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CONTRACT LAW—BREWING A SOLUTION: AN ARGUMENT FOR FAIRNESS IN MASSACHUSETTS BEER FRANCHISE LAWS

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For over a decade, Massachusetts craft brewers have been fighting to change the Massachusetts Beer Franchise Law as it directly impacts their success. The Law makes it extremely difficult for a brewer to escape a contract with a distributor. Once a brewer and a distributor establish a relationship for at least six months, a brewer must show good cause to terminate the agreement, which can be extremely time-consuming, cumbersome, and costly. There is no written or oral agreement requirement, and the statutory provision can take effect without the knowledge of either party. Thus, an up-and-coming brewery without knowledge of the statute may think it is just testing out the waters with a distribution company and can end up stuck working with that company indefinitely. The problems arise when a brewer is unhappy with a distributor and cannot do anything about it.

The Massachusetts Beer Franchise Law is meant to protect small distributors from large breweries. The legislation did not take into account the negative effects that could arise if the industry dynamic were to change. Now, it is the small brewers that need protection from large distributors. This Note discusses the negative impacts of static statutory solutions and proposes new, dynamic statutory provisions to resolve the ongoing conflict created by the Massachusetts Beer Franchise Law. Additionally, this Note considers non-legislative protections such as contractual provisions a brewer might consider

* Juris Doctor, Western New England University School of Law, 2021; Senior Articles Editor for the *Western New England Law Review*. Sincere thanks to Professor René Reich-Graefe for his exceptional guidance throughout the drafting of this Note. An immense thank you to my father, Antonios Rizos, who is a pioneer in his field and whose perseverance and extraordinary work ethic inspired this Note.

when entering into a distribution agreement.

INTRODUCTION

Suppose that a business owner has a lifelong dream of opening his own brewery. After years of working and saving, he finally achieves his goal. The brewer is soon approached by a large, local distribution company. Thrilled to have a big-name company distributing his beer, he ships the distributor his beer for circulation. Six months later, the relationship is not what the brewer thought it would be. The brewer notices that the distributor has not been pushing his beer to sell to retailers. The distributor has been putting its effort into selling brands other than the brewer's beer. Upset, the brewer approaches the distributor planning to terminate the relationship. The distributor tells the brewer there is nothing that can be done to end the distribution contract. The brewer offers to pay to terminate the contract, but the distributor declines and threatens suit if the brewer takes further action to attempt to terminate the relationship.

Motivated to get his beer sales back up, the brewer hires an attorney to try and acquire the rights to distribute his beer. Months pass, the brewer is \$100,000 in debt from legal fees. Litigation has gone nowhere. Even if the brewer believes he can win the case, he realizes he cannot afford to litigate any longer. The brewer sticks with his distributor and watches his sales suffer. After another year of poor sales, he decides his days as a brewer are over. It is time to move on from his dream.¹

For nearly a decade, craft brewers and beer wholesalers² have been debating the controversial beer franchise laws of Massachusetts.³ The Massachusetts Beer Franchise Law makes it an “unfair trade practice” for a producer or supplier “to refuse to sell, except for good cause shown, any item having a brand name to any licensed wholesaler to whom such [brewer] has made regular sales of such brand item during a period of six months preceding any refusal to sell.”⁴ This statute (hereinafter, the “Massachusetts Beer Franchise Law”) has locked breweries into indefinite

1. This fact pattern was adapted from the founder of Opa-Opa Brewing Company to whom the author of this Note has a familial connection. For general background information on the original Opa-Opa brewing business, see Patrick Johnson, *Opa-Opa Owner Says Inflexible State Law has Massachusetts Craft Beer Brewers Over a Barrel*, MASSLIVE (Mar. 3, 2014), https://www.masslive.com/news/2014/03/opa_opa_owner_says_inflexible.html [<https://perma.cc/87SH-24ZX>]. See generally Brief for Appellee, *Shelton Bros., Inc. v. Craft Beer Guild*, No. 2019-P-0536 (Mass. App. Ct. Aug. 21, 2019), 2019 Mass. App. Ct. Briefs Lexis 335.

2. The terms “wholesalers” and “distributors” are used interchangeably in the beer industry and throughout this Note.

3. Justin Kendall, *Massachusetts' Franchise Reform Debate Resumes*, BREWBOUND (Jul. 16, 2019, 6:05 PM), <https://www.brewbound.com/news/massachusetts-franchise-reform-debate-resumes> [<https://perma.cc/U3E8-XSKB>].

4. MASS. GEN. LAWS ch. 138, § 25E (2019).

relationships with distributors, which has caused major conflict between beer brewers and distributors.⁵ While brewers can end the contract for “good cause shown,”⁶ it can take years of litigation, endless legal fees, and almost inevitable loss of sales to do so.⁷ In Massachusetts, brewing businesses have died trying to fight the conflict created by the Massachusetts Beer Franchise Law.⁸ Ironically, the statute was originally put in place in 1971 to protect distributors from contractual overreaching, exploitation, and unfairness in the marketplace at the hands of large national beer conglomerates.⁹ Now, it is the brewers who need protection.¹⁰

In Massachusetts, legislators have proposed various bills to resolve this conflict; however, none have been passed into law.¹¹ Most recently, the Massachusetts Senate passed a bill that allows breweries of a certain size to terminate a relationship with a distributor without good cause under certain conditions.¹² The bill was referred to the House Committee on Ways and Means, but due to the Coronavirus pandemic, it is unlikely to be reviewed by the end of the legislative session.¹³ This bill is the closest thing to a legislative “solution” the Commonwealth has seen on the matter.¹⁴ Alcohol distribution companies typically have much financial wherewithal. With that comes lobbying power. This power has allowed

5. See Rob McGovern, *We detail the fight over Massachusetts' alcoholic beverage franchise laws*, CRAFT BREWING BUS. (Sept. 27, 2017), <https://www.craftbrewingbusiness.com/featured/detail-fight-massachusetts-alcoholic-beverage-franchise-laws/> [hereinafter *The Fight Over Massachusetts' Alcoholic Beverage Franchise Laws*].

6. See *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n.*, 519 N.E.2d 276, 279 (Mass. 1988) (holding that a written cancellation clause “permitting either party to cancel upon the ‘[s]ale or transfer of control or management of the other party’” constituted good cause).

7. See Johnson, *supra* note 1.

8. Kendall, *supra* note 3 (Opa-Opa died trying to fight to change this [franchise law] to get out of their wholesaler relationship.”).

9. While the legislative history of the Massachusetts Beer Franchise Law is “sparse,” it “appears to be one of ‘a number of statutes enacted in [Massachusetts] . . . to redress the economic imbalance in particular relationship.’” *Seagram Distillers Co.*, 519 N.E.2d at 279 (quoting *Amoco Oil Co. v. Dickson*, 389 N.E.2d 406, 409 (Mass. 1979)). See also Brian D. Anhalt, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162, 163–64 (2016).

10. In 2019, an all-time high of twelve breweries closed in Massachusetts. *12 Massachusetts Breweries Closed in 2019, An All-Time High: Here's Who, and Why*, MASS. BREW BROS. (Jan. 6, 2020), <https://massbrewbros.com/12-massachusetts-breweries-closed-in-2019-an-all-time-high-heres-who-and-why/> [https://perma.cc/C9GG-JXRX].

11. See, e.g., H.R. 327, 191st Gen. Ct. (Mass. 2019); H.R. 3549, 191st Gen. Ct. (Mass. 2019); H.R. 314, 191st Gen. Ct. (Mass. 2019); H.R. 104, 191st Gen. Ct. (Mass. 2019); H.R. 270, 191st Gen. Ct. (Mass. 2019); H.R. 271, 191st Gen. Ct. (Mass. 2019).

12. See S. 2841, 191st Gen. Ct. (Mass. 2020).

13. *Id.*

14. While this bill poses somewhat of a resolution, it is by no means a perfect solution and creates problems of its own. See *infra* Part III.

them to shut down all bills that have been proposed to date and keep them in control of the small state breweries.¹⁵ Meanwhile, other states have developed solutions to the conflict arising from beer franchise laws through statutory amendment.¹⁶

The Massachusetts Beer Franchise Law is outdated and small breweries are suffering from the effects of the legislation's static regulation of a dynamic commercial relationship. Additionally, since the Law was put into place in 1971, the total number of U.S. breweries has increased by more than one hundred times. Any revision of or replacement for the law must account for the changing dynamic of the industry to ensure the same issue does not occur.

Part I of this Note describes in detail the beer industry and its history in America. Part II analyzes the current legislation in Massachusetts regarding beer franchise agreements. It also analyzes how other states (specifically Maine, Maryland, and North Carolina) addressed similar problems. Part III first addresses the issues surrounding the pending bill in Massachusetts. Next, it proposes a more cohesive legislative solution to the brewer's dilemma, sketched out above, through various statutory provisions. Such provisions include a written agreement requirement, a right to cure provision, an extended period for the statutory protection to take effect, and reasons for termination.

Finally, Part IV of this Note discusses contract provisions every brewer should consider before entering into a franchise agreement with a distributor—irrespective of the particular status quo of a given state jurisdiction's applicable beer franchise laws. Ultimately, however, this Note proposes a more reasonable statutory solution to the conflict created by the Massachusetts Beer Franchise Law by developing amended statutory provisions that protect both parties to the beer distribution relationship and that are designed to adapt along with the industry over the foreseeable future.

I. THE HISTORY OF BEER IN AMERICA, ALCOHOL REGULATION, AND IMPLEMENTATION OF BEER FRANCHISE LAWS

Beer is a fundamental part of American culture.¹⁷ It “sheds light on histories of immigration, urbanization, business innovation, evolving

15. Currently, there are over 130 craft breweries in Massachusetts. *Craft Breweries: Hop into a Massachusetts local brewery for a taste!*, MASS.GOV, <https://www.mass.gov/service-details/craft-breweries> [<https://perma.cc/L9BU-JFYJ>].

16. See Kendall, *supra* note 3.

17. See Ari Shapiro, *How The Story Of Beer Is The Story Of America*, NPR (July 3, 2017, 1:29 PM), <https://www.npr.org/sections/thesalt/2017/07/03/532250762/how-the-story-of-beer-is-the-story-of-america> [<https://perma.cc/RER7-ULC8>].

consumer tastes, and much more.”¹⁸ The United States has beer in its roots. Virginia colonists began brewing beer using corn in 1587.¹⁹ Massachusetts also has deep roots in the brewing of beer, specifically in Boston.²⁰ For example, Samuel Adams, second cousin of our second president, is recognized as having “a key role in both the Revolution and brewing.”²¹ Additionally, immigration overlaps significantly with American history and beer.

It is no coincidence that in the 1860s, along with an “influx of German immigrants,” came an increase in breweries.²² When emigrating to the United States, German immigrants “brought their brewing traditions.” The popularity of beer among Americans grew as the population of German immigrants rose.²³ By 1873, there were 4,131 breweries throughout the country.²⁴ However, for several reasons, over the next century, the number of breweries decreased substantially.²⁵ In 1978, there were only eighty-nine breweries left in the country.²⁶ At that time, every new brewery changed the dynamic of the industry in its region.²⁷ With few distributors and limited breweries (most of which were larger breweries), there was a “natural bargaining advantage” for the breweries.²⁸ “Breweries had more economic power and [a] greater choice of distributors, allowing them to better influence the outcome of the franchise negotiations. If a brewery was unsatisfied with the terms offered by a distributor, the brewery had several other distributors it could bargain with for a better agreement.”²⁹ This led to the implementation of Beer Franchise Laws.³⁰

“The Massachusetts [Beer] Franchise Law was established in the early 1970s to protect distributors at a time when the industry was

18. *Brewing History*, NAT’L MUSEUM OF AM. HIST., <https://americanhistory.si.edu/brewing-history> [<https://perma.cc/J73J-RKSL>].

19. *History of American Beer*, BEER ADVOC., https://www.beeradocate.com/beer/101/history_american_beer/ [<https://perma.cc/DL37-QXK8>].

20. *Id.*

21. *Id.*

22. Andrew Tamayo, *What’s Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina’s Craft Breweries*, 88 N.C. L. REV. 2198, 2207 (2010).

23. *Id.*

24. *National Beer Sales & Production Data*, BREWERS ASS’N FOR SMALL & INDEP. CRAFT BREWERS, <https://www.brewersassociation.org/statistics-and-data/national-beer-stats/> [<https://perma.cc/AN3R-TY2C>].

25. *Id.*

26. *Id.*

27. Anhalt, *supra* note 9, at 167.

28. *Id.* at 163.

29. *Id.* at 175 (citation omitted).

30. See *The Fight Over Massachusetts’ Alcoholic Beverage Franchise Laws*, *supra* note 5.

flipped.”³¹ The industry was dominated by large breweries “while a crowded field of mom and pop distributors fought for their business.”³² Thus, if a distributor lost even one brewer client, its business would likely fail.³³ To protect distributors, in 1971, Massachusetts sought to remedy the power imbalance by enacting the Massachusetts Beer Franchise Law.³⁴ The legislation proved successful in protecting small distributors from the large beer conglomerates;³⁵ however, the law did not take into account the consequences of establishing static rules for both a dynamic relationship and a dynamic industry.³⁶

In the last decade, craft breweries have become a phenomenon in the United States.³⁷ In 2018, there were a total of 7,450 craft breweries throughout the country.³⁸ Of those, 4,522 are considered microbreweries—4,017 more microbreweries than existed a decade ago.³⁹ With thousands of breweries to work with, distributors have more options than ever.⁴⁰ Not only that, but because of the Massachusetts Beer Franchise law, distributors in Massachusetts also have more power over market access, product availability, and developing brand recognition for state microbreweries than ever before.⁴¹ In order to recognize the deleterious effects of beer franchise laws on microbreweries, it is important to understand alcohol regulation and the industry overall.

A. *Alcohol Regulation and the Infamous Three-Tier System*

Throughout American history, alcohol has remained a hot

31. *Id.*

32. *Id.*

33. *Id.*

34. MASS. GEN. LAWS ch. 138, § 25E (2019). *See also* AN ACT FURTHER REGULATING THE SALE OF BRAND NAME ALCOHOLIC BEVERAGES TO LICENSED WHOLESALERS, ch. 833 (1971).

35. Anhalt, *supra* note 9, at 175.

36. *The Fight Over Massachusetts' Alcoholic Beverage Franchise Laws*, *supra* note 5.

37. *National Beer Sales & Production Data*, *supra* note 24. One reason for the growth in craft beer is greater access to brewing licenses. For example, in 2002, Farmer Brewery licenses were introduced to encourage “the development of domestic farms.” MASS. GEN. LAWS ch. 138, § 19C (2020).

38. *National Beer Sales & Production Data*, *supra* note 24. A craft brewery, or nanobrewery, is “any facility that produces fewer than 15,000 barrels of beer annually, with 75% or more of its beer served off-site.” *Brewery, Microbrewery, Brewpub, What's the Difference?*, EVERGREEN (Aug. 18, 2016), <https://www.evergreenhq.com/blog/brewery-microbrewery-brewpub-whats-the-difference/> [<https://perma.cc/T5UT-JXCF>] (a brewery is “a beer producer that produces 15,000 – 6,000,000 barrels per year” and a brewpub is a bar owned by a brewery that sells their beer directly to customers).

39. *National Beer Sales & Production Data*, *supra* note 24.

40. *See The Fight Over Massachusetts' Alcoholic Beverage Franchise Laws*, *supra* note 5.

41. *Id.*

commodity.⁴² “Of all the products humans have devised, alcohol is the only one that has been the subject of two constitutional amendments.”⁴³ The status and acceptance of alcohol in America have transformed throughout history.⁴⁴ As discussed above, beer and other alcoholic beverages rose in popularity with the arrival of European immigrants.⁴⁵ Alcohol later lost its approval during prohibition and, thus, declined in popularity.⁴⁶ Following prohibition, alcohol once again rose in popularity. Specifically, breweries have been on the rise ever since.⁴⁷ While public attitudes about alcohol have shifted over time, there is one thing that has stayed constant: regulation.⁴⁸ Alcohol was regulated before prohibition, by and during prohibition, and in the years following prohibition.⁴⁹ Currently, the states are charged with “the task of regulating commerce in alcoholic beverages.”⁵⁰ However, the alcoholic beverage industry is also regulated at the federal level by the U.S. Bureau of Alcohol, Tobacco, and Firearms and the U.S. Food and Drug Administration.⁵¹ Federal regulation, which was crucial post-prohibition, inspired the infamous “Three-Tier System.”⁵²

1. The Three-Tier System in Action: How it Works

The beer industry is based on a “Three-Tier System consisting of manufacturers, distributors . . . and retailers,” where manufacturers produce the beer, distributors deliver the beer to retailers, and retailers sell

42. See Andrew D’Aversa, Comment, *Brewing Better Law: Two Proposals to Encourage Innovation in America’s Craft Beer Industry*, 165 U. PA. L. REV. 1465, 1472 (2017).

43. *Id.*

44. *Id.* at 1473. See also U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

45. See *Brewing History*, *supra* note 18. See also Tamayo, *supra* note 22, at 2207.

46. D’Aversa, *supra* note 42, at 1473.

47. See *National Beer Sales & Production Data*, *supra* note 24.

48. NAT’L RSCH. COUNCIL, *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 61 (Mark Moore & Dean Gerstein, eds., 1981). Prohibition laws allowed for legal alcohol production for medicinal use through a physician’s prescription. *Medicinal Alcohol*, OHIO ST. U., <https://prohibition.osu.edu/american-prohibition-1920/medicinal-alcohol> [<https://perma.cc/2A5G-JXAS>].

49. *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 61–62, *supra* note 48.

50. *Id.* at 64. In Massachusetts, alcoholic beverages are regulated by the Alcoholic Beverage Control Commission (ABCC) and Local Licensing Authorities (LLAs). E. Macey Russell et. al., *Alcoholic Beverages Control Commission of Massachusetts: Task Force Report* (Dec. 27, 2017), https://www.mass.gov/files/documents/2017/12/28/Alcohol%20Task%20Force%20Report_0.pdf [<https://perma.cc/KY8Q-QNRB>] [hereinafter *Task Force Report*].

51. *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 61–62, *supra* note 48.

52. 27 U.S.C. § 205 (1935).

the product to consumers.⁵³ In this Three-Tier System, each “tier” is prohibited⁵⁴ from having cross-ownership in another tier, known as a “tied house.”⁵⁵ For example, under this regulation, a brewer cannot own their own distributing company, or even lease out a building to a retailer.⁵⁶ As time progressed, the lines between the tiers became blurred. “In many states, including big markets like California and New York, a brewer can become a distributor and vice versa.”⁵⁷ Many states have also made exceptions for brewers distributing their beer, including the ability to self-distribute.⁵⁸ In Massachusetts, for example, any manufacturer holding a Farmer Brewery License⁵⁹ may self-distribute to licensed retailers.⁶⁰ Ultimately, the three tiers rely on each other for success. Understanding this reliance is a key factor in analyzing the effect of the Massachusetts Beer Franchise Law. The Massachusetts Beer Franchise law not only frustrates the brewer-distributor relationship, but it frustrates the entire beer market in Massachusetts.

2. Access to Licensing and Its Impact on the Beer Industry

One of the main reasons craft breweries exploded in popularity was access to licensing through federal regulations.⁶¹ The Federal Alcohol Administration Act allows any persons to be entitled to a “basic permit”

53. See *The Fight Over Massachusetts’ Alcoholic Beverage Franchise Laws*, *supra* note 5.

54. Self-distribution is a more recent exception to the tied-house laws and will be discussed further *infra* Section II.B.1.

55. “The ‘tied house’ has been dealt with in the statutes of many States as an evil to be avoided.” Op. of Justices to H.R., 333 N.E.2d 414, 418 (1975). See also 27 U.S.C. § 205(b) (1935). “[Tied House] laws generally limit[] or completely prohibit[] cross-ownership between ‘industry members.’” Mark Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, CRAFTBEER.COM (Mar. 6, 2017), <https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer> [<https://perma.cc/7WP8-LX65>] [hereinafter *Understanding the Three-Tier System*].

56. 27 U.S.C. § 205(b) (1935). See also *Understanding the Three-Tier System*, *supra* note 55.

57. See *Understanding the Three-Tier System*, *supra* note 55.

58. See, e.g., MONT. CODE ANN. § 16-3-213 (2019) (allowing breweries to sell and deliver beer that they manufacture in its original packaging); OKLA. STAT. tit. 37A, § 2-102 (2020) (allowing a small brewer to elect to self-distribute or use a distributor in a specific territory, but not both); TEX. ALCO. BEV. CODE tit. 3B, ch. 62A (effective Sept. 1, 2021) (providing a brewer not exceeding 125,000 barrels per year may self-distribute). See also *Understanding the Three-Tier System*, *supra* note 55.

59. “A Farmer Brewery license allows the holder to produce malt beverages and sell them at retail or at wholesale.” *Apply for an Alcoholic Beverages Farmer Brewery License (ABCC)*, MASS.GOV, <https://www.mass.gov/how-to/apply-for-an-alcoholic-beverages-farmer-brewery-license-abcc> (last visited Jan. 19, 2021).

60. MASS. GEN. LAWS ch. 138, § 19C (2019).

61. 27 U.S.C. § 205 (1935).

unless the Secretary of Treasury does not see fit.⁶² Additionally, President Carter’s deregulation of the alcohol industry in 1979 reopened the market to craft brewers.⁶³ In Massachusetts, a brewer can obtain various licenses to produce and sell beer.⁶⁴ Most recently, Massachusetts introduced a “Farmer” licensing series.⁶⁵ A farmer brewer can sell directly to licensed Massachusetts retailers and licensed Massachusetts wholesalers.⁶⁶ Even with the ability to sell directly to retailers, many brewers will still decide to enter into distribution agreements as distributors can provide a lot of added value.⁶⁷

3. The Distributor’s Role in the Three-Tier System

Distribution is crucial to a brewery’s success. A distributor’s main responsibility is to “buy, store, sell and deliver beer.”⁶⁸ However, they do more than just that.⁶⁹ They also “provide a tremendous variety of beer brands and styles to licensed retailers at a great value while protecting the public.”⁷⁰ Because of distributors, customers at a bar in Massachusetts can enjoy a craft beer made across the country.⁷¹

That being said, distributors have a lot of influence. While they do not produce beer, distributors are typically the ones who sell it to liquor stores and restaurants.⁷² Therefore, brewers put a lot of trust in the distributor to ensure that their product is actively promoted, sold, and ultimately put in the hands of the consumers. However, with the rise in craft beer, competition among beer producers has intensified, and distributors have to work harder than ever to ensure they are selling sufficient amounts of beer from all of their producers to keep them in

62. *Id.* at § 204.

63. Max Fisher, *How Jimmy Carter Saved Craft Beer*, THE ATLANTIC (Aug. 5, 2010), <https://www.theatlantic.com/culture/archive/2010/08/how-jimmy-carter-saved-craft-beer/315886/> [<https://perma.cc/J6MT-8ZPE>].

64. See MASS. GEN. LAWS ch. 138, § 19(c)–(e), (g) (2019).

65. *Id.* at 19(b)–(c), (e).

66. *Id.* The farmer-series license was put into place “[f]or the purpose of encouraging the development of domestic farms[.]” *Id.* at § 19(c)(a). This license promotes “the development and use of local ingredients by requiring the brewery itself to grow or buy a percentage of the ingredients used in the manufacturing or blending process from farms located within Massachusetts.” Courtney McGee, *The Different Types of Brewery Licenses in Massachusetts*, LAW OFFICES OF JOHN P. CONNELL, P.C. (2015), <https://www.connelllawoffices.com/the-different-types-of-brewery-licenses-in-massachusetts/> [<https://perma.cc/R4US-G8US>].

67. *What is a Beer Distributor?*, NBWA, <https://www.nbwa.org/about/what-beer-distributor> [<https://perma.cc/RCA8-JQN2>].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

business.⁷³ Nonetheless, “distributors lack much incentive to promote or distribute small brands.”⁷⁴ Of course, some beers sell themselves, such as larger, well-known domestic beers, but for smaller brands, distributors often take on the responsibility of marketing.⁷⁵ The distributor is responsible for ensuring retailers know of smaller breweries.⁷⁶

In contrast, new and upcoming brands have little initial value and seldom have built relationships with retailers.⁷⁷ Thus, distributors take on a lot of a brewery’s marketing, requiring a lot of resources.⁷⁸ Even though new breweries require more time, effort, and money to sell, distributors have a duty to treat all beers equal in the sense that they are not permitted to push one of their clients’ beers over the other.⁷⁹ However, distributors do not always do this in practice.⁸⁰

Occasionally, distributors have been known to use the “pay-to-play” method, resulting in retailers “awarding tap handles and shelf space to the highest bidder.”⁸¹ Such methods are illegal and grounds for termination of a franchise agreement.⁸² In 2019, the Supreme Judicial Court of Massachusetts upheld a multimillion-dollar fine to a Massachusetts distributor for paying illegal kickbacks to Boston bars.⁸³ In this case, the distributor gave “free beer, high-end draught equipment, maintenance services, signs, televisions, and even donations to charities in retailers’ names” to retailers “in hopes that they would do business with [them].”⁸⁴ This resulted in millions of dollars in fines, and will hopefully discourage other distribution companies from partaking in similar activities.⁸⁵ Even

73. Dan Adams, *A Rare Glimpse into a Beer Distributor’s ‘Pay-to-Play’ Tactics*, BOSTON GLOBE (Mar. 3, 2016, 7:52 PM), <https://www.bostonglobe.com/business/2016/03/03/just-like-mass-nyc-beer-distributor-used-pay-play-tactics/dcZL74qIyyFoKNlbHsO1LL/story.html> [https://web.archive.org/web/20170704041851/https://www.bostonglobe.com/business/2016/03/03/just-like-mass-nyc-beer-distributor-used-pay-play-tactics/dcZL74qIyyFoKNlbHsO1LL/story.html].

74. Anhalt, *supra* note 9, at 184 (“Distributors lack incentive because a new craft brewery’s brand often has little initial value.”).

75. *What is a Beer Distributor?*, *supra* note 67.

76. *Id.*

77. Anhalt, *supra* note 9, at 184.

78. See *The Fight Over Massachusetts’ Alcoholic Beverage Franchise Laws*, *supra* note 5.

79. MASS. GEN. LAWS ch. 138, § 25E.

80. The idea of treating all beers equally in itself is an almost impossible standard because every time the distributor is trying to sell one beer, they are doing so at the cost of not selling another brand. Adams, *supra* note 73.

81. *Id.*

82. *Id.*

83. *Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm’n*, 117 N.E.3d 676, 680–82, 694–95 (2019).

84. *Id.*

85. *Id.*

without the Massachusetts Franchise Law, distributors, by default, have a lot of power in saying what beer gets sold and to whom.

There is no doubt that distributors are an essential piece of the supply chain regarding the availability of craft beer in the United States.⁸⁶ Thus, it makes sense that legislation was put into place to protect them from going out of business. However, distributors' power has increased immensely over the past few decades and such legislation requires legislative reevaluation.⁸⁷ The original statutory protection is no longer needed; it does more harm than good.⁸⁸

B. *An Introduction to Beer Franchise Laws*

Franchise laws were an effort by legislators to even out bargaining power and protect distributors from contractual overreaching and commercial unfairness while also protecting the entire state alcohol production and consumption market from anti-competitive behavior by the larger brew conglomerates.⁸⁹ “A full-fledged beer franchise law will usually . . . [d]efine franchise agreements to include informal, oral arrangements, making any shipment to a wholesaler the start of a franchise relationship.”⁹⁰ A majority of the states have enacted some form of a beer franchise law.⁹¹ When beer franchise laws were introduced, breweries had more economic power than the typical distributor, which at the time was a small, family-owned business.⁹² Before these regulations, if a brewery was not happy with a distributor, they could easily find another and negotiate better terms.⁹³ Additionally, breweries could switch distributors at any time.⁹⁴ Thus, a brewery could use a distributor to establish their brand, and then once established, switch distributors for a lesser price, leaving the original distributor with a major loss. Losing just one client could lead to a distributor going out of business.⁹⁵ Beer franchise laws

86. See Anhalt, *supra* note 9, at 163–64.

87. *Id.*

88. *Id.*

89. *Id.*

90. Marc E. Sorini, *Beer Franchise Law Summary*, BREWERS ASS'N (2014), <https://www.brewersassociation.org/wp-content/uploads/2015/06/Beer-Franchise-Law-Summary.pdf> [<https://perma.cc/73N7-5MBJ>] [hereinafter *Beer Franchise Law Summary*]. See also ALA. CODE §§ 28-8-1 to 28-9-11 (2019); KAN. STAT. ANN. § 41-410 (2020); ME. REV. STAT. ANN. tit. 28-A, §§ 1451 to 1465 (2020); MINN. STAT. §§ 325B.01 to 325B.17 (2020); N.M. STAT. ANN. §§ 60-8A-1; 60-8A-2; 60-8A-7 to 60-8A-11 (2019); N.Y. ALCO. BEV. CONT. LAW § 55-c (2020).

91. *Beer Franchise Law Summary*, *supra* note 90.

92. Anhalt, *supra* note 9, at 174–75.

93. *Id.* at 175.

94. *Id.*

95. *The Fight Over Massachusetts' Alcoholic Beverage Franchise Laws*, *supra* note 5.

were put in place to prevent that.⁹⁶ If it was a good idea to adopt the beer franchise law, then, based on the same reasoning, it is a good idea now to adopt amendments to the beer franchise law.⁹⁷

Beer franchise laws offer a variety of protections to distributors.⁹⁸ Typical protections they provide include: territorial protections, transfer protections, termination protections, damages, procedural protections, and operational protections.⁹⁹ The Massachusetts Beer Franchise Law offers termination protection.¹⁰⁰ After six months, neither the distributor nor the brewer can terminate the agreement but for “good cause shown.”¹⁰¹ Additionally, the notice requirement mandates that the party seeking to terminate the agreement must inform the other side of their intent to do so 120-days in advance.¹⁰² Typically, it is the brewer seeking termination, which requires it to go through an extensive discovery process to prove good cause.¹⁰³ The Massachusetts Beer Franchise Law limits good cause to:

- (a) *disparagement of the product so as to impair the reputation of the brand owner or the brand name of any product,*
- (b) *unfair preferment in sales effort for brand items of a competitor,*
- (c) *failure to exercise best efforts in promoting the sale of any brand item,*
- (d) *engaging in improper or proscribed trade practices, or*
- (e) *failure to comply with the terms of sale agreed upon between supplier and wholesaler.*¹⁰⁴

According to brewers, the Massachusetts Beer Franchise Law “is confusing, the rights of farmer brewers under a franchise (distribution) agreement is not fair, and it is difficult for farmer brewers to change distributors because they must prove ‘good cause.’”¹⁰⁵ In order to solve the problems created by the Massachusetts Beer Franchise Law, there must be a substantial change.

96. Anhalt, *supra* note 9, at 175.

97. *Id.*

98. *Id.* at 176. Territorial protections mean that “no other distributors are allowed to distribute the brewery’s product in that geographic area.” *Id.* Transfer protections “limit a brewery’s ability to prevent a distributor from transferring its distribution rights to another distributor.” *Id.* at 178. Termination protections prevent parties from terminating a distribution agreement without good cause. *Id.* at 179. Damages and procedural protections permit distributors to recover damages, and operational protections require breweries to “comply with stringent procedures in their operations.” *Id.* at 180.

99. *Id.* at 176–81.

100. MASS. GEN. LAWS ch. 138, § 25E (2019).

101. *Id.*

102. *Id.*

103. *Task Force Report, supra* note 50, at 44–45.

104. MASS. GEN. LAWS ch. 138, § 25E (2019).

105. *Task Force Report, supra* note 50, at 42.

II. THE MASSACHUSETTS BEER FRANCHISE LAW: A STATIC SOLUTION FOR A DYNAMIC INDUSTRY

The problem with the Massachusetts Beer Franchise Law is that it is contrary to basic principles of contract law. Contract law is founded on the policy of promoting predictability, party autonomy, fairness, and efficiency.¹⁰⁶ Meanwhile, this law creates a quasi-permanent contract in which one party has nearly all the power. As a practical matter, neither party can escape the contract.¹⁰⁷ Thus, the Massachusetts Beer Franchise Law should be revised to promote the basic principles of contract law in order to improve the functionality of the alcohol marketplace as a whole.

The Massachusetts Beer Franchise Law was “passed based on industry conditions that are no longer true today.”¹⁰⁸ Many distributors are no longer small “mom and pop” shops but large corporations.¹⁰⁹ Additionally, breweries no longer consist only of the large companies that legislators wished to protect distributors from in the 1970s when these laws were enacted.¹¹⁰ The Massachusetts Beer Franchise Law is outdated and small breweries are suffering from the effects of the legislation’s static regulation of a dynamic commercial relationship.¹¹¹ A revision to the Massachusetts Franchise Law is long overdue and must take into account the changing dynamic of the industry to ensure the same issue does not occur. By considering the dynamic industry and its constant changes, an amendment should not favor one side over the other, but rather even the playing field overall while protecting both parties.

A. *Massachusetts’ Unsuccessful Attempts to Revise the Beer Franchise Law*

Over the years, the statutory interference with basic contract principles has gained the attention of many.¹¹² In Massachusetts, there have been several legislative attempts to change the law.¹¹³ In July of 2019, craft brewers proposed a solution creating three tiers of breweries based on production volumes, where small breweries have a non-

106. See MICHAEL HUNTER SCHWARTZ & ADRIAN WALTERS, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK* 5–7 (2d ed. 2015).

107. “Massachusetts courts have not yet addressed the question whether distribution agreements fall within [Article 2 of the Uniform Commercial Code].” *Paper City Brewery Co. v. La Resistance, Inc.*, 17–P–1633, 124 N.E.3d 159, 2019 Mass. App. Unpub. LEXIS 188, at *3–4 (Mar. 15, 2019).

108. Tamayo, *supra* note 22, at 2218.

109. *Id.*

110. *Id.*

111. Anhalt, *supra* note 9, at 165.

112. See Kendall, *supra* note 3. See also *Paper City Brewery Co. v. La Resistance, Hebert*, 2019 Mass. App. Unpub. LEXIS 188 (March 15, 2019).

113. See Kendall, *supra* note 3.

contractual right to refuse to sell.¹¹⁴ Thus, the law would not apply to small breweries in that they can terminate the distributor-brewer relationship at any time. The tiers consisted of small breweries (less than 5,000 barrels), mid-size breweries (5,001–300,000 barrels), and large breweries (300,001–6,000,000 barrels).¹¹⁵ At each tier, the brewer would be required to give notice, in writing, of the refusal, and the successor distributor.¹¹⁶ The successor distributor would also have to pay the affected distributor fair market value for the distribution rights.¹¹⁷ The time of notice and percentage paid would have varied based on the tier.¹¹⁸ For example, a small brewer would be required to give thirty days' notice to the distributor of its refusal to sell.¹¹⁹ From there, the wholesaler would have thirty days to “transfer all malt beverage brands at the direction of the small brewer for no less than the total cost of 50% of the fair market value of the wholesaler’s rights to sell and distribute the brand(s) of the terminating small brewer.”¹²⁰ Additionally, under the brewers’ proposal, any dispute between parties would have been decided by an independent third-party arbitrator.¹²¹

The brewers are not the only ones who proposed a statutory change; distributors have also recently proposed their own.¹²² The July of 2019 proposal would allow for an “emerging brewery” (producing less than 100,000 barrels in a twelve-year period) to get out of a contract with its distributor without cause provided that it gives ninety days’ notice and pays the fair market value of distribution rights plus the cost of inventory.¹²³ In the distributors’ proposal, the distributor would need to receive full compensation before termination would take place, where full compensation is “an amount not less than the laid-in cost of the inventory plus the laid-in cost of the sales and marketing material plus the fair market value of the distribution rights for the brands which are being terminated by the emerging brewery.”¹²⁴ Additionally, the Massachusetts Alcoholic Beverages Control Commission would oversee any disputes.¹²⁵

Both the brewers’ and the wholesalers’ proposals were heard by the Joint Committee on Consumer Protection and Professional Licensure on

114. H.B. 327, 191st Gen. Ct. (Mass. 2019); S.B. 104, 191st Gen. Ct. (Mass. 2019).

115. *Id.*

116. *Id.*

117. *See* Kendall, *supra* note 3. Fair market value is a vague concept that will almost always open the door for litigation.

118. *Id.*

119. H.B. 327, 191st Gen. Ct. (Mass. 2019).

120. *Id.*

121. *Id.*

122. H.B. 3459, 191st Gen. Ct. (Mass. 2019).

123. *Id.*

124. *Id.*

125. *Id.*

July 15, 2019.¹²⁶ A wholesaler present at the hearing “argued that the brewers’ bill contains only ‘cosmetic’ changes and would be a ‘job killer.’”¹²⁷ In contrast, the founder of Boston Beer Company pointed out that the distributors’ proposal would treat his company—which accounts for two percent of the United States beer market—the same as large scale brewers, such as Anheuser-Busch InBev, MillerCoors, and Heineken.¹²⁸ One party, in particular, Wine Institute, voiced its concern regarding the categorizing of breweries by production volume.¹²⁹ The company argues that the production caps are “a rather transparent attempt to provide Massachusetts beer manufacturers with an in[-]state advantage over out-of-state producers.”¹³⁰ Currently, both proposals are under review, but it is unlikely that Massachusetts will see a legislative solution anytime soon.¹³¹

The bill proposed by the brewers¹³² has since been revised¹³³ and agreed on by brewers and distributors.¹³⁴ However, this bill is not a perfect solution to the issues created by the Massachusetts Beer Franchise Law. The current bill allows breweries producing fewer than 250,000 barrels of beer per year to cancel distribution agreements with wholesalers without proving good cause.¹³⁵ This means only one Massachusetts brewery, Boston Beer Company, would not be protected by the new law.¹³⁶ While there is currently only one brewery in the state producing

126. Hearing on H.B. 327 Before the Joint Comm. on Consumer Prot. & Prof'l Licensure, 191st Gen. Ct. (Mass. 2019); Hearing on S.B. 104 Before the Joint Comm. on Consumer Prot. & Prof'l Licensure, 191st Gen. Ct. (Mass. 2019); Hearing on S.B. 2841 Before the Joint Comm. on Consumer Prot. & Prof'l Licensure, 191st Gen. Ct. (Mass. 2019).

127. Kendall, *supra* note 3. Another wholesaler mentioned the seventy-five layoffs that occurred when Red Bull decided to terminate his company without reason. Non-alcoholic beverages such as Red Bull are not subject to franchise laws. *Id.*

128. *Id.*

129. Hearing on H.B. 327 Before the Joint Comm. on Consumer Prot. & Prof'l Licensure, 191st Gen. Ct. (Mass. 2019) (testimony of Carol A. Martel, Counsel, Wine Institute).

130. *Id.*

131. See Kendall, *supra* note 3. Both proposals have been referred to the House Committee on Ways and Means; however, they will likely not be reviewed before the end of the legislative session. See H.B. 327, 191st Gen. Ct. (Mass. 2019); S.B. 2841, 191st Gen. Ct. (Mass. 2019). Due to the Coronavirus pandemic, the legislative session has been extended from August 1, 2020 until December 31, 2020. Despite the “Emergency Preamble” included in Senate Bill S.B. 2841, it is unlikely that the Committee will prioritize reviewing this Bill over the current pandemic emergencies. See S.B. 2841, 191st Gen. Ct. (Mass. 2019).

132. S.B. 104, 191st Gen. Ct. (Mass. 2019).

133. *Id.*; S.B. 2829, 191st Gen. Ct. (Mass. 2019); S.B. 2841, 191st Gen. Ct. (Mass. 2019).

134. Chris Furnari, *Massachusetts Craft Brewers, Distributors Reach Agreement On Franchise Law Reform*, FORBES (July 20, 2020, 4:06 PM), <https://www.forbes.com/sites/chrisfurnari/2020/07/20/massachusetts-craft-brewers-distributors-reach-agreement-on-franchise-law-reform/#5350c12c5839>.

135. S.B. 2841, 191st Gen. Ct. (Mass. 2019).

136. See Furnari, *supra* note 134.

beer above the 250,000-barrel limit, the cap discourages other breweries from wanting to produce beer at such a volume. Additionally, there is an argument against providing caps on production volumes under the Commerce Clause.¹³⁷ “[R]ecently, a Massachusetts’ law¹³⁸ limiting wine shipment to wineries producing less than 30,000 gallons was found to be a violation of the Commerce Clause” because it favored in-state interests over out-of-state interests.¹³⁹ Thus, such regulations will not stand if found to violate the Commerce Clause.

Under the proposed bill, in order to terminate without good cause, the brewers must provide thirty days’ notice and pay fair market value for the brewer’s brands being terminated.¹⁴⁰ Fair market value is defined as “the price that the affected wholesaler’s business that is related to the terminated brands of the brewery would sell for in an arms-length transaction between a willing buyer and a willing seller as of the date the notice of termination was received by the affected wholesaler.”¹⁴¹ Fair market value is a widely-used term in the legal field.¹⁴² However, its “application and meaning continue to be the subject of equally wide dispute.”¹⁴³ The brewer-distributor relationship is a complicated one.¹⁴⁴ While a distributor may be able to put a price on costs, such as the product itself, storage fees, and marketing fees, the fair market value of the brewer’s brand is significantly more complex. Obliging two interested parties to settle on the fair market value of one party’s brand is almost certain to result in disagreement. Thus, the fair market value concept alone creates an issue that warrants litigation for parties involved.¹⁴⁵

Even though the bill recently passed by the Senate is agreed upon by both parties, it has flaws of its own and, if ultimately passed into law, brewers should sincerely consider these concerns when entering into a distribution relationship. While Massachusetts has yet to determine a

137. Hearing on H.B. 327 Before the Joint Comm. on Consumer Prot. & Prof’l Licensure, 191st (Mass. 2019) (testimony of Carol A. Martel, Counsel, Wine Institute). U.S. CONST. art. I, § 8, cl. 3.

138. MASS. GEN. LAWS ch. 138, § 19F (2019).

139. Hearing on H.B. 327 Before the Joint Comm. on Consumer Prot. & Prof’l Licensure, 191st (Mass. 2019) (testimony of Carol A. Martel, Counsel, Wine Institute). *See generally* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010); Bacchus Imps. v. Dias, 468 U.S. 263, 276 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Inst., 491 U.S. 324 (1989).

140. S.B. 2841, 191st Gen. Ct. (Mass. 2019).

141. *Id.*

142. *See* Emanuel L. Gordon, *What Is Fair Market Value*, 8 TAX L. REV. 35, 35 (1952–1953).

143. *Id.* *See generally* Kohler Co. v. United States, 387 F. Supp. 2d 921 (E.D. Wis. 2005); S. Nat. Gas Co. v. United States, 412 F.2d 1222 (Ct. Cl. 1969); Premier Packing Co. v. Commissioner, 12 B.T.A. 637 (1928).

144. *See* Section I.A.3; *see also* *What is a Beer Distributor?*, *supra* note 67.

145. *See generally* Gordon, *supra* note 142.

solution, other states have successfully amended their beer franchise laws.¹⁴⁶

B. Recent Action by States to Reverse the Negative Implications of Beer Franchise Laws: Maine, Maryland, and North Carolina

While most states have some sort of Beer Franchise Law in place,¹⁴⁷ many of them are making legislative changes to resolve the power imbalance such statutes have created.¹⁴⁸ Most recently, Maine, Maryland, and North Carolina have passed legislation to reverse the negative implications on breweries and beer markets created by the franchise laws.¹⁴⁹ Each state provides a different example of how to approach the issue from a legislative standpoint.

1. Maine: Promoting Self-Distribution

Maine is one state that has recently amended its beer franchise law.¹⁵⁰ Maine's previous law included provisions such as: exclusive territories, a ninety days' notice for termination, and termination had to be for good cause.¹⁵¹ Maine's new legislation changes their "small beer manufacturer" definition, by decreasing the amount of beer a small brewery can produce from 50,000 barrels per year to 30,000 barrels per year.¹⁵² A small beer manufacturer may self-distribute its products to licensed wholesalers and retailers.¹⁵³

An issue with categorizing small beer manufacturers by production volumes is that the industry is always evolving. Capping production

146. *See, e.g.*, AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (WEST); Alcoholic Beverages—Beer Franchise Agreements—Notice Of Nonrenewal Or Termination, 2019 Maryland Laws Ch. 379 (H.B. 1080); AN ACT TO CONFIRM THE STATE'S SUPPORT OF THE THREE-TIER SYSTEM FOR DISTRIBUTION OF MALT BEVERAGES AND THE FRANCHISE LAWS, TO MAKE ADJUSTMENTS TO MODERNIZE THE EXEMPTIONS TO THE THREE-TIER SYSTEM, AND TO PROMOTE THE GROWTH OF SMALL AND MID-SIZED INDEPENDENT CRAFT BREWERIES, 2019 North Carolina Laws S.L. 2019-18 (H.B. 363).

147. *Beer Franchise Law Summary*, *supra* note 90.

148. *See* Kendall, *supra* note 3.

149. *See, e.g.*, AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (West); Alcoholic Beverages—Beer Franchise Agreements—Notice of Nonrenewal or Termination, 2019 Maryland Laws Ch. 379 (H.B. 1080); AN ACT TO CONFIRM THE STATE'S SUPPORT OF THE THREE-TIER SYSTEM FOR DISTRIBUTION OF MALT BEVERAGES AND THE FRANCHISE LAWS, TO MAKE ADJUSTMENTS TO MODERNIZE THE EXEMPTIONS TO THE THREE-TIER SYSTEM, AND TO PROMOTE THE GROWTH OF SMALL AND MID-SIZED INDEPENDENT CRAFT BREWERIES, 2019 North Carolina Laws S.L. 2019-18 (H.B. 363).

150. ME. REV. STAT. ANN. tit. 28-A, §§ 1451–65 (2019).

151. *Id.*

152. AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (West).

153. *Id.*

volumes limits a brewery's ability to grow. Additionally, categorizing breweries by production volumes can leave businesses that need protection most, unprotected. For example, smaller breweries with fewer resources and bargaining power are more likely to need protection than larger, established breweries. While it is unclear why the production threshold was lowered, by lowering the threshold, the statute is clearly protecting fewer breweries than it was before.¹⁵⁴ Again, this is a result of using static regulation for a dynamic industry. Additionally, where a statute puts a cap on production, there may be a violation of the Commerce Clause.¹⁵⁵

Self-distribution is becoming more and more common in the industry.¹⁵⁶ It can help save costs in the long run by cutting out the middleman as well as give the brewer more control over where their beer goes.¹⁵⁷ Typically, as part of the three-tier system, a brewer must first sell their product to a wholesaler to get it to the consumer.¹⁵⁸ Self-distribution removes this step and allows breweries to sell their beer directly to retailers.¹⁵⁹ However, startup costs for self-distribution can be expensive because in order to distribute one needs sales personnel, equipment, and warehouse space.¹⁶⁰ Self-distribution is not legal in every state¹⁶¹ and even if it is, like in Maine,¹⁶² the brewer needs to decide what is best for their business.¹⁶³

Maine also changed its written notice requirement. The new law states:

Before any termination procedure initiated by the [brewer], the [brewer] shall give the wholesale licensee written notice of any claimed deficiency existing in the wholesale licensee's territory . . . or, if the [brewer] is a small beer manufacturer . . . at least 30 days to

154. *Id.*

155. Hearing on H. 327 Before the Joint Comm. on Consumer Prot. & Prof'l Licensure, 191st Gen. Ct. (Mass. 2019) (testimony of Carol A. Martel, Counsel, Wine Institute). U.S. CONST. art. I, § 8, cl. 3. *See generally* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010); Bacchus Imps. v. Dias, 468 U.S., 263, 276 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Inst., 491 U.S. 324 (1989).

156. *Beer Distribution 101: Self Distribution vs. Distributor*, ORCHESTRATEDBEER (Jan. 31, 2018), <https://www.orchestratedbeer.com/blog/beer-distribution> [<https://perma.cc/NB7D-E9SQ>].

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See, e.g.*, ALA. CODE §§ 28-8-1 to -9-11 (2020); CONN. GEN. STAT. § 30-17 (2020); IND. CODE § 7.1-5-5-9 (2017).

162. *See AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS*, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (West); *see also* ARIZ. REV. STAT. ANN. §§ 44-1565–1567 (2020).

163. *Beer Distribution 101: Self Distribution vs. Distributor*, *supra* note 156.

*correct the claimed deficiency or deficiencies.*¹⁶⁴

Interestingly, Maine changed their notice from ninety to thirty days.¹⁶⁵ As discussed below, Massachusetts currently requires 120-days' notice, the longest in the country.¹⁶⁶ A long notice period can have negative effects on an already damaged relationship.¹⁶⁷ By shortening the notice period, both parties are satisfied because either the problem is fixed in a timely manner, or the relationship is terminated and both parties can move on.¹⁶⁸

Concerning termination, if a small beer manufacturer terminates its agreement with a distributor, unless for good cause, the manufacturer must pay the distributor "reasonable compensation" for the termination if "the total number of case equivalents of the affected brand . . . distributed by the [distributor] was less than 10,000 and represented no more than 3% of the total number of case equivalents of all brands of liquor . . . that were distributed by the [distributor]."¹⁶⁹ The small beer manufacturer must pay reasonable compensation for the fair market value of the "[distributor]'s business related to the affected brand."¹⁷⁰ This provision presents itself as fair to both parties. Franchise laws were put into place to limit termination and, thus, protect distributors from losing clients.¹⁷¹ As discussed above, distributors often put significant resources into selling a brewer's beer, including helping them build their brand.¹⁷² Therefore, it makes sense for there to be some sort of termination fee for ending that relationship.

Additionally, in a dispute between parties, the law calls for neutral arbitration.¹⁷³ Arbitration can be a less expensive alternative to litigation and offers the arbitrator's knowledge and expertise in the area.¹⁷⁴ Maine's new legislation offers protections to small brewers while preventing them from abusing the option to get out of the distribution relationship.¹⁷⁵

164. AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (WEST) (implying that there is a still "good cause" requirement for termination).

165. *Id.*

166. *Task Force Report, supra* note 50, at 40.

167. *Id.*

168. *Id.*

169. AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (West).

170. *Id.* (additionally, the statute lays out guidelines for the calculation of "reasonable compensation").

171. *Beer Franchise Law Summary, supra* note 90.

172. *See supra* Part I.

173. AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (West).

174. Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1156 (2019).

175. *See* ME. REV. STAT. ANN. tit. 28-A, §§ 1451 to 1465 (2019).

2. Maryland: Starting from Scratch

Maryland took a different route in amending its beer franchise law. The state completely repealed its former legislation and built a new statute from scratch.¹⁷⁶ The decision to completely repeal the original beer franchise law is not extraordinary. Most franchise laws were created to protect distributors and are now outdated.¹⁷⁷ Thus, rather than amending the statute to balance power, it makes sense to repeal the statute completely and address the concerns of both parties with a fresh slate. The statute offers a definition for the term “Beer Franchise Agreement” which lays out some of the expectations of the brewer-distributor relationship.¹⁷⁸

Like Maine, Maryland’s new statute categorizes brewers by production volume. In Maryland, there are separate requirements for breweries that produce less than 20,000 barrels per year.¹⁷⁹ For example, regarding a notice to terminate, a brewer that produces less than 20,000 barrels must give a forty-day notice before termination, whereas all other breweries must give 180-days’ notice.¹⁸⁰ Additionally, should a brewery that produces above 20,000 barrels wish to terminate the “franchise agreement,” they can only do so with good cause. Meanwhile, brewers under the 20,000-barrel threshold can terminate the agreement with the exception that they enter into a termination agreement.¹⁸¹ Said agreement requires the brewer agree to pay the distributor both the fair market value of the terminated franchise and the costs of inventory.¹⁸²

Again, having a production volume limit has its benefits and drawbacks. While many brewers enjoy protections from the franchise law by having lower production volumes, should their volumes increase, they lose those protections. Additionally, it is unfair for a brewer who produces 30,000 barrels a year to be in the same category as a larger player producing hundreds of thousands of barrels a year.¹⁸³ Finally, there is the

176. MD. ANN. CODE art. 2B, § 17-101 (2019).

177. Anhalt, *supra* note 9, at 163–64.

178. Alcoholic Beverages—Beer Franchise Agreements—Notice of Nonrenewal or Termination, 2019 Maryland Laws Ch. 379 (H.B. 1080).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. For reference, Anheuser-Busch produces approximately 500 million barrels a year. Brian Feldt, *A decade after Anheuser-Busch’s sale, beer still pours from St. Louis brewery but much has changed*, ST. LOUIS POST-DISPATCH (July 13, 2018), https://www.stltoday.com/business/local/a-decade-after-anheuser-busch-s-sale-beer-still-pours/article_5a9faf1c-d7c9-5d46-99de-b11b1e22f703.html [https://perma.cc/LKT6-Y36L]. In comparison, Sam Adams, Massachusetts’ largest brewery produced “just under [four] million barrels in 2017.” Amelia Kosciulek & Taryn Varricchio, *Samuel Adams spearheaded the craft beer craze that’s now a \$26 billion industry in America. See inside the legendary factory*,

Commerce Clause¹⁸⁴ argument that may force states to remove such classifications.¹⁸⁵ While Maryland was sensible in rebuilding its beer franchise law from the bottom up, there are many brewers of medium production that still have concerns for those who have medium production levels.

3. North Carolina: Make it Modern

North Carolina also passed new legislation regarding its beer franchise law this year.¹⁸⁶ In passing the new legislation, the North Carolina General Assembly reported that the Beer Franchise Law and three-tier system to “promote[] consumer choice and variety,” “promote[] the growth of the craft beer industry,” ensure the industry complies with alcohol regulations, “promote[] a vibrant marketplace,” “prevent[] vertical integration,” and “promote[] regulatory control.”¹⁸⁷ The General Assembly also reported that the previous provision is outdated and in need of modernization.¹⁸⁸ In the new legislation, North Carolina defines a small brewery as selling no more than 25,000 barrels a year.¹⁸⁹ Furthermore, a small brewery can terminate a distribution agreement without good cause.¹⁹⁰ North Carolina’s beer franchise law also permits brewers that produce up to 50,000 barrels to self-distribute.¹⁹¹ Additionally, a brewery that produces 100,000 barrels or less can self-distribute up to 50,000 barrels.¹⁹² North Carolina offers a variation of the Maine and Maryland statutory protections.

Maine, Maryland, and North Carolina set the example that it is time for beer franchise laws to be modified. These three states also provide

BUSINESS INSIDER (May 3, 2019, 3:23 PM), <https://www.businessinsider.com/sam-adams-spearheaded-craft-beer-industry-worth-26-billion-see-inside-legendary-factory-2019-5> [https://perma.cc/KC5A-YZ9L]. Tree House Brewing, a smaller, but fast-growing, Massachusetts brewery produced 44,000 barrels in 2018. *How the Biggest Massachusetts Breweries Performed in 2018*, MASS BREW BROS. (June 12, 2019), <https://massbrewbros.com/how-the-biggest-massachusetts-breweries-performed-in-2018/> [https://perma.cc/G99F-YZFU].

184. U.S. CONST. art. I, § 8, cl. 3.

185. *See generally* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010); *see also* Hearing on H. 327 Before the Joint Comm. on Consumer Prot. & Prof’l Licensure, 191st (Ma. 2019) (testimony of Carol A. Martel, Counsel, Wine Institute).

186. AN ACT TO CONFIRM THE STATE’S SUPPORT OF THE THREE-TIER SYSTEM FOR DISTRIBUTION OF MALT BEVERAGES AND THE FRANCHISE LAWS, TO MAKE ADJUSTMENTS TO MODERNIZE THE EXEMPTIONS TO THE THREE-TIER SYSTEM, AND TO PROMOTE THE GROWTH OF SMALL AND MID-SIZED INDEPENDENT CRAFT BREWERIES, 2019 North Carolina Laws S.L. 2019-18 (H.B. 363).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

multiple ways to get to the same solution: a resolution to the conflicts created by their respective beer franchise laws. Originally, beer franchise laws protected distributors from large breweries and such protections are not only no longer needed but are now creating a power imbalance that needs to be rectified.¹⁹³ Massachusetts must address its Beer Franchise Law and make a change to follow suit.

III. A LEGISLATIVE PROPOSAL FOR MASSACHUSETTS

While other states have crafted solutions to the franchise law dilemma, Massachusetts has struggled for over a decade to find a solution.¹⁹⁴ Even if the bill recently passed by the Senate is signed into law, it will create new problems for the industry. Naturally, brewers and distributors disagree on the best way to address the issue.¹⁹⁵ However, an effective solution must account for the interests of both parties.¹⁹⁶ Currently, the statute noticeably favors distributors.¹⁹⁷ Thus, distributors are hesitant to get on board with an amendment.¹⁹⁸ To amend the Massachusetts Beer Franchise Law, the interests of brewers and distributors must be balanced. The Commonwealth of Massachusetts legislature should consider the following statutory revisions: a written agreement requirement, a right to cure provision, extended time for Section 25E to take effect, and reasons for termination.

A. *Written Agreement Requirement*

Currently, the Massachusetts Beer Franchise law does not require a written contract.¹⁹⁹ Thus, many agreements between brewers and distributors are guided by a handshake and the Massachusetts Beer Franchise Law.²⁰⁰ Because of the risks this creates for the relationship, many states have implemented a written agreement requirement.²⁰¹ As of

193. Anhalt, *supra* note 9, at 163–64.

194. *See supra* Part II.

195. *Task Force Report*, *supra* note 50, at 38.

196. *Id.*

197. Kevin Adams, *Contract Considerations For The Craft Beer Distribution Relationship* (May 19, 2016), <http://www.mulcahyllp.com/blog/contractconsiderationsfortheecraftbeerdistributionrelationship.html> [<https://perma.cc/22KL-6MQG>].

198. Kendall, *supra* note 3.

199. MASS. GEN. LAWS ch. 138, § 25E (2019). While the Statute of Frauds typically requires a written contract of some sort, “Massachusetts courts have not yet addressed the question whether distribution agreements fall within [Article 2 of the Uniform Commercial Code].” *Paper City Brewery Co. v. La Resistance*, Hebert, 2019 Mass. App. Unpub. LEXIS 188 (March 15, 2019).

200. Adams, *supra* note 197.

201. *Task Force Report*, *supra* note 50, at 39.

2016, twenty-four states²⁰² require a written agreement between brewers and distributors.²⁰³ Of those states, seven states require those agreements to be filed with the state's liquor control regulatory body.²⁰⁴ While there is no clear data on "whether brewers and distributors in states where the agreement must be in writing have more or less difficulty resolving disputes, it is reasonable to assume that having a written agreement is the better practice."²⁰⁵ Written agreements give both brewers and distributors a better idea of each other's expectations, and allow breweries to add provisions to protect them from the harms of the Massachusetts Beer Franchise Law.²⁰⁶

B. *Right to Cure*

Under the Massachusetts Beer Franchise Law, a party seeking to terminate an agreement must give notice to the other party, which gives the other party the right to cure the alleged breach.²⁰⁷ During the notice to cure period, business operations must take place as usual.²⁰⁸ "This means, for example, that a farmer brewer . . . must continue to sell product to a distributor despite wanting to terminate the relationship."²⁰⁹ Massachusetts requires a 120-day period for the right to cure.²¹⁰ According to an industry review by a Task Force put together by the Honorable Deborah Goldberg, Treasurer and Receiver General of the Commonwealth of Massachusetts, Massachusetts "provides distributors with the longest notice to cure period in the country."²¹¹ Massachusetts should consider shortening the right to cure period. In comparison, where other states require business operations to continue during the notice to cure period, the majority of states have a notice of right to cure period of ninety days.²¹² Thus, Massachusetts should revise the applicable provision to read as follows:

The notice of discontinuance of sale shall be furnished by the manufacturer, importer or wholesaler to the wholesaler being discontinued at least ninety days before the effective date of such

202. The states requiring a written agreement include: Ala., Cal., Colo., Ill., Iowa, Ky., La., Mich., Miss., Mo., Mont., Neb., N.H., N.J., N.Y., N.D., Okla., Pa., R.I., Tex., Utah, Wash., W. Va., Wis. See *Beer Franchise Law Summary*, *supra* note 90.

203. See *Beer Franchise Law Summary*, *supra* note 90.

204. *Id.*

205. *Id.*

206. See *infra* Part IV.

207. MASS. GEN. LAWS ch. 138, § 25E (2019).

208. *Task Force Report*, *supra* note 50, at 40.

209. *Id.*

210. MASS. GEN. LAWS ch. 138, § 25E (2019).

211. *Task Force Report*, *supra* note 50, at 40.

212. *Id.*

*discontinuance.*²¹³

A right to cure provision will allow unsatisfied parties to resolve their concerns before trying to find a way to escape the agreement. Ideally, the right to cure provision will allow the parties to solve their problems out front, resulting in fewer terminations overall.

C. *Section 25E to Take Effect After Twelve Months*

Currently, the Massachusetts Beer Franchise Law takes effect after six months of ongoing sales from a brewer to a distributor.²¹⁴ This six-month period is not enough time for a brewer and distributor to fully comprehend the aspects of their relationship.²¹⁵ For instance, many craft breweries have seasonal products.²¹⁶ A period of six-months would not even allow the distributor to cycle through all the brewer's products. Having the ability to reflect on an entire year will allow the distributor to handle most of the brewer's products and thus better suit both parties. The Massachusetts Beer Franchise Law needs a revision that allows for twelve months before the statute applies.

D. *Reasons for Termination*

While brewers should have the freedom to get out of a distribution agreement that they are unhappy with, they should not get off scot-free. Distributors take time and money to help brewers develop their brands.²¹⁷ At the same time, brewers put a lot of trust in distributors to ensure their product gets to consumers.²¹⁸ So, if the brewer is unhappy, they should be able to do something about it in a reasonable manner for a reasonable cost.

Currently, the legislation puts the burden on the party who wishes to terminate the agreement to show good cause.²¹⁹ Typically, the terminating party is the brewer.²²⁰ Therefore, they are the ones required to "spend time, effort, and legal expense" on proving good cause.²²¹ The good cause requirement requires terminating brewers "to conduct discovery of . . . retail customers as to whether the brewer's product sells[,] . . . discovery from the distributor on sales efforts[,] . . . [and] a brewer likely needs expert testimony on whether the distributor used best

213. *Compare, with* MASS. GEN. LAWS ch. 138, § 25E (2019).

214. *Id.*

215. *Task Force Report, supra* note 50, at 40.

216. *Id.*

217. *What is a Beer Distributor?, supra* note 67.

218. *Id.*

219. MASS. GEN. LAWS ch. 138, § 25E (2019).

220. *Task Force Report, supra* note 50, at 44.

221. *Id.*

sales efforts in the marketplace to sell the brewer's product."²²² The extensive discovery required to prove good cause can be extremely difficult for a small brewer with limited resources.²²³

In contrast, larger breweries have greater resources and not only can afford costly discovery, but they also make up more of distributors' profits.²²⁴ Because larger domestic breweries make up for more of the market, and thus create more sales, a distributor typically experiences more harm by losing a contract with a large brewery than from a small brewery.²²⁵ Accordingly, it would make sense to develop a statutory threshold to protect smaller breweries.

As discussed above, thresholds can create problems of their own.²²⁶ However, there is truth in the fact that smaller businesses need more protection than large corporations; after all, this was the concept behind the Massachusetts Beer Franchise Law in the first place.²²⁷ As a result, the statutory provisions should reflect this need. The current good cause provision favors distributors and is therefore unfair to brewers. A reasonable solution is to amend the statute so that smaller breweries may terminate a distribution agreement established under the Massachusetts Beer Franchise Law without cause.

To allow small breweries to terminate franchise agreements without cause, there must be some sort of regulation. Thus, a termination agreement should be put in place to prepare for such scenarios. The termination agreement should include a reasonable termination fee agreed upon by both parties. The Massachusetts Beer Franchise Law could be amended to include a provision defining a maximum termination fee pursuant to a termination agreement. This would discourage outrageous fees.²²⁸ Additionally, the termination agreement should be agreed upon at the beginning of the distribution relationship. Whether the parties can agree on a termination agreement may foreshadow what it would be like to work with one another. By requiring collaboration at the front end, both parties know what to expect should their business relationship terminate

222. *Id.*

223. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564 ("One expert estimates the cost of producing a single electronic document to be as high as \$4.").

224. *National Beer Sales & Production Data*, *supra* note 24.

225. *Id.*

226. See *supra* Part II.

227. See *The Fight Over Massachusetts' Alcoholic Beverage Franchise Laws*, *supra* note 5.

228. See *Alcoholic Beverages—Beer Franchise Agreements—Notice Of Nonrenewal Or Termination*, 2019 Maryland Laws Ch. 379 (H.B. 1080) (requiring that if parties cannot agree on compensation for termination that "the matter shall be submitted to binding arbitration"); see also AN ACT TO ASSIST SMALL BEER MANUFACTURERS AND SMALL HARD CIDER MANUFACTURERS, 2019 Me. Legis. Serv. Ch. 529 (S.P. 593) (L.D. 1761) (WEST) (providing guidance on how to calculate reasonable compensation).

in the future. Should there be a dispute regarding the agreement, the parties shall split the cost of an arbitrator to resolve said dispute. Arbitration is a viable alternative to litigation and thus may be more accessible to brewers and distributors with limited resources should they choose that route.²²⁹

While termination in any business relationship is not ideal, agreements made in advance can ease the process. Massachusetts should consider a termination agreement requirement, like Maryland's franchise law. The proposed provision is as follows:

The termination agreement shall:

(i) compensate the terminated franchisee for the fair market value of the terminated franchise; and

*(ii) provide for the repurchase of all the franchisor's beer at an amount equal to the laid-in cost of the franchisee's inventory of the franchisor's products that are in the warehouse or in transit to the franchisee.*²³⁰

This provision will allow brewers and distributors to work together to decide what is to happen if things go south in the relationship. While terminations are not ideal, they are going to happen, and it is important to have a back-up plan in place for when they do. The current Massachusetts Beer Franchise Law creates a conflict by making brewers seemingly powerless. If adopted, the foregoing statutory provisions will aid in balancing the power between brewers and distributors. A statutory amendment is necessary to resolve the harms caused by the Massachusetts Beer Franchise law.

IV. CONTRACTUAL PROTECTIONS TO CONSIDER WHEN ENTERING INTO A FRANCHISE AGREEMENT

While the Massachusetts Beer Franchise Law exposes small breweries to certain risks, having proper contract provisions in place can help protect them. While "the provisions of a franchise law cannot be waived by contract," a separate contract can be drafted to ensure both parties' interests are protected.²³¹ Since the Massachusetts Beer Franchise Law does not require a written contract,²³² distribution relationships are often "guided by no more than a 'handshake deal.'"²³³ This can be

229. See Anhalt, *supra* note 9, at 208.

230. 2019 Maryland Laws Ch. 379 (H.B. 1080).

231. Marc Sorini, *5 Common Franchise Law Myths*, <https://s3-us-west-2.amazonaws.com/brewersassoc/wp-content/uploads/2014/10/Sorini-Common-Franchise-Law-Myths.pdf> [<https://perma.cc/PQY3-DVSK>] [hereinafter *5 Common Franchise Law Myths*].

232. *Beer Franchise Law Summary*, *supra* note 90.

233. Adams, *supra* note 197.

extremely problematic because without a written document it is difficult “to show what a brewer expected of the distributor” in the first place and vice versa.²³⁴ Additionally, in the absence of an agreement, the Massachusetts Beer Franchise Law (which clearly favors distributors) governs the relationship.²³⁵ Therefore, even if the Massachusetts Beer Franchise Law is not amended to require a written agreement, as suggested in Part III, brewers should have a well-crafted, written distribution agreement in place.²³⁶ However, when approached by a distributor, it is unlikely that the first thing that crosses a brewer’s mind is drafting a contract.

Owning a small business “takes a tremendous amount of hustle, sacrifice and dedication.”²³⁷ When presented with a business deal, legal issues are not what comes to mind for a business owner.²³⁸ In the hopes of quickly getting their beer in the hands of consumers, a brewer will likely just shake the distributor’s hand and begin selling them their beer rather than considering legal consequences. Before anyone realizes, six months have gone by and the brewer is barred from discontinuing that relationship with the distributor whether they like it or not. For this reason, brewers should be aware of the important provisions of distribution agreements. Additionally, they should ensure that these elements are in place to protect their interests. Such contracts encourage advanced planning and can include a variety of provisions laying out expectations of both parties and providing protection. Issues to consider when crafting a distribution agreement include sales requirements, territory limitations, exclusivity, pricing flexibility, renewal, termination, and arbitration.

A. Sales Requirements

A sales requirement provision will allow for brewers to set a standard for distributors regarding sales. It can be presumed that a brewer may want to terminate their distribution agreement if they are unhappy with their sales. That being said, with no guidance on the number of sales, there is no standard for distributors to meet. By creating a minimum sales requirement, distributors will be encouraged to promote the brewer’s beer. In contrast, distributors may be less encouraged to promote the beer once the minimum requirement is met. This provision creates a risk that

234. 5 *Common Franchise Law Myths*, *supra* note 231.

235. Adams, *supra* note 197.

236. *Id.*

237. Victoria Treyger, *What It Takes To Be A Small Business Owner*, FORBES (Dec. 27, 2017, 9:00 AM), <https://www.forbes.com/sites/groupthink/2017/12/27/what-it-takes-to-be-a-small-business-owner/#63578550620d> [<https://perma.cc/9NA7-HUZ5>].

238. Abdullahi Muhammed, *Nine Common Legal Mistakes Small Business Owners Make*, ENTREPRENEUR (Feb. 4, 2017), <https://www.entrepreneur.com/article/288649> [<https://perma.cc/C9XV-5GFC>].

distributors will only meet their requirement, rather than exceed it. However, it would ensure distributors are held accountable for reaching certain sales goals. So long as the distributor meets the goals, the brewer will be satisfied and ultimately wish to keep working with the distributor.

B. *Territory Limitations*

Territory limitations are a common provision in beer franchise agreements.²³⁹ This type of provision gives a distributor the right to distribute a brewer's beer in specific geographic locations.²⁴⁰ A brewer may want to limit distribution in proximity to its business for greater recognition.²⁴¹ Additionally, if a distributor is only licensed in one state, and the brewer wishes to expand their sales, then a territory limitation would allow the brewer to contract with another distributor in other states.²⁴² If the parties choose to include a territory provision, they must ensure said party is fit for the chosen territory.²⁴³ Territory limitations protect brewers by limiting where a distributor gets to distribute; however, if the distributor does not perform well in that territory, the same problem exists, it is just limited to a given area. Territory limitations will not solve the problem created by the Massachusetts Beer Franchise Law alone, but paired with other provisions, it can give the brewer more protections.

C. *Exclusivity*

Often, brewers offer exclusivity of their product to distributors.²⁴⁴ Evidently, this benefits distributors because it gives them the advantage of being the only ones able to sell the product.²⁴⁵ Thus, if a retailer wants said brewer's beer, they have to go through that distributor to get it. However, this can also be of advantage to the brewer. By creating exclusivity, the brewer is guaranteed to sell their beer for as long as the agreement lasts. In contrast, if the brewer is unhappy, they do not have another distributor to turn to. Nevertheless, "small and start-up craft brewers have little leverage to convince a capable distributor to forego brand or territory exclusivity."²⁴⁶ This provision, if present in a distribution agreement, should be carefully reviewed. If this were a provision in the agreement, it may do more harm than good. However, when paired with other provisions, such as territorial exclusivity and sales

239. Adams, *supra* note 197.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* If a brewery expands to outside states, they should also consider adding a choice of law provision in any contract they have.

244. *Id.*

245. *Id.*

246. *Id.*

requirements, the brewer is less likely to be negatively affected. An exclusivity provision is likely to be pushed by a distributor in drafting a contract and should be carefully considered by the brewer.

D. Pricing Flexibility

A pricing flexibility provision protects a brewer from being locked into a fixed price even when markets change.²⁴⁷ Thus, if it gets more expensive to brew a certain beer, brewers have the right to raise the prices they charge distributors provided they give notice. This provision seems favorable towards brewers on its face, but fair overall as distributors can also raise the prices they charge retailers.²⁴⁸ Alternatively, without the provision, “a brewer may be forced to continue doing business, if possible, at the deflated prices until the agreement is renewed.”²⁴⁹ Pricing flexibility is a solution for this unfair scenario.

E. Renewal

The relationship between a brewer and a distributor is a dynamic one. Not only is the industry always changing, but breweries themselves grow in popularity every day.²⁵⁰ Therefore, one agreement for a relationship that may last decades is not sufficient without the ability to revise it. A renewal provision will allow the parties to come together at the end of the term to review all terms and provisions and make any necessary, agreed-upon changes.²⁵¹ The importance of this provision is that it allows an escape for brewers if they are unhappy at the end of the term.²⁵² Parties can choose the length of each term. A month-to-month option would be most favorable to the brewer, but a distributor may want a renewal period to be longer. Perhaps an annual renewal option would make a respectable compromise. Regardless, a renewal provision should be included when considering a distribution agreement.

F. Termination

A termination agreement would come into play should either party wish to terminate the agreement. Having terms in place to facilitate the termination is beneficial because it allows both parties to discuss their expectations should it come to that. Currently, there is no statutory requirement for a termination agreement.²⁵³ Thus, writing one into a distribution agreement will ensure fairness because while a party may

247. *Id.*

248. *Id.*

249. *Id.*

250. *National Beer Sales & Production Data*, *supra* note 24.

251. *Adams*, *supra* note 197.

252. *Id.*

253. *See* MASS. GEN. LAWS ch. 138, § 25E (2019).

terminate the agreement, there may be consequences. For example, if a brewer terminates the agreement, a termination provision may require them to pay the distributor for any inventory costs and possibly even fair market value of the distribution rights. Such provision allows the brewer freedom to get out of the contract without harming the distributor.

G. Arbitration

Arbitration is a practical alternative to litigation.²⁵⁴ Arbitration benefits parties in a dispute because it offers “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”²⁵⁵ The benefits of arbitration include privacy, timeliness, and cost-efficiency.²⁵⁶ Additionally, arbitrators generally have more knowledge in specific subject areas than judges in traditional courts.²⁵⁷ Although, the Alcoholic Beverage Control Commission typically hears all disputes regarding alcoholic beverages, having an arbitrator promotes neutrality. Arbitration presents many advantages, but there are also drawbacks. While many claim arbitration is less costly and time consuming than litigation, arbitrators do not come free and commercial arbitrations may still drag on for years.²⁵⁸ Similar to most contract provisions, arbitration clauses have both advantages and disadvantages. Overall, having various contractual provisions can make a difference in the future of a brewer. Having a well-drafted contract before entering into a distribution relationship can make all the difference for the brewery’s future.

CONCLUSION

The Massachusetts Beer Franchise Law is not only outdated, but it promotes an uneven power dynamic within the industry.²⁵⁹ The franchise law was put into place in the 1970s to protect small distributors from large brewers.²⁶⁰ Such protection is no longer needed because the industry dynamic has flipped.²⁶¹ The law offers a static solution for a dynamic industry, ultimately resulting in a power imbalance in need of modification. Now, it is the small brewers that seek protection from large distributors they are locked into agreements with.²⁶² The beer industry is made up of brewers, distributors, and retailers. For the market to thrive,

254. Bookman, *supra* note 174, at 1156.

255. *Id.*

256. Adams, *supra* note 197.

257. *Id.*

258. *Id.*

259. *See supra* Part I.

260. Kendall, *supra* note 3.

261. *Beer Franchise Law Summary*, *supra* note 90.

262. *See Task Force Report*, *supra* note 50.

all players must agree on how to re-balance the power between parties. For the foregoing reasons, Massachusetts should redesign its beer franchise laws to ensure fairness, provide protection, and promote business for both distributors and brewers alike. The current pending proposals, while they address the issue, would not solve the issues presented by the Massachusetts Beer Franchise Law. They simply provide a temporary fix by adding a production volume limitation.²⁶³ However, should Massachusetts not settle on a solution for the applicable law, many breweries may suffer and as a result, businesses will close, jobs will be lost, and entrepreneurial spirit will plummet. Massachusetts should, therefore, follow the lead of other states in making changes to outdated beer laws.

In addition to a change in the legislature, brewers need to push for written contracts when entering into a beer franchise agreement. Such agreements can include provisions to even out the bargaining power between brewers and distributors. Through the modernization of the Massachusetts Beer Franchise Law and proper contract drafting, craft breweries in Massachusetts will be stronger than ever.

263. See Kendall, *supra* note 3.