

IBA CONFERENCE 2008

Buenos Aires

Dr. Jürgen Brandstätter

**Consignment sales and
parallel imports**

I. Consignment Sales

Consignment

- Under consignment in domestic business the usual sales commission is to be understood.
- Under consignment in export trade the commission order for selling the goods overseas is to be understood.

Sales commission

- The selling agent is not owner of the commissioned goods,
- but he is entitled to dispose of the commissioned goods
- and can alienate the ownership of the commissioned goods to the buyer

Stock on hand

- as own stock of reseller
- as consignment stock

Stock on hand as own stock of reseller

- reseller is the owner of the goods

Consignment stock agreement

- is not regulated by Austrian law
- between seller and reseller
- reseller is entitled to dispose of the consignment goods
- reseller acts on one's own behalf and for own account

Consignment stock

- the consignment goods remain in the seller's ownership
- commission for the stock keeping
- marking of the consignment goods

Consignment goods

- retention of title of the seller
- passing of ownership of consignment goods occurs by their removal from the consignment stock
- obligation of reseller to insure consignment goods against all risks

Retention of title in Austria

- is not regulated by statute

Functions:

- securing of the purchase price claim
- protection against the creditors of reseller
(by distraint and insolvency of reseller)

Retention of title cannot be registered in Austria

- Conditional rights cannot be registered before the occurrence of the condition (Sec. 357, 424 and 431 of Austrian Civil Code)

Processing of consignment goods

- legal consequences according Sec.415 of Austrian Civil Code
 - common ownership
- exception: retention of title expires on the consignment goods, which have become dependent components of a main good

Advantages of consignment stock

- reduction of transport costs
- high availability of the consignment goods
- standardized handling of payments
- increasing of customer satisfaction

II. Parallel Imports

Problem

- Different market conditions cause different prices and packaging of the goods
- Parallel importers are significant competitors for official distributor

Principle of EEA (European Economic Area) – wide „Exhaustion“ of the trademark right

- According to **sec. 10b para. 1 of Trademark Protection Act** the trademark does not grant the right to its owner to forbid a third party to use the trademark for the goods which have been brought into circulation within EEA under this trademark by its owner or with approval of trademark's owner.
- Free circulation of the goods within EEA

**Parallel imports within EEA are
basically allowed**

Legal basis of the legitimacy of parallel imports within EEA

- Article 81 and 82 of Treaty on European Union: free competition within EU
- Article 7 EU Trademark Directive: Principle of EEA – wide „Exhaustion“ of trademark law

Exception of „Exhaustion“ Principle according to Sec. 10b para. 2 of Trademark Protection Act:

- change or deterioration of the goods
- quality of the goods and quality of a packaging are protected by law
- injunctive reliefs against parallel importer

Parallel imports outside EEA

- illegal parallel imports
- For parallel imports outside EEA Sec. 10b para. 1 of Trademark Protection Act shall not apply.

Legal measures against illegal parallel imports:

Injunctive relief according to Sec. 10 of Trademark Protection Act

- Use of the same sign for the same product
- In the case of parallel imports the identity of signs is obvious
- The exclusive right of the trademark

Injunctive relief according to Sec. 51 of Trademark Protection Act

- absence of approval of trademark's owner for the distribution of the goods within EEA
- fault is not a condition for the assertion

Removal claim according to Sec. 52 of Trademark Protection Act

- permanency of infringement of the trademark rights
- fault is not a condition for the assertion

Conclusion: Assertion of these claims is possible

- in case of illegal parallel imports
or
- in case of exception of „Exhaustion“ -
Principle according to Sec. 10b para. 2 of
Trademark Protection Act

Thank you for your attention

juergen.brandstaetter@bma-law.com

+ 43 1 535 16 30