts.[36] Further, in those cases, federal courts have predicted that the Puerto Rico Supreme Court would follow a series of decisions adopting federal law on the enforcement of forum selection clauses, disregard the prohibition in Law 75, and give more weight to federal policy interests.[37]

Notwithstanding, a panel of the intermediate appellate court in Puerto Rico recently went the other way on this issue. In *Caribe RX Service, Inc. v. Grifols Inc.*,[38] the Puerto Rico appellate court held that Section 278b-2 of Law 75 required finding that a clause in a distributor agreement providing for mandatory litigation in North Carolina was illegal and unenforceable.[39]

34. Choice of forum clauses have not always been enforced by the U.S. District Court for the District of Puerto Rico on federal law grounds. In *Victory Management Solutions, Inc. v. Grohe America, Inc.*, 103 F. Supp. 3d 191 (D.P.R. 2015), *rev'd*, No. 14-1818, 2015 WL 10662841 (D.P.R. July 8, 2015) (reversed on reconsideration based on new evidence), the supplier Grohe moved to dismiss on grounds of *forum non conveniens* (not for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)). Grohe alleged that the Law 21 claim for alleged wrongful termination of contract fell under a mandatory forum selection clause providing for litigation in Illinois. The district court found many problems with the chosen venue that made the clause unreasonable and unenforceable under the court's *Bremen* analysis. The district court determined that the clause had no connection to the parties, the agreement, or the dispute. *Id.* at 197. Grohe's lease of a third party warehouse for storage, logistics, distribution, and service support was insufficient and made it unfair for the agent to litigate in Illinois. *Id.* However, the court did give weight to the fact that an Illinois court would most probably apply Puerto Rico law despite a contrary choice of law clause in the agreement. *Id.* The court also held that the clause was not invalid under Law 21's public policy. *Id.* at 196. While this part of the court's decision is *dicta*, it opines on an issue previously left unresolved by the First Circuit in the *Barril* case but is consistent with other decisions validating forum selection clauses in distribution agreements governed by Law 75.

35. *See* Caribbean Rest. v. Burger King Corp., 23 F. Supp. 3d 70 (D.P.R. 2014); Marpor Corp. v. DFO, LLC, No. 10-1312, 2010 WL 4922693 (D.P.R. Dec. 2, 2010); P.R. Surgical Tech., Inc. v. Applied Med. Distrib. Corp., No. 10-1797, 2010 WL 4237927 (D.P.R. Oct. 26, 2010).

36. *See Caribbean Rest.*, 23 F. Supp. 3d at 78; *Marpor Corp.*, 2010 WL 4922693, at *5.

37. *See P.R. Surgical Tech.*, 2010 WL 4237927, at *3 (citing cases).

38. KLCE201400314, 2014 WL 2527399 (P.R. Ct. App. Apr. 14, 2014).

39. *Id.* at *3–5. In the *Grifols* case, the appeals court validated the trial court's order denying a motion to dismiss for lack of jurisdiction based on a North Carolina forum selection clause in the distribution agreement. The appeals court denied certiorari review from the trial court's order. *Id.* at *5–6. Although this decision is not precedent in other cases, *see* García v. Padro, 165 P.R. Dec. 324, 336 (2005); *see also* Núñez Borges v. Pauneto Rivera, 130 P.R. Dec. 749, 755–56 (1992) (same as to a Puerto Rico Supreme Court denial of certiorari), the opinion still reached and rejected the merits of the arguments raised by *Grifols*. *Id.* at *2–5. Unlike the U.S. Supreme Court when it denies discretionary review without reaching the merits, Puerto Rico's appellate courts tend to reach merit issues in orders denying certiorari review. Those determinations may be considered persuasive, though not binding, by the lower trial court or sister panels of the intermediate appellate court. *See, e.g.*, Cadiz Gomez v. E.L.A. de Puerto Rico, HSCI201500189, 2016 WL 6989560, at *10 (P.R. Ct. App. Oct. 31, 2016); *see also* Rivera Maldonado v. E.L.A., 119 P.R. Dec. 74, 79–80 (1987) (judgments issued without opinion by the Puerto Rico Supreme Court also do not have res judicata effect, but may be cited as persuasive). Another difference

Further appeal to the Puerto Rico Supreme Court as to the forum selection clause issue was not taken in that case.[40] To date, the Puerto Rico Supreme Court has not decided the validity of a forum selection clause specifically in a Law 75 or Law 21 contract. As the law now stands, given the long line of cases deciding precisely this question in the federal forum, the latter appears to be more receptive to the enforcement of choice of forum clauses in Law 75 or Law 21 cases than the local Puerto Rico court, where the issue is unsettled.

2. Does It Make a Difference Where the Request for a Preliminary Injunction Under Laws 75 or 21 Is Made?

Deciding whether a case requires moving for a preliminary injunction may influence a dealer-plaintiff on its choice of forum. Under Federal Rule of Civil Procedure 65, a federal court may not issue a preliminary injunction without proof that the traditional requirements for injunctive relief, including proof of irreparable harm and likelihood of success on the merits, have been satisfied.[41] However, in Law 75 cases filed in local Puerto Rico courts, the traditional requirements for injunctive relief are permissive and relaxed,[42] and this may influence a plaintiff's choice of forum or the outcome pending a final judgment.

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between Puerto Rico and federal appellate practice that should be relevant to the distribution law practitioner is that Puerto Rico appellate courts, unlike the First Circuit, rarely if ever hold oral argument in pending cases. *See* Rule 80 of the Puerto Rico Court of Appeals, P.R. LAWS ANN. 4, App. XXII-B.

40. *But see* Grifols, Inc. v. Caribe RX Serv., Inc., 2016 TSPR 147 (P.R. 2016) (Rodríguez, J., concurring) (reversing and modifying preliminary injunction that was subsequently granted to plaintiff; published concurring opinion discusses preliminary injunction factors in Law 75 context and Puerto Rico law of contracts applied to verbal agreement vis-à-vis integration clause included in distribution contract).

41. *See* Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015). Under *Hanna v. Plummer*, 380 U.S. 460, 471–72 (1965), federal procedural rules requiring a showing of irreparable harm should preempt contrary state substantive law or rules. *Cf.* Gil de Rebollo v. Miami Heat, 137 F.3d 56, 66–67 (1st Cir. 1998) (in diversity case, Federal Rule of Civil Procedure 68 that did not allow for recovery of attorney fees after offer of judgment preempted contrary Puerto Rico substantive law or Puerto Rico Rule of Civil Procedure 35.1 allowing recovery of attorney fees); *see also* Ferrero v. Assoc. Materials Inc., 923 F.2d 1441, 1448 (11th Cir. 1991) (applying *Hanna* criteria to hold that Federal Rule of Civil Procedure 65 displaces Georgia's substantive law containing presumption in favor of injunctive relief); S. Milk Sales, Inc. v. Martin, 924 F.2d 98, 102 (6th Cir. 1991) (same, as to Michigan statute requiring the granting of injunctive relief to restrain acts that encourage breach of contracts).

42. As the First Circuit has pointed out, Law 75's "statutory provision for preliminary injunctive relief neither specifies nor forbids that the dealer show a likelihood of success on the merits, [] P.R. LAWS ANN. [tit. 10,] § 278b-1, and the case law appears to be divided on whether there is such a requirement." V. Suarez & Co., Inc. v. Dow Brands, Inc., 337 F.3d 1, 8 n.10 (1st Cir. 2003) (citing Luis Rosario, Inc. v. Amana Refrigeration, Inc., 733 F.2d 172, 173 (1st Cir. 1984)); Cobos Liccia v. DeJean Packing Co., 24 P.R. Offic. Trans. 896 (1989); Systema de Puerto Rico, Inc. v. Interface Int'l, Inc., 23 P.R. Offic. Trans 347 (1989)). In the federal context, this question of whether "the likelihood of success" requirement applies would present a direct conflict with the *Hanna* holding, requiring the federal procedural standard to govern (in this case, Federal Rule of Civil Procedure 65), when in conflict with state substantive law. *See* Ricardo F. Casellas-Sánchez & Manuel Pietrantoni, *When a Substantive Rule of Puerto Rico Law*

In *Next Step I*,[43] the Puerto Rico Supreme Court held that the issuance of a Law 75 preliminary injunction to a qualified dealer required weighing the policies served by the statute and balancing all the relevant interests.[44] The court reiterated its prior statements to the effect that traditional standards for preliminary injunctions are relevant, but do not necessarily apply in this context, although traditional defenses to equitable relief, such as laches and estoppel, still apply.[45] The sequel case, *Next Step II*,[46] involved the principal's termination of a Law 75 contract after the dealer's distribution rights had been expressly assumed by the principal's successor.[47] After the trial court scheduled a preliminary injunction hearing, the principal admitted lack of just cause and argued that the request for a preliminary injunction had become moot because all that remained was a prompt hearing on damages. The trial court agreed with the principal.[48] The intermediate appellate court not only reversed but, concluding that the principal had admitted lack of just cause, also entered a preliminary injunction on appeal and without a hearing.[49]

This procedural imbroglio came before the Puerto Rico Supreme Court on two issues: first, whether the principal's admission of liability mooted the preliminary injunction remedy (it did not), and second, whether the appellate court erred by granting a preliminary injunction on appeal (it did).[50] The court held that the preliminary injunction was not moot. The purpose of the Law 75 provisional remedy was to lessen the impact to the dealer from its loss of the dealer contract until a final judgment on the merits. Because the case was not over with only an admission of lack of just cause, the provisional remedy was not moot.[51] However, the intermediate appellate court did err in granting the preliminary injunction without a hearing because the dealer still had the burden of proving the reality of its damages and that the balancing of the relevant factors justified injunctive relief under *Next Step I*.[52] The case was remanded for further proceedings.

for the Issuance of Preliminary Injunctions in Dealer Contract Cases Clashes with a Federal Procedural Rule, Is There a Doubt as to Which One Should Apply? From The Bar (Spring 2008) (Fed. Bar. Ass'n P.R. Chapter newsletter).

43. Next Step v. Biomet, Inc., 190 P.R. Dec. 474 (2014) [*Next Step I*].
44. *Id.* at 496–500.
45. *Id.* at 499.
46. Next Step v. Biomet Inc., 195 P.R. Dec. 739 (2016) [*Next Step II*].
47. *Id.* at 742.
48. *Id.* at 744–45.
49. *Id.* at 744–46.
50. *Id.* at 746.
51. *Id.* at 755–57.
52. *Id.* at 757.

II. Overview of Puerto Rico's Special Laws Protecting Dealers and Sales Representatives

Puerto Rico has no law regulating disclosures by franchisors to franchisees, dealers, or prospective investors prior to the sale of a franchise.[53] The only special relationship laws that apply specifically in the franchise context are Law 75 governing dealers (including franchisees, distributors, wholesalers, and other resellers)[54] and Law 21 for exclusive sales representatives.[55] Law 75 is a special law passed in 1964 that embodies a public policy in Puerto Rico to "remedy the abusive practices of suppliers who arbitrarily eliminated distributors after they had invested in the business and had successfully established a market for the supplier's product or service."[56] One of the main purposes of Law 75 is to "level the contractual conditions between two groups that are economically unequal," recognizing that the supplier, typically a more powerful company, has leverage over the Puerto Rico dealer that lacks bargaining power when entering into contracts.[57] The statute traces its origins to similar laws in the Dominican Republic, Cuba, and the United States.[58] Law 75 has survived federal constitutional and statutory challenges.[59]

Law 75 prohibits the termination, non-renewal, or impairment of the dealer contract without just cause. As such, it applies to prevent arbitrary ter-

53. Martin's BBQ v. García De Gracia, 178 P.R. Dec. 978 (2010).

54. P.R. LAWS ANN. tit. 10, §§ 278 et. seq.

55. P.R. LAWS ANN. tit. 10, §§ 279 et. seq.

56. Re-Ace, Inc. v Wheeled Coach Indus., Inc., 363 F.3d 51 (1st Cir. 2004) (citation omitted); Newell Puerto Rico, Ltd. v. Rubbermaid, Inc., 20 F.3d 15, 22 (1st Cir.1994). "[Law 75] regulates the termination of a supplier's relationship with a dealer providing that, regardless of any unilateral right to terminate present in a contract, 'no principal or grantor may directly or indirectly perform any act detrimental to the established relationship . . . , without just cause.'" *Newell Puerto Rico*, 20 F.3d at 54 (quoting P.R. LAWS ANN. tit. 10, § 278a). "Law 75's main interest is to prevent unfair usurpation by the supplier of the distributor's hard won clientele and goodwill." V. Suarez & Co. v. Dow Brands, Inc., 337 F.3d 1, 7 (1st Cir. 2003).

57. Next Step v. Biomet, Inc., 190 P.R. Dec. 474, 488 (2014); *see V. Suarez & Co.*, 337 F.3d at 7 (discussing Borg Warner Int'l Corp. v. Quasar Co., 138 P.R. Dec. 60 (1995)).

58. Foreign jurisdictions that can be persuasive in the interpretation of Laws 75 and 21 include Spain, Cuba, and the Dominican Republic, of which the last two have similar statutes that predate Puerto Rico's. *See* COMMONWEALTH OF P.R., CHAMBER OF COMMERCE, Estudio Sobre la Ley 75 de 24 de junio de 1964 que Reglamenta los Contratos de Distribución [Report on Law 75 of June 24, 1964 That Regulates Distribution Contracts], at 80 (undated). But common law jurisdictions that have also shaped many of the amendments to Law 75 relating to the presumption of lack of just cause include California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Maine, Massachusetts, Mississippi, North Carolina, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and possibly, Wisconsin. *See id.* at 61–77. Delaware enacted a "Franchise Security Law" on July 8, 1970, protecting certain franchisees with a place of business within the state from unjustified terminations. Damages include lost profits and loss of goodwill. "[Delaware law], within the ambit of legislation in the United States, is closest in its focus to Law 75." *See id.* at 67–68.

59. *See, e.g.*, Matosantos Commercial Corp. v. SCA Tissue N.A., 340 F. Supp. 2d 109, 112–13 (D.P.R. 2004) (challenge under Commerce Clause); Pan Am. Comp. Corp. v. Data Gen. Corp., 562 F. Supp. 693, 696–702 (D.P.R. 1983) (challenges under Impairment of Contracts Clause, Equal Protection Clause, Due Process Clause, Commerce Clause, and antitrust laws).

minations or other abusive conduct by the principal or grantor.[60] The statute provides that "no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its expiration except for just cause."[61] Impairment is conduct by the manufacturer that does not terminate the contract, but is considered to be detrimental to the established relationship.[62] Termination of a Law 75 contract must be done in good faith and with due prior notice to the dealer considering the nature and characteristics of the relationship.[63]

A. *How Do Puerto Rico's Relationship Statutes Depart from Their Common Law Counterparts?*

In its most basic formulation, Law 75 departs from civil and common law principles governing commercial contracts in significant ways. First, Law 75 superimposes in every dealer contract a requirement of "just cause" for the principal to terminate, impair, or refuse to renew the agreement and establishes presumptions of lack of just cause in specified circumstances.[64] A Law 75 contract is not terminable at will, or on its own terms, since it requires just cause.[65] Public policy does not permit provisions of Law 75 to be contracted away and the distributor's rights cannot be waived.[66] This

60. R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 485 (1st Cir. 1994); San Juan Mercantile v. Canadian Transport Co., 8 P.R. Offic. Trans. 218, 222 (1978); Ileana Irvine, IRG Research Grp., Inc. v. Murad Skin Research Labs., Inc., 194 F.3d 313, 317 (1st Cir. 1999).

61. P.R. LAWS ANN. tit. 10, § 278; Twin Cty. Grocers, Inc. v. Méndez and Co., Inc., 81 F. Supp. 2d 276, 280 (D.P.R. 1999); *Ileana Irvine*, *IRG Research Grp*., 194 F.3d at 317; Vulcan Tools of Puerto Rico v. Makita U.S.A., Inc., 23 F.3d 564, 568 (1st Cir. 1994); La Playa Santa Marina, Inc. v. Chris-Craft Corp., 597 F.2d 1 (1st Cir. 1979).

62. In the context of what constitutes a detrimental act, Law 75 does not create rights where none exist by contract. *See* Medina & Medina v. Hormel Foods Corp., 840 F.3d 26, 41–42 (1st Cir. 2016). Law 75 protects contractually acquired rights. *Id.* For example, where the contract is non-exclusive, a dealer cannot claim an impairment of contract or damages from the supplier's sales of products to a competing distributor or for selling products directly, nor can the dealer convert an expressly non-exclusive contract into an exclusive contract. *Id.*; *see also* Grifols, Inc. v. Caribe RX Serv., Inc., 2016 TSPR 147, at *11–12 (P.R. 2016) (Rodríguez, J., concurring) (dealer held to content of signed written agreement, executed after extensive negotiation and containing an integration clause, that limited exclusivity to specific lines of product; dealer's one-sided contention that implied agreement was for exclusivity over all products did not trump actual agreement reached in writing with distributor).

63. Medina & Medina v. Country Pride Foods, Ltd., 858 F.2d 817 (1st Cir. 1988).

64. P.R. LAWS ANN. tit. 10, § 278a–1(c)

65. Under Puerto Rico law, contracts not governed by Law 75 and that have no fixed term or duration are terminable at will by either party. *See* Quality Const. Chems. v. Sika Corp., 389 F. Supp. 2d 246 (D.P.R. 2005).

66. P.R. LAWS ANN. tit. 31, § 3372 (1991); P.R. LAWS ANN. tit. 10, § 278c. For that reason, "[the] just cause limitation applies even where a contract includes a clause providing for termination under specified circumstances." Casas Office Machines, Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 679 (1st Cir. 1994). Similarly, provisions fixing any rules or standards of conduct or goals are invalid to prove just cause through non-compliance, unless those provisions are reasonable and adjust to the realities of the Puerto Rico market at the time of the non-performance or the alleged contract violation. P.R. LAWS ANN. tit. 10, § 278a–1(c). The burden of proof to show the reasonableness of the rule of conduct or goal rests with the principal or grantor. *See Casas Office Machines*, 42 F.3d at 679. As an exception, a non-renewal of a Law 75 dealer contract without just cause is valid where the dealer fails to comply with a contractual provision requiring ad-

principle is consistent with the Civil Code, in that contracts are enforceable unless contrary to law, morals, or public policy.[67]

Under Law 75, the principal or grantor has the "the burden of persuasion to prove the factual elements of the just cause inquiry."[68] There is just cause if the dealer commits a violation of an essential provision in the agreement or engages in conduct that substantially and adversely affects the interests of the principal or grantor in Puerto Rico.[69] What is an essential obligation (or not) depends on the terms of the agreement or the course of dealings between the parties.[70] If the principal or grantor fails to prove just cause, it "shall have

vance notice of intent to renew the agreement prior to its expiration date. *See* Nike Int'l v. Athletic Sales, Inc., 689 F. Supp. 1235 (D.P.R. 1988). In that narrow situation, the contract expires on its own terms without any liability. *Id.*

On an issue of Law 75 damages and waiver of rights, a panel of the American Arbitration Association issued a partial award in July 2011, holding that a provision in an exclusive subdistribution agreement (analogous to a liquidated damages provision), allowing an offset of the value of the distribution rights granted by the principal (the owner of the trademarks) from the amount of Law 75 damages that would accrue from an unjustified termination, did not constitute a waiver of Law 75 rights. *See* V. Suárez & Co., Inc. v. Bacardi Corp., No. KLCE201201176, 2013 WL 4037215, at *2 (P.R. Ct. App. June 25, 2013) (confirming trial court decision that confirmed partial award). The purpose of that provision had been to compensate the dealer, which did not pay a franchise fee as consideration for the grant of exclusivity, for the excess value of the line at the time of termination over and above the distribution value. *See* Bacardí Int'l Ltd. v. V. Suárez & Co., Inc., 719 F.3d 1, 4–6 (1st Cir. 2013) (related federal case). The authors represented Bacardí in that case and in the arbitration.

67. P.R. LAWS ANN. tit. 10, § 278c.

68. Newell Puerto Rico, Ltd. v. Rubbermaid, Inc., 20 F.3d 15, 22 (1st Cir.1994).

69. "Just cause" requires the principal to prove that the dealer violated an essential obligation specified in the agreement or that it committed a serious or egregious action or omission that has adversely and substantially affected the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service in Puerto Rico. *See* P.R. LAWS ANN. Tit. 10, § 278(d); *cf.* R.W. Int'l Corp. v. Welch Foods, 88 F.3d 49, 51–52 (1st Cir. 1996) (non-breaching actions or omissions by dealer must be "sufficiently egregious" and must be shown to have adversely and substantially affected the manufacturer's interests). Depending on the facts of each case, "resolving whether a breach [of an essential obligation] occurred requires assessing the adequacy or reasonableness of [the dealer's] performances and course of conduct . . ."); Casco Inc. v. John Deere, No. 13-1325, 2014 WL 4233241, at *6 (D.P.R. Aug. 24, 2014) (decided in context of supplier's contention that failure to pay on time breached an essential obligation, although distribution agreement, with an integration clause, listed all the essential obligations and did not include payment terms in such list).

70. An "essential obligation" is one that must be complied with by a party because it is the other party's true motive for entering into the contract. *See* Ramírez v. Club Cala de Palmas, 123 P.R. Dec. 339, 347–48 (1989). Some obligations are not essential because they are accessory or complementary and do not justify the termination of a contract, either because the parties did not specify that they were essential in their agreement or because complying with that obligation was not the true motive for entering into the agreement. Where the breach concerns an accessory or supplemental provision, e.g., one that clarifies the understanding of the parties, it does not justify the termination of a contract. *See* Neca Mortg. Corp. v. A&W Dev., 137 P.R. Dec. 860, 875–76 (1995). Minor contract violations or violations of non-essential provisions do not, without more, provide just cause for termination. *See R.W. Int'l Corp.*, 88 F.3d at 51–52; *see, e.g.*, La Playa Santa Marina, Inc. v. Chris-Craft Corp., 597 F.2d 1, 3–4 (1st Cir. 1979) (not posting the manufacturer's signs or having no inventory).

executed a tortious act against the dealer and shall indemnify it to the extent of the damages caused him."[71]

Another important difference from the common law is that, in case of an unjustified termination, refusal to renew, or detrimental act, Law 75 codifies a measure of damages for five years of the dealer's lost profits[72] or, if less than five years, five times the average annual profits, plus a separate amount for loss of goodwill, among other provisions for recovery.[73] Under this statutory formula, the amount of the potential indemnity is not insubstantial.[74]

71. P.R. LAWS ANN. tit. 10, § 278b; Puerto Rico Oil Co., Inc. v. Dayco Prods., Inc., 164 P.R. Dec. 489 (2005); Sheils Title Co. Inc. v. Commw. Land Title Ins. Co., 184 F.3d 10, 14 (1st Cir. 1999).

72. In computing lost profits, there should be a deduction of the costs incurred by the dealer that are directly related to its volume of sales of the product line in question from the gross profits. This generally means deducting the costs that the dealer would necessarily have had to incur had the manufacturer not terminated the contract. *See* Ballester Hermanos, Inc. v. Campbell Soup Co., No. 92-1096, 1993 WL 269656, at *6 (D.P.R. 1993). Puerto Rico law does not allow recovery of gross profits, *see* El Coqui Landfill v. Mun. de Gurabo, 186 P.R. Dec. 688, 701 (2012), and recovery is pre-tax, *see* Casas Office Machines v. Mita Copystar Am., Inc., 961 F. Supp. 353, 359 (D.P.R. 1997).

73. P.R. LAWS ANN. tit. 10, § 278b; *Casas Office Machines*, 961 F. Supp. at 359; *Ballester Hermanos*, No. 92-1096, 1993 WL 269656, at *3–4.

74. Law 75 provides that the amount of such indemnity shall be fixed on the basis of the following factors:

> (a) The actual value of the amount expended by the dealer in the acquisition and fitting of premises, equipment, installations, furniture and utensils, to the extent that these are not easily and reasonably useful to any other activity in which the dealer is normally engaged.
>
> (b) The cost of the goods, parts, pieces, accessories and utensils that the dealer may have in stock, and from whose sale or exploitation he is unable to benefit.
>
> (c) The good will of the business, or such part thereof attributable to the distribution of the merchandise or to the rendering of the pertinent services, said good will to be determined by taking into consideration the following factors:
>
> (1) Number of years the dealer has had charge of the distribution;
>
> (2) Actual volume of the distribution of the merchandise or the rendering of the pertinent services and the proportion it represents in the dealer's business;
>
> (3) Proportion of the Puerto Rican market said volume represents;
>
> (4) Any other factor that may help establish equitably the amount of said good will.
>
> (d) The amount of the profit obtained in the distribution of the merchandise or in the rendering of the services, as the case may be, during the last five (5) years, or if less than five (5), five (5) times the average of the annual profit obtained during the last years, whatever they may be.

P.R. LAWS ANN. tit. 10, § 278b. It is important to note that the factors enumerated in Law 75 are not mandatory or exclusive of other factors. *See* Marina Indus., Inc. v. Brown Boveri Corp., 14 P.R. Offic. Trans. 86, 118 (1983). Rather, they constitute guidelines to be utilized contingent upon the presentation of adequate proof in each case. *See* Ileana Irvine, IRG Research Grp., Inc. v. Murad Skin Research Labs., Inc., 194 F.3d 313, 319–20 (1st Cir. 1999). Adequate proof means that the party claiming damages must prove "their existence, their relationship to the act complained of and their value." Computec Sys. Corp. v. Gen. Automation, Inc., 599 F. Supp. 819, 825 (D.P.R. 1984). Once the existence of damages and the relation to the act complained of has been established, the amount of damages can be estimated on a reasonable basis and there is no need for mathematical certainty. *Id.* at 825. "The Act provides for a liberal interpretation in furtherance of the remedial considerations behind it." *Id.* (citing P.R. LAWS ANN. tit. 31, § 278c).

Pursuant to Law 75 case law, the termination of a distribution contract produces two wrongs: (1) the loss of the profits that the line yields and (2) the loss of the value (good will) that the line gave to the business. As explained in *Ballester Hermanos, Inc. v. Campbell Soup Co.*:

> [Law 75] actually provides one recovery for profits (or benefits . . .) which are lost as a result of the termination of an average distributor while it also provides a separate recovery which, at least in part, is for profits to be lost after the termination of a distributor who generated good will in the product. This is a crucial distinction because it reflects the reason why Law 75 does not provide duplicative or punitive damages.[75]

That is to say, "[t]he dealer must be indemnified to the extent that profits which are attributable to its efforts and that it had expected to enjoy will be enjoyed by another company after the dealer is terminated."[76]

Law 75 also allows separate recovery for impairment damages, short of termination. If the fact-finder concludes that the principal or grantor impaired the agreement without just cause, damages for any lost profits are to be determined based on the benefits that the dealer would have made in distributing the products had the impairment not occurred, or the amount that the dealer would have realized under the contract if it had been dutifully carried out, plus out of pocket expenses incurred, less the direct costs of making that profit.[77] Again, damages must be proven by the dealer.[78]

Law 75 codifies the remedy of a preliminary injunction, available to preserve the status quo ante, pending a final judgment in the litigation.[79] It also has a fee-shifting provision allowing recovery of attorney fees, expert witness fees, and costs by the prevailing party.[80] Finally, another important difference is that Law 75 is a remedial statute and should be interpreted liberally in order to guarantee "the most effective protection" of the dealer's rights.[81]

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75. No. 92-1096, 1993 WL 269656, at *6 (citing Pan Am. Comp. Corp. v. Data Gen. Corp., 562 F. Supp. 693, 700 (D.P.R. 1983).

76. *Id.*; *see also Puerto Rico Oil Co., Inc.*, 164 P.R. Dec. at 504–10; Goya de P.R., Inc. v. Rowland Coffee Roasters, No. 01-1119, 2004 WL 5459246, at *8 (D.P.R. Oct. 22, 2004).

77. *Casas Office Machines*, 961 F. Supp. at 359.

78. Sun Blinds, Inc. v. S.A. Recasens, 111 F. App'x 617, 619 (1st Cir. 2004); Draft-Line Corp. v. Hon Co., 781 F. Supp. 841, 846–47 (D.P.R. 1991) (noting that Law 75 damages are not automatic upon proof of a violation of the statute; actual damages must be proven by the dealer).

79. P.R. LAWS ANN. tit. 10, § 278b-1. There is no permanent injunction remedy in the text of Law 75 to compel the principal to do business with the dealer because damages are the sole remedy. A permanent injunction would raise constitutional objections of involuntary servitude. *See* Ricardo F. Casellas-Sánchez, *Like Oil and Water: Puerto Rico Dealerships and Permanent Injunctions Do Not Mix*, 32 REV. JUR. UIPR 67 (1997).

80. On September 1, 2000, Law 75 was amended to add a provision for recovery of attorney and expert witness fees by the prevailing party. P.R. LAWS ANN. tit. 10, § 278e. The Statement of Motives for Act No. 288 of September 1, 2000 (Puerto Rico Senate Bill 1371) behind this amendment states that the "Legislature deem[ed] it necessary to allow the granting of attorney's fees to the prevailing party under parameters similar to those under Title VII of the Civil Rights Act of 1964, as amended." Act No. 288 of Sept. 1, 2000, S.B. 1371, at 1 (2000). However, Law 21 has no provision allowing recovery of fees.

81. P.R. LAWS ANN. tit. 10, § 278c.

B. *Threshold Questions in Law 75 Cases*

There are threshold questions that come to bear in most Law 75 cases. First, as a general rule, Law 75 does not apply retroactively to contracts or relationships existing before the statute's enactment in 1964.[82] An exception to this rule is when there has been an extinctive novation, as determined under Civil Code principles, of the original relationship or agreement predating the enactment of Law 75, and the substitution of that relationship with the creation of a new relationship or agreement.[83]

Second, Law 75 applies only to a "person actually interested in a dealer contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service."[84] A dealer contract is defined by the statute as a "relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico."[85] The multi-factor test to determine who qualifies as a Law 75 dealer is fact intensive. As expounded in *Roberco, Inc. y Colón v. Oxford Industries, Inc.*,[86] those factors include:

> . . . if the "dealer" actively promotes the product and/or concludes contracts; if he keeps an inventory; if he has a say on price fixing; if he has discretion to fix the sales terms; if he has delivery and billing responsibilities and authority to extend credit; if he independently or jointly embarks on advertising campaigns; if he has assumed the risks and responsibilities for the activities undertaken; if he buys the product; and if he has facilities and offers product-related services to his clients. More could be added inasmuch as a complete list is not intended.[87]

82. Tavarez v. Champion Prod., Inc., 903 F. Supp. 268, 271–72 (D.P.R. 1995) ("Law 21 is an offspring of the Dealer's Contract Law [75]" and like Law 75, does not apply retroactively); *see also* Warner Lambert v. Super. Ct., 1 P.R. Offic. Trans. 527, 538–43 (1973) (holding as unconstitutional retroactive application of Law 75 to contracts already existing at time of law's enactment).

83. Kellogg USA v. B. Fernández Hermanos, Inc., No. 07-1213, 2010 WL 376326, at *8–9 (D.P.R. Jan. 27, 2010).

84. 10 P.R. Laws Ann. § 278(a).

85. 10 P.R. Laws Ann. § 278(b).

86. 22 P.R. Offic. Trans. 107 (1988).

87. *Id.* at 122; *see* Cobos Liccia v. De Jean Packing Co, Inc., 24 PR Offic. Trans. 641, 652 (1989) (quoting *Roberco* and noting that this list of factors is not exhaustive); Cruz Marcano v. Sanchez Tarazona, 172 P.R. Dec. 526, 540 (2007) (same); *see also* Triangle Trading Co., Inc. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir. 1999) (same). In certain circumstances, the sale of generic or private label products—whether or not the brand is registered—may qualify for Law 75 protection, as it would for trademarked or brand name goods. *See* Jorge Rivera Surillo & Co. Inc., v. Cerro Copper Products Co., 885 F. Supp. 358 (D.P.R. 1995) ("Act 75 does not define dealer in terms of the merchandise but in terms of the person's activities in relation to the merchandise or service.").

Regarding what a Law 75 dealer is not, the following analysis by the Puerto Rico Supreme Court in *Lorenzana v. General Accident Insurance Company*[88] is instructive:

> [I]n *Roberco* . . . we established a key distinction between two (2) fundamentally different trade auxiliaries: the distributor and the traveling salesman. The traveling salesman assists the businessman in a stable and continuous manner, and his business is deployed outside the place of business. "The traveling salesman extends the clientele of the merchant, giving the public that is distant from the business place information about the merchandise (by samples usually) or services obtained therein. The prosperity of the business often depends on the skill and competence of traveling salesman." J. Garrigues, *Curso de Derecho Mercantil* [Commercial Law Course], 7th ed., Madrid, Imp. Aguirre, 1976, p. 674.
>
> However, it is also true that "[t]he powers of the traveling salesman vary in practice: sometimes his power extends to the conclusion of the sales contract (authorized or not to receive the payment); other times he is only authorized to transmit contract offers to the principal; others, finally, he may contract, but subject to the approval of the principal." Garrigues, *op. cit*. On the other hand, the distributor "assumes [a risk that] outweighs the commercial risk issuing from a simple commission clause." *Medina & Medina v. Country Pride Foods*, supra, p. [822]. This level of risk and entrepreneurial independence creates a fundamental difference between the traveling salesman and the distributor. Therefore, although "he constantly widens the circle of business operations of the enterprise, maintaining, renewing and increasing the clientele as possible" (R. Uría, *Derecho Mercantil* [Commercial Law], 11th ed. Madrid, Imp. Aguirre, 1976, p. 52), "*the travelling salesman is not protected by [Law] No. 75*." (Emphasis supplied). *Roberco, Inc. y Colón v. Oxford Inds., Inc.*, supra, at [121].[89]

Third, Law 75 applies only to qualified *Puerto Rico* dealers, that is, a dealer that is located in, a resident of, or authorized to do business in Puerto Rico.[90] The statute does not apply to stateside corporations or foreign companies that, without more, export products or services to Puerto Rico.[91] Moreover, it is settled that Laws 75 and 21 do not apply extraterritorially.[92] However, it has not been resolved if sales to customers within federal military installations in Puerto Rico are covered by these relationship statutes.[93]

88. 154 P.R. Dec. 547 (2001).

89. *Id.* at 554–55 (authors' translation).

90. *See* A.M. Capen's Co. Inc. v. Am. Trading and Prod. Co., 202 F.3d 469, 474–75 (1st Cir. 2000) (holding that "legislature sought to protect the interests of commercial distributors working in Puerto Rico," and noting that courts interpreting the statute and its legislative history have uniformly held as much) (quoting *Draft–Line Corp. v. Hon Co.*, 781 F. Supp. 841, 843–44 (D.P.R.1991), *aff'd*, 983 F.2d 1046 (1st Cir.1993), and citing Puerto Rico Supreme Court jurisprudence).

91. *Id.* (finding that New Jersey corporation exporting products to Puerto Rico is not a Law 75 dealer).

92. *See* Goya de Puerto Rico, Inc. v. Rowland Coffee, 206 F. Supp. 2d 211, 215 n.4 (D.P.R. 2002) (sales made by Puerto Rico dealer in the Virgin Islands would not count in measure of Law 75 damages because dealer did not create a market for principal's products or services in Puerto Rico); *see also* Stewart v. Husqvarna Constr. Prods. N. Am., Inc., No. 11-1182, 2012 WL 1590284, at *5 (D.P.R. May 4, 2012) (noting that Law 21 applies to sales representatives who are "assigned a specific territory or market, within the Commonwealth of Puerto Rico").

93. *See* Patterson v. Ford Motor, 931 F. Supp. 98, 102 (D.P.R. 1996).

Importantly, Law 75 protects both exclusive and non-exclusive dealers.[94] Further, commercial agreements, such as those covered under Laws 21 and 75, are not required to be written for them to be enforceable, and extrinsic evidence is unnecessary to corroborate their existence.[95] These special laws apply to written contracts as well as to verbal agreements or relationships established by a course of dealings.[96] Finally, Law 75 is directed against only the principal or grantor in the existing relationship or agreement. There is no joint liability by non-contracting parties under Law 75.[97]

C. *Law 21 Is Patterned After Law 75*

Law 75 and its interpretive jurisprudence are persuasive when ruling on Law 21 issues.[98] In 1990, the Legislature enacted Law 21 to protect exclusive sales representatives who were providing services on a commission or remuneration basis and did not qualify for protection as dealers under Law 75.[99] This is the figure of the manufacturer's representative who has been assigned a specific market or territory in Puerto Rico.[100]

A significant difference between these statutes is the exclusivity requirement. Unlike Law 75, which requires no exclusivity as an element of a claim, Law 21 requires the agent to be an exclusive manufacturer's representative in order to gain the statute's protections.[101] Despite this requirement,

94. *See* Vulcan Tools of Puerto Rico v. Makita U.S.A., Inc., 23 F.3d 564, 569 (1st Cir. 1994); *see also* Medina & Medina v. Hormel Foods Corp., 840 F.3d 26, 41 (1st Cir. 2016). There is a misconception that Law 75 requires exclusivity, but that is not so. An exclusive right arises from the principal's grant of exclusivity in a contract, verbal or written, or in the absence of a contract, from a course of dealings by both parties where, over time a *de facto* exclusive distribution arrangement could, but not necessarily, create exclusive rights under Law 75. According to precedent, exclusivity "constitutes . . . a contractual limitation—obligation to abstain from doing—on the principal. It enjoins said principal or grantor from providing—either directly or indirectly—services of the same nature as those included in the contract in areas designated as exclusive." Systema de P.R. v. Interface, 23 P.R. Offic. Trans. 347 (1989) (citing treatises). Nonetheless, definitional problems remain on the meaning and scope of exclusivity. Law 75 does not define exclusivity. *Hormel Foods* aptly illustrates the problems that develop when a claim of exclusivity arises from a verbal appointment without a meeting of the minds as to the scope and reach of the alleged exclusive rights. There, the dealer failed to prove that the supplier had agreed to grant "airtight" exclusive distribution rights over sales of all products to a club store in Puerto Rico or over new products or that in fact the dealer was exclusive. *Hormel Foods*, 840 F.3d at 36–37.

95. Distribuidora VW, Inc. v. Old Fashioned Foods, Inc., 84 F. Supp. 3d 82, 85–87 (D.P.R. 2014) (interpreting Law 21 and the Civil and Mercantile Codes).

96. *Id.*; *see also* Homemedical Inc. v. Sarns/3M Health Care Inc., 875 F. Supp. 947, 951 (D.P.R. 1995) (course of dealings evidence may be relevant to prove exclusivity at least absent a written non-exclusive agreement).

97. *See* Romero v. ITE Imperial Corp., 332 F. Supp. 523, 525 (D.P.R. 1971) (finding that, pursuant to Puerto Rico legislative intent, "a claim for damages under [Law 75] can only be directed against the principal or grantor" and all defendants other than the principal or grantor were improper parties to claims under the Act).

98. Beatty Caribbean, Inc. v. Nova Chems., Inc., No. 08-2259, 2009 WL 2151303, at *12 (D.P.R. June 16, 2009).

99. P.R. LAWS ANN. tit. 10 § 279(a)-(c).

100. P.R. LAWS ANN. tit. 10 § 279(a).

101. *Id.*; *see also* Gonzalez v. Hurley Int'l LLC, 920 F. Supp. 2d 243, 249 (D.P.R. 2013) (noting this distinction between the two laws).

Law 21 does not define the meaning of exclusivity. The case law has seized on the apparent ambiguity of the statute and suggests that exclusivity, in the context of Law 21, has two potential meanings: (1) exclusivity in the sense that the principal agreed not to sell or distribute the products directly in Puerto Rico or appoint another competing agent in the territory or (2) that the agent agreed not to compete and is bound to represent the products or services of its principal or grantor exclusively.[102]

Like Law 75, Law 21 has a just cause requirement and establishes rebuttable presumptions of lack of just cause.[103] Regarding the measure of damages, Law 21 has a similar provision to Law 75's allowing recovery of lost profits, actual value of investments and expenses for the line, and loss of goodwill.[104] However, Law 21 has an additional provision allowing for an alternative compensation formula, based on a maximum of 5 percent of the total sales volume for the number of years of the representation, if it does not cause an unjust enrichment of the dealer.[105]

III. Jury Trials of Dealer Termination Cases in U.S. District Court

Not surprisingly, jury trials of dealer termination claims in the U.S. District Court for the District of Puerto Rico are few and far between. Even fewer jury verdicts are reported.[106] With the overwhelming majority of federal civil cases resulting in settlements, voluntary dismissals, referrals to

102. *Hurley Int'l*, 920 F. Supp. 2d at 254–56 (in dictum, noting but not deciding the issue). The legislative history of Law 21 sheds no light about the meaning of exclusivity or the reasons for making it a requirement. It is clear, however, that non-exclusive sales representatives that do not otherwise qualify for protection under Law 75 will have no right of action under these special relationship laws.

103. P.R. LAWS ANN. tit. 10, §§ 279a (c) & 279b(b).

104. P.R. LAWS ANN. tit. 10, § 279c.

105. P.R. LAWS ANN. tit. 10, § 279d.

106. Sun Blinds, Inc. v. S.A. Recasens, 111 F. App'x 617, 619–20 (1st Cir. 2004) (jury's verdict for dealer vacated for lack of proof of damages); Sheils Title Co. Inc. v. Commw. Land Title Ins. Co., 184 F.3d 10, 15–18 (1st Cir. 1999) (vacated jury's Law 75 liability verdict for dealer on the ground that contract permitted only one reasonable interpretation of its terms and it proved just cause); Ileana Irvine, IRG Research Grp., Inc. v. Murad Skin Research Labs., Inc., 194 F.3d 313, 319–20 (1st Cir. 1999) (vacated jury's verdict for dealer and ordered a new trial where expert's opinion on damages was flawed); Newell Puerto Rico, Ltd. v. Rubbermaid, Inc., 20 F.3d 15, 22–23 (1st Cir.1994) (upheld jury's verdict for dealer of lack of just cause and damages because principal had known for many years that dealer had been marketing competing products; jury awarded an amount of damages that was approximately an average of the sums of the opinions of the experts for both sides and an independent expert appointed by the court). Bench trials of Law 75 or Law 21 cases are more common, but the judgments and opinions are rarely published. *See, e.g.*, La Playa Santa Marina, Inc. v. Chris-Craft Corp., 597 F.2d 1, 4–5 (1st Cir. 1979) (construing § 278(d) and affirming district court's verdict of damages for Law 75 dealer after finding sufficient evidence that supplier failed to prove just cause because "any alleged violations of the agreements" did not in any way adversely and substantially affect its interests in promoting the marketing or distribution of the products). There is one reported and recent arbitration award on the merits favoring a Puerto Rico dealer, which was enforced under the FAA. *See* Thomas Díaz v. Colombina, S.A., 831 F. Supp. 528 (D.P.R. 2011).

binding arbitration, or summary disposition before trial, it is no wonder that the art of trying a commercial civil case before a jury is vanishing.[107] In the few civil cases that are tried, the jury selection process can be perplexing. In particular, lawyers in the District of Puerto Rico are allowed no direct participation in the voir dire to question the venire,[108] meaning that jurors who actually get picked are more of a lucky draw than a conscientious or scientific effort at jury selection.

A. Case Study of a Law 75 Jury Trial: *Casco, Inc. v. John Deere Construction Co. and Forestry Co.*[109]

On March 11, 2016, a jury in the U.S. District Court for the District of Puerto Rico found defendant John Deere Construction & Forestry Company liable for termination of a twenty-seven year-old dealer contract without just cause under Law 75 and awarded the plaintiff Casco Sales, Inc., the Puerto Rico distributor, impairment and termination damages totaling $1,763,934.[110] Casco was a Puerto Rican distributor of construction equipment, which claimed that John Deere, one of the leading manufacturers of construction equipment in the United States, impaired the contract by canceling in 2012 a purchase order for the sale of a John Deere excavator worth $268,000 and unilaterally terminated its contract in 2013 without just cause.[111] Only the separate claims for impairment and termination of contract under Law 75 reached the jury. At trial, the court dismissed the dolus (fraud) claim, holding that the alleged predicate for fraud or constructive termination of the contract in 2009 was not actionable under Puerto Rico Law 75. Mid-trial, as noted, the court granted John Deere's motion under Federal Rule of Procedure 50 to dismiss the dolus claim for fraudulent inducement and fraudulent performance of contract, entered judgment for

107. *See* D. Brock Hornby, *Imagined Conversations: A Series, The Decline in Federal Civil Trials*, 100:1 JUDICATURE (Spring 2016).

108. *See* U.S. District Court for the District of Puerto Rico Local Civil Rule 47(a) ("Unless otherwise ordered by the Court, the presiding judge will personally conduct the initial examination of prospective jurors requesting that each juror address the court orally, stating his or her name, address, occupation, and previous jury service. At the close of the examination, the Court will afford counsel an opportunity, at the bench, to request that the Court ask additional questions."); U.S. District Court for the District of Puerto Rico Local Civil Rule 47(b) ("Challenges for cause of individual prospective jurors shall be made at the bench, at the conclusion of the Court's examination.").

109. Mr. Casellas is lead counsel for Casco in this case. More details about the facts and the court's pretrial rulings can be found at *Casco, Inc. v. John Deere Construction Co. and Forestry Co.*, No. 13-1325, 2004 WL 4233241 (D.P.R. Aug. 26, 2014) (opinion and order denying cross-motions for summary judgment) and *Casco, Inc. v. John Deere Construction Co. and Forestry Co.*, No. 13-1325, 2015 WL 4132278 (D.P.R. July 8, 2015) (opinion and order on motions in limine).

110. *See* U.S. District Court for the District of Puerto Rico, Civil No. 13-1325, Docket Nos. 243 & 249.

111. *Casco, Inc.*, No. 13-1325, 2004 WL 4233241, at *1–2, *3–4.

John Deere on its counterclaim for collection of a debt of roughly $200,000, and denied the latter's motion to dismiss the Law 75 termination claim.[112]

The jury pool in the *Casco v. John Deere* case was composed of roughly thirty-six candidates. Some were excused for cause, either for medical reasons or because of prior travel arrangements or commitments, or because they knew the lawyers or their law firms. For example, one of the potential jurors worked as a clerk for the external auditors of the plaintiff's counsel's law firm and was stricken for cause. The jury, which was initially composed of four men and four women, was selected from those who remained after three peremptory challenges per side.[113] After a number of back-to-back recesses called by the judge mid-trial, a middle-aged female juror became sick and was excused for cause. The remaining jury of four men and three women was representative of all walks of life. There was an administrative assistant of a multinational corporation, two engineers, an attendant of an auto parts store, a public school physical education teacher, an accounts receivable clerk in a newspaper, and a housewife. There were no accountants or financial analysts in the jury, except perhaps for the accounts receivable clerk who may have known basic accounting, and the engineers who likely had a fuller understanding of science and mathematics. These individuals did not appear to have post-graduate degrees. Although their ages were not disclosed, one could speculate that most were between the ages of thirty and fifty-five. All lived in different municipalities across Puerto Rico, except for one juror from the capital, San Juan. As expected, fluency in English was mixed.

The judge required the second venire (the second pool of jurors who are left after others from the first batch are excused for cause) to read out loud and on the record, their responses to a short set of boilerplate questions, such as, where they live and work and what their family members do for a living. Most of the jurors were naturally so soft-spoken in the intimidating courtroom environment that one could barely hear what they said. From what may have been a twenty second narrative by each of roughly twenty persons, the lawyers were supposed to discern all the facts to make an informed judgment to select the jury. No interrogation by counsel was allowed, nor is it typically allowed in the Puerto Rico district.[114] In this case, jurors clearly spoke and understood English, but not as a first language. The only common denominator, that may or may not have been relevant, is that none of the jurors had served before in any other case, civil or criminal, implying that all had an open mind and were not contaminated by experiences in other cases.[115]

112. *See* U.S. District Court for the District of Puerto Rico, Civil No. 13-1325, Docket No. 235.

113. *See* FED. R. CIV. P. 47(b); 28 U.S.C. § 1870.

114. *See supra* note 108.

115. *See, e.g.*, Ronald C. Dillehay & Michael T. Nietzel, *Juror Experience and Jury Verdicts*, 9:2 L. & HUMAN BEHAVIOR 179–91 (June 1985) (study concentrating on criminal trials found corre-

Regarding Casco's success on the Law 75 claims, the jury had sufficient admissible evidence from which to find that John Deere's ostensible reasons for the impairment and subsequent termination, as stated in two letters, were false or a pretext and that Casco had not breached an essential obligation in the contract. The jury credited Casco's version of the events that John Deere retaliated or discriminated against its Puerto Rican dealer over many years as a vendetta for the dealer's owner's business affiliation with Volvo Construction, a competitor. Casco introduced substantial evidence at trial that John Deere treated its Puerto Rican distributor differently than other construction equipment dealers in Latin America and the United States. Those other dealers received grace periods to comply with John Deere's requirements and were invited to attend important dealer conferences. Casco received no breaks and was the only dealer excluded from the dealer conferences. John Deere executives admitted to being upset at Casco for standing up for its rights on many commercial issues in their relationship and more so for Casco's business dealings with Volvo. Importantly, the John Deere dealer agreement with Casco did not have a non-compete obligation, as do many of John Deere's newer dealer contracts with other distributors.

After a two-week trial and over two hours of deliberations, the jury awarded Casco impairment damages of $323,440 and termination damages of $1,440,494, fully compensating Casco for 100 percent of its Law 75 claims. As discussed previously, Law 75 has a cost-shifting provision requiring the court to award reasonable attorney and expert witness fees in the dealer's favor as the prevailing party.[116] As of this writing, the judgment is not final.[117]

B. *Insights Gleaned from Jury Trials in Dealer Termination Cases*

In the highly improbable scenario that a case gets to a jury, how do juries see and decide dealer termination cases in Puerto Rico? Do they decide dealer versus manufacturer commercial cases any differently than other cases? It is hard to tell in the District of Puerto Rico because jury exit polling after a verdict is prohibited,[118] and the authors have found no published studies on this subject. Two decades ago, informal statistical research con-

lation between increase in the number of jurors who had prior jury experience with an increased probability of a conviction).

116. P.R. LAWS ANN. tit. 10, § 278e. *See supra* note 80.

117. *See* U.S. District Court for the District of Puerto Rico, Civil No. 13-1325, Docket Nos. 251, 253, 260, 264, 266, 267, 269, 274, 277, 280, 286, 293, 294 & 299.

118. *See* U.S. District Court for the District of Puerto Rico Local Civil Rule 47(c) ("Except under the supervision of the Court, attorneys involved in a particular case may not interview or interrogate any juror with respect to the action heard by the juror. This prohibition applies even after the jury has been discharged."); U.S. District Court for the District of Puerto Rico Local Civil Rule 47(d) ("Counsel and the parties shall refrain from any post-verdict communication with the jurors, except under the supervision of the Court.").

ducted based on the federal court's public electronic database for a Law 75 case about to go to trial showed that, of all the docketed jury verdicts in commercial diversity cases in the U.S. District Court for the District of Puerto Rico, plaintiffs prevailed roughly 75 percent of the time. Of course, it is hard to validate those numbers or extrapolate any concrete data to reach conclusions about jury trials today from what was a non-empirical study. Nonetheless, impressions about how juries decide dealer termination cases can be formed from the presentation of the evidence in each case and the isolated instances during trial when lawyers can see a juror "connecting" with or being turned off by a witness, or paying particular attention to one exhibit and not to others.

From experience and practice, one can try to make a few generalizations in these cases. First, juries generally favor the underdog. In these cases, the underdog is almost always the Puerto Rico dealer or representative, who is up against the more economically powerful manufacturer or supplier. Second, an underdog status, without more, will not win the case for the dealer. Third, juries give more weight to a credible witness testifying about an exhibit and the totality of the evidence than to an exhibit without a credible witness backing it up. Fourth, jurors turn to their own life experiences, knowledge, and backgrounds in applying the court's instructions to the admissible evidence. A keen lawyer will be mindful of this during closing. Fifth, as previously discussed, Laws 75 and 21 cases require juries by law to decide whether a termination was just and whether there was cause.[119] This inquiry may open up at trial relevant considerations of the terms of the contract; the conduct of the parties; and what was fair, just, and reasonable. For example, was the termination based on true and legitimate business justifications or was there an ulterior motive behind it? Sixth, assuming everything else equal, a direct relationship often exists between a strong liability case for the principal and a low award of damages and a strong liability case for the dealer and a high award of damages. Finally, sometimes, as in the *Newell Puerto Rico, Ltd. v. Rubbermaid, Inc.* case, juries may "split the difference" when it comes to determining damages. In that case, the court appointed an independent expert on damages and each side had its own Law 75 expert.[120] The amount awarded by the jury amounted to an average of the admissible evidence of the amounts of damages of all three experts.[121]

119. *See, e.g.*, R.W. Int'l Corp. v. Welch Foods, 88 F.3d 49, 51–52 (1st Cir. 1996) (existence of "just cause" under Law 75 is a question of fact for the jury to decide); Newell Puerto Rico, Ltd. v. Rubbermaid, Inc., 20 F.3d 15, 22 (1st Cir.1994) (affirming district court decision not to disturb jury's finding that defendant failed to establish just cause).

120. *See Newell Puerto Rico*, 20 F.3d at 19–20.

121. *Id.* at 18 (amount awarded by jury totaled $1.4 million) & 19 n.2, n.4, n.5 (amounts estimated by defendant's expert, plaintiff's expert, and court appointed expert, were $269,431, (max.), $3,954,749 (max.), and $585,951, respectively).

IV. Conclusion

Dealer termination cases are challenging to litigate and try for manufacturers or suppliers in Puerto Rico, particularly for those with wholly stateside operations. Laws 75 and 21 are designed as remedial statutes and provide not only preliminary injunctive relief, but also compensatory damages to qualified dealers or sales representatives upon proof of damages stemming from an unjustified termination or impairment of the existing relationship or contract. Like the federal Civil Rights Act, Puerto Rico's Law 75 (but not Law 21) also provides for recovery by the prevailing party of reasonable attorney and expert witness fees. Importantly, these relationship laws start with the presumption (which can be disproved) that the local qualified dealer or exclusive sales representative has created a favorable market or clientele for the principal's products or services in Puerto Rico and that the principal has acted to take that market away without paying just compensation. With this in mind, lawyers can and should give proactive counseling to clients and carefully draft contracts before clients do business with a Puerto Rico dealer or agent to prevent disputes from reaching litigation.

There is truth to the anecdotal evidence that plaintiffs that survive summary judgment and reach trial prevail most of the time in civil jury cases tried in the federal court in Puerto Rico. Dealer termination cases are no exception. Therefore, if representing a supplier or manufacturer about to enter into a relationship potentially governed by Puerto Rico law, one should carefully craft an integrated agreement to minimize the risk of having a federal jury or a local court decide the case on the merits. This means including enforceable forum selection and arbitration provisions as well as reasonable performance standards or goals that should be spelled out clearly and completely in the agreement. As *Medina v. Hormel Corporation*[122] illustrates, doing business on a handshake, without a written contract, spells trouble ahead for the supplier or manufacturer, creates uncertainty for both parties, and invites costly and protracted litigation.

If litigation is imminent or pending in the local court, a practitioner should also decide whether to file a declaratory judgment action in a stateside forum with personal jurisdiction and venue or whether to remove the case to an appropriate federal district court. The filing by the dealer of a motion for preliminary injunctive relief or the existence of a stateside forum selection clause may influence a practitioner's decision whether to remove the case. Other relevant considerations on the choice of forum issue include the federal court's familiarity with Law 75 and Law 21 precedents, the feasibility of summary judgment resolution, any differences in the application of substantive law by the federal courts and the local courts, as well as the likelihood of success or failure of an appeal from a final judgment to the First Circuit or to the local appellate courts.

122. Medina & Medina v. Hormel Foods Corp., 840 F.3d 26 (1st Cir. 2016).

For franchisee counsel, although a federal jury may seem like the obvious choice, the local trial courts are as familiar with Law 75 and Law 21 issues as the federal court and have proved to be expeditious in scheduling preliminary injunction hearings in those cases. Finally, it is hard to say whether arbitration is a more favorable forum for one side or the other in dealer disputes in Puerto Rico because so few of the awards are reported unless they involve a court proceeding to confirm or vacate the award.

Analyzing all of the above factors will be critical to early decisions made when drafting franchise and distribution agreements and to the later decisions that shape litigation proceedings.

BLP appoints Andrew MacGeoch to head Real Estate & Infrastructure in APAC

Posted by Lisa Mayhew under All Press Releases, By expertise, By region, By Sector, Global, Hong Kong, Hotels, Leisure, Sport & Hospitality, Real Estate Industry, Real Estate Sector, on 22.05.2017

International law firm, Berwin Leighton Paisner (BLP) has today (22 May 2017) announced the appointment of Partner Andrew MacGeoch as Head of Asia Real Estate, Hospitality and Leisure.

Andrew, a Partner since 1999 and currently Asia Head of the Hospitality & Leisure Group at Mayer Brown JSM, will join BLP's Hong Kong office in the Autumn. This signals BLP's intent to provide clients with a premium global real estate and infrastructure capability and is a further boost for the firm in Asia, where there have been numerous strategic hires including the Haley & Co LCR/ Projects team, the William Ho team specialising in asset finance and private client expert Marcus Dearle.

A market-leader in the Real Estate, Hospitality and Project sectors, Andrew has extensive experience in dealing with infrastructure developments and mixed-use projects. He represents developers, owners, institutional investors, governments and statutory corporations, and is best known for his work across Hong Kong, Macau, Mainland China, Vietnam and Thailand.

Commenting on the news, BLP's Managing Partner Lisa Mayhew said: "This is a significant milestone for us as we continue to realise our ambitions as a global Real Estate and Infrastructure powerhouse. Clients tell us they value our expertise and are supportive of a truly global service.

"Andrew is highly respected in the real estate sector and wider market and we're looking forward to welcoming him to BLP."

Responding to his appointment, Andrew MacGeoch said: "I've watched with interest as BLP has replicated and expanded its market-leading real estate sector expertise from the UK to Germany, Russia and the Middle East. Asia is the natural next step and I'm looking forward to supporting clients with inbound and outbound real estate opportunities."

BLP has a clear strategy based on: building a leading global real estate capability, an internationally recognised litigation and corporate risk practice, a strong corporate and finance practice; building Real Estate, Infrastructure and ENR, Financial Services, and Private Wealth teams; continuing to invest in and build its Enterprise businesses such as LOD and Streamline.

BERWIN LEIGHTON PAISNER

BLP appoints Ibrahim Elsadig to head up UAE Corporate Practice

Posted by Jonathan Morris under All Press Releases, By expertise, By region, Commercial, Corporate, Corporate Finance, Dubai, on 30.01.2017

International law firm Berwin Leighton Paisner (BLP) today (30 January 2017) announces the lateral hire of Partner Ibrahim Elsadig from Dentons (UAE). He will help launch and spearhead the Firm's UAE Corporate and Commercial practice from its Dubai office.

Ibrahim will create BLP's first dedicated corporate capability in the UAE and will complement the existing legal expertise in the country including its Litigation and Corporate Risk practice and its Real Estate and Infrastructure teams. He will be looking to strengthen the team during the year.

Ibrahim has an exceptional market reputation and joined Dentons in 1996. Between 2005-2007 he had a spell in-house at GE Energy before rejoining the firm where he has been since. During his time at Dentons, he has headed up the Corporate and Commercial practice in Dubai. He has an extensive understanding of the UAE market and the wider Middle East and Africa region and has a wide range of experience including joint ventures, bankruptcy and restructuring and corporate M&A. Much of his work is focused in the energy and natural resources, telecommunications and technology, healthcare and education sectors.

Jonathan Morris, Head of Corporate, BLP, commented: "As a Firm we want to build a balanced and complementary portfolio of capabilities across different geographies to ensure that we're able to offer our clients the very best service. Bringing Ibrahim into our Dubai office, the hub for the Middle East and Africa, adds breadth to our global corporate offering that will help us to complete multi-jurisdictional work for clients and drive our international growth. Ibrahim also does a considerable amount of Africa-related work and, working with our Africa business, will add additional services and capabilities for our clients. This appointment will be of huge benefit to BLP."

Richard Davies, Country Managing Partner, UAE, added: "The appointment of Ibrahim adds a new service line for our Dubai office and across the UAE. There is significant opportunity for us at this time with the UAE really establishing itself a large global financial hub, a major trading centre and a choice for multinational operations. With his expertise, relationships and network Ibrahim will also help us to drive revenue across all our departments both inbound and outbound and we welcome him to our Firm."

BERWIN LEIGHTON PAISNER

BLP boost Manchester capability with Partner relocation

Posted by Mark Grayson under All Press Releases, By region, By Sector, Real Estate Expertise, Real Estate Industry, Real Estate Industry Sector, Real Estate Sector, UK, on 06.03.2017

International law firm Berwin Leighton Paisner (BLP) has today (6 March 2017) announced that Real Estate Partner Damian Fleming is joining the legal delivery team based in Manchester.

Damian has been a London based BLP Partner since 2006. His experience covers a broad range of commercial real estate matters, including investment, landlord and tenant and funds work, as well as property aspects of secured financing transactions.

As BLP's first Partner in Manchester, he will focus on excellence in legal service delivery by ensuring that market-leading processes and technology deployed in Manchester deliver the highest quality client service. Damian will continue to work with the existing BLP client base including those already benefitting from the Manchester offering.

Opened in August 2014, BLP has a team of Associate lawyers, Paralegals, Legal Apprentices and business service experts in Manchester. Since launch, headcount has nearly quadrupled from 21 to 80, with the office expanding to drive the Firm's integrated services to clients.

Commenting on his move Damian said: "I am looking forward to using my experience to support both the Manchester and London teams in providing a seamless premium service. Clients tell us that our entrepreneurialism in legal service delivery helps us stand out as innovative legal partners. The team here in Manchester plays a vital role in developing and implementing the processes and technology which delivers tremendous efficiencies."

Mark Grayson, BLP Head of Operations, Manchester, added: "Damian will be a huge boost to the team here. His transactional experience coupled with our relentless focus on improving our large scale client-led solutions will improve our offering to clients."

Damian's relocation news follows BLP's recent announcement to introduce trainee lawyer contracts in its Manchester office from September 2017. BLP already has five Legal Apprentices working in its Manchester office as part of the 'Trailblazer Apprenticeship' scheme, which offers a work-based learning route to qualification as a solicitor and takes 6-7 years to complete.