

BLOGS
Contracts

Second Circuit Affirms Dismissal of Distributor's Breach of Contract Claims

The Second Circuit Court of Appeals recently affirmed a lower court's dismissal of a distributor's breach of contract claims because the contract was terminable at will and the manufacturer had no duty to protect the distributor from competition. *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Company*, 976 F.3d 239 (2d Cir. Sept. 29, 2020). In 1952, PepsiCo and Compania Embotelladora Del Pacifico, S.A. (CEPSA) entered into an exclusive bottler agreement (EBA) granting CEPSA the exclusive right to bottle and distribute Pepsi Cola in a protected territory in parts of Peru. PepsiCo agreed that so long as the EBA was in effect, it would not appoint another bottler to service the protected territory. The EBA had no expiration date, but did permit PepsiCo to terminate it for specific defaults, including breach of the EBA or insolvency. The parties had a successful relationship until the 1990s when CEPSA encountered financial hardship, including the inability to pay PepsiCo. In August 1998, one of CEPSA's creditors filed an insolvency petition. In March 1999, PepsiCo sent CEPSA a notice of termination, citing multiple breaches, including CEPSA's insolvency. In October 2000, CEPSA sued PepsiCo in a federal court in New York, alleging wrongful termination and failure to protect CEPSA from third parties transshipping Pepsi products into the protected territory. Years of litigation ensued and, in October 2008, CEPSA filed an amended complaint alleging two additional tort claims, which the district court eventually dismissed along with CEPSA's wrongful termination claim.

The court later granted a motion for summary judgment by PepsiCo on the transshipment claim because CEPSA failed to prove damages and PepsiCo did not have a contractual duty to protect CEPSA from third-party transshipment into the protected territory. The court further rejected CEPSA's proposition that PepsiCo had a duty to protect it based on the implied covenant of good faith and fair dealing. CEPSA appealed the dismissal of its wrongful termination claim and its breach of contract claim.

Applying a *de novo* standard, the Second Circuit eventually affirmed the lower court's rulings. With respect to CEPSA's wrongful termination claim, under New York law a "contract of indefinite duration is terminable at will unless the contract expressly and unequivocally states that the parties intended to be perpetually bound." The EBA had no expiration date, and the Second Circuit found no contract language that expressly and unequivocally created a perpetual contract. Therefore, PepsiCo had the right to terminate the EBA and the Second Circuit affirmed dismissal of CEPSA's wrongful termination claim. On the transshipping

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claim, the Second Circuit found that based on the EBA contract language, PepsiCo's only obligation was to refrain from appointing another bottler to service the protected territory. The EBA did not obligate PepsiCo to police the protected territory on CEP SA's behalf. Because the EBA did not discuss or create such an obligation, the court declined to extend the covenant of good faith and fair dealing to require PepsiCo to police the protected territory. The court found no law at the time the parties entered into the EBA that would create such a duty. Thus, the Second Circuit affirmed the lower court's decisions in favor of PepsiCo.