
# THE TOP 5 THINGS

## THE TOP 5 THINGS THE BEVERAGE INDUSTRY SHOULD KNOW ABOUT IMPORT CONTRACTS© BY GILDA R. TURITZ, SIDEMAN & BANCROFT LLP

For 30 years, a New York-based company imported Singha beer, the top-selling Thai export beer of the Boon Rawd Brewery, to the U.S. without any written contract or even any express oral contract as to the parties' rights. In August 2009, the exporter gave the importer written notice of its intent to terminate the importation arrangement effective at year end. In the hard-fought federal litigation entitled Boon Rawd Trading International Co., LTD. v. Paleewong Trading Co., Inc., Paleewong Trading Co. (PTC), claimed that its "import rights" were violated when Boon Rawd terminated PTC as an importer of Singha without cause and without paying PTC any compensation, based on an alleged "implied in fact" contract arising from the parties' conduct and dealings. These dealings included various payment offers and business proposals by Boon Rawd made during termination discussions with PTC over several years. Boon Rawd contended that the import relationship was at will and could be terminated at any time, without compensation. In addition to its implied contract claims for $9 million in damages, PTC contended that it was entitled to statutory protections as a "franchisee" of the exporter under the California Franchise Relations Act.

The resulting judgement on all claims in Boon Rawd's favour is a significant court victory affecting the rights of alcoholic beverage exporters and importers to the U.S. in conducting their business together. In addition to its noteworthy rulings on contract issues, including that PTC could not prove any contract for the alleged terms, the court's decision was a landmark in

determining that importation was not an activity encompassed by the California franchise law which includes engagements "in the business of offering, selling or distributing goods or services." The importer therefore had none of the statutory protections afforded to qualified "franchisees" that market another company's goods or services.

The history of PTC's importation of Singha to the U.S. illustrates the pitfalls of conducting business in the beverage industry on a handshake basis, without written contracts delineating their rights. The court's ruling that the franchise statute does not encompass importation rights has impact beyond California, as it will inform courts in other states with similar franchise laws. State statutes typically protect "franchisees" – with or without a formal franchise agreement – by requiring the franchisor to give the franchisee written notice and an opportunity to cure any claimed cause for termination before it can take effect. In California, an importer cannot rely on those statutory protections under the court's determination that the franchise statute does not cover importation rights, and that ruling underscores the need for written import agreements.

Five important points the beverage industry should heed about import contracts are:

Written contracts delineating the exporter's and importer's rights and responsibilities are essential. Even longstanding relationships of trust operating on a handshake basis should be committed to writing.

Exporters and importers must be fully aware of all state and federal laws that affect the export/import relationship and ensure that their contract complies with those laws. Annual contract review for continued conformity with the law is imperative.

Contracts also should be periodically reviewed and modified to ensure conformity to the exporter's and importer's actual practices and procedures. Modifications by oral agreements, emails, or conduct may not be enforced in the event of a dispute.

Notwithstanding the ruling that the California franchise statute does not encompass importation, exporters and importers must understand the consequences of conducting themselves so that they are considered a "franchise" under the applicable state laws, whether or not that is their intent, and protect themselves accordingly if they determine that they do or do not want to be a "franchise."

When disputes arise, especially without a written contract, threats of litigation may have a major effect on the parties' ability to provide the proof in court that they wish to rely on to prove their claims. Parties should tread carefully in their communications and consult counsel to protect their rights.