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AGENCY AND DISTRIBUTOR LEGISLATION IN LATIN AMERICA AND THE CARIBBEAN: THE IMPACT ON U.S. EXPORTERS

CHARLES M. HARRIS, JR.*

I. INTRODUCTION

THE U.S. exporter has various options available in determining how best to develop a particular foreign market. These options include: direct sales in the foreign market; entering into a joint venture agreement to manufacture and market the principal's products in the particular country; granting a license; appointing an agent or designating a distributor. Increasingly, many U.S. exporters are opting for the use of an agent or a distributor as its mechanism for developing the market.¹ This choice, particularly in Latin America and the Caribbean, has significant legal implications.

Several Latin American and Caribbean countries, for example, have adopted remarkably protective legislation. In response to the mistreatment of agents and distributors, and especially their arbitrary termination, these nations have adopted legislation which limits the ability of the exporter to terminate the dealer² agreement. These laws establish limited, specified "just causes" for when a principal or exporter may terminate the agency or distributor agreement. These stated "just causes" often require the principal to prove a bitter disparagement of the product or some other type of egregious conduct which goes well beyond simple dissatisfaction with the dealer.³ In addition, where the

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1. It has been estimated that nearly half of all U.S. export trade, amounting to hundreds of billions of dollars worth of goods, is handled by agents and distributors. Henry T. King, Jr., *Legal Aspects of Appointment and Termination of Foreign Distributors and Representatives*, 17 CASE W. RES. J. INT'L LAW 91 (1985).

2. The term "dealer" is used in this Comment to refer to agents and distributors collectively.

3. Frank W. Swacker, *Dealer and Agent Relations: Avoidance of Common Pitfalls*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA 95, 99 (Stanley J. Stairs ed., 1985). See also Salvador Juncadella, *Agency, Distribution and Representation Contracts in Central America and Panama*, 6 LAW. AMERICAS 35 (1974); Ovidio M. Giberga, *Laws Restraining Agency Agreement Terminations*, in FOREIGN BUSINESS PRACTICES (U.S. Dept. of Commerce, May 1981).

agent is terminated without just cause, the principal is required to pay compensation as determined by a specific statutory formula. Moreover, until this dispute is resolved and the principal has paid compensation, the exporter is usually precluded from exporting or doing business at all in the particular country.

There are currently nine Latin American countries, and Puerto Rico, which have adopted protective dealer legislation which specifically limits the ability to terminate the dealer. In addition to Puerto Rico, these nations include: Brazil, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, and Nicaragua.⁴ This Comment will discuss the primary differences between an agent and a distributor from a Latin American and civil law perspective, and the advantages and disadvantages of hiring one versus the other. The Comment will then review the respective provisions of those nations with protective legislation, and, particularly, the provisions on dealer termination and compensation. In addition, the other substantive and procedural requirements imposed on the exporter will also be noted. Finally, this Comment will point out potential pitfalls and make several contract drafting recommendations in order to avoid complex and costly litigation for the U.S. exporter down the road.

II. AGENTS AND DISTRIBUTORS

In order to effectively choose between an agent or a distributor arrangement to develop the Latin American or Caribbean market, it is essential to understand the differences between the two. In this section, the conceptual and legal differences between agents and distributors under common and civil law jurisdictions will be briefly discussed. Next, the actual differences, from a Latin American basis, between the scope and authority of agents and distributors will be reviewed. Finally, the process of selecting an agent or a distributor will be briefly discussed.

A. Agency and Distributor Legislation Under Common Law and Civil Law Jurisdictions

With the exception of Puerto Rico, which has a combination civil law "state" court system and a common law federal court system, all Latin American and Caribbean countries have civil law systems. The significance of this is twofold: first, court decisions have limited precedential value as written law disposes of nearly all cases submitted to

4. Panama's protective legislation was recently ruled unconstitutional by the nation's Supreme Court. Judgment of August 2, 1989.

the court; and second, the interpretation of statutes consists of reliance on general principles established by other statutes and not by other case law.⁵ As such, in those civil law nations which have adopted protective legislation, statutes are practically the only source of law to rely on.⁶

The fundamental difference regarding agency law between civil and common law jurisdictions concerns the ability of authorized agents to bind an undisclosed principal. Under the common law, an authorized agent, or one with apparent authority, has the power to conclude a legally enforceable contract between the principal and a third party even where the third party is unaware of the identity of the principal.⁷ In contrast, in civil law systems, unless specifically provided in the agency contract, agents, who act in their own name, do not create legally enforceable contracts between the principal and third parties.⁸ Under civilian law, while the agent and third party bind each other contractually, the principal does not have a contractual obligation with a third party unless and until a separate agreement is reached between them.⁹

B. The Differences Between Agents and Distributors: A Latin American and Caribbean Perspective

There are several fundamental differences between an agent and a distributor in terms of responsibilities and scope of authority. These differences represent basic advantages and disadvantages which should be considered in determining the appropriate arrangement for the exporter. The distinction between an agent and a distributor is less important in Latin America than in other civil law countries, because

5. 4 THOMAS F. CLASEN, *INTERNATIONAL AGENCY AND DISTRIBUTION AGREEMENTS* § 1.3.1 (1991). See generally RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 188-221 (1970); Clive M. Schmitthoff, *Agency in International Trade: A Study in Comparative Law*, in *SELECT ESSAYS ON INTERNATIONAL TRADE LAW* 306, 321 (Chai-Jui Cheng ed., 1988).

6. CLASEN, *supra* note 5, at § 1.3.2.

7. Karl G. Herold & David D. Knoll, *Negotiating and Drafting International Distribution, Agency and Representative Agreements: The United States Exporter's Perspective*, 21 *INT'L LAW* 939, 946 (1987).

8. PAUL H. VISHY, *GUIDE TO INTERNATIONAL COMMERCIAL LAW*, § 4.04 (1991); Ralph B. Lake, *Foreign Business Organization*, in *THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS* § 2.02 (Ved P. Nanda ed., 1990).

9. As such, under civil law two separate and independent contracts exist:

The agent and third party bind each other, while the contract between the agent and its principal remains apart. There is no contract between the principal and the third party. . . . To tie the principal and third party contractually, a separate assignment is needed. The agent and third party must specifically contract to assign rights to the principal to enforce the arrangement if and when the principal is disclosed.

Herold & Knoll, *supra* note 7, at 946.

many of these nations' legislation covers both types of arrangements without distinction in terms or obligations.¹⁰ There are, however, other legal implications which come to play depending upon the arrangement selected. For this reason, the distinction in terminology remains important.

1. Basic Differences

The differences between an agent and a distributor are straightforward but not without significance. In most Spanish speaking countries, an agent is viewed as an "independent entrepreneur who undertakes to perform a function for a principal, with the principal's approval, subordinated to the principal and who is not personally liable for the outcome of his efforts if he acts within his instructions."¹¹ There are several different types of agency recognized in civil law;¹² however, the legislation of Latin American countries generally does not distinguish between them but rather groups them under the broad category of "agents" or "representatives." Essentially, an agent works in an ongoing contractual relationship with the principal to intermediate between the principal and third parties.¹³

The distributor, on the other hand, purchases goods directly from the exporter in his own name and resells them for his own account.¹⁴ The distributor also has four distinctive characteristics: first, the distributor buys and sell under its own account and is compensated based

10. In contrast, many Western European countries have enacted protective legislation for agents but not for distributors thereby creating significant obligations for the foreign exporter under the former arrangement but not the latter. See *infra* notes 19-21 and accompanying text.

11. CLASEN, *supra* note 5, at § 2.1.

12. These include:

- (a) Del credere agents act as a surety to the exporter by guaranteeing payment by the purchaser; however, the del credere agent does not contract for himself. Rather, this agent is only liable if the ultimate purchaser does not pay;
- (b) Brokers or representative agents are usually described as those agents who introduce buyers and sellers but take no part in contract formation;
- (c) Commission agents act in their own name in the purchase or sale of goods or securities for the account of the principal and are analogous to distributors;
- (d) Independent commercial agents are engaged permanently in soliciting orders or concluding contracts with third parties on behalf of one or more principals. These agents have comparatively more freedom and flexibility in their operations on behalf of the principal;
- (e) Employee-agents act in a dependent fashion for the principal based entirely upon contractual and statutory obligations. This is the predominate form of agency and the type covered extensively in terms of authority, rights and obligations, in civil law statutes.

VISHNY, *supra* note 8, at §§ 4.05-.07.

13. Herold & Knoll, *supra* note 7, at 952.

14. See WILLIAM F. FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS § 3.3.2 (1984).

on its markup value of the product; second, the distributor bears the economic risk of sales and carries customer's credit; third, the distributor warehouses and physically distributes the goods; and fourth, the distributor has no power to bind the principal as it is an independent agency.¹⁵

2. *Advantages and Disadvantages*

The differences between an agent and a distributor present some obvious advantages and disadvantages. As far as an agency arrangement, the primary advantage is that it permits the principal to control sales operations and prices while the primary disadvantage is that under this relationship, the principal is forced to assume a significant credit risk in dealing with various buyers in a foreign market.¹⁶

In contrast, the advantages of a distributor arrangement are that the exporter's risk is eliminated because the distributor bears the responsibility of collection from buyers, and the distributor is usually better able to promote the product and establish goodwill for the principal as the distributor will generally maintain an inventory of the goods at convenient locations and provide services to customers after the sale.¹⁷ The disadvantages, however, are that the principal has little control over the prices that the distributor ultimately charges the customers and the fact that the distributor has less manufacturer loyalty and will usually neglect merchandise with a low profit margin or slow turnover in favor of more profitable goods.¹⁸

In addition to these basic advantages and disadvantages inherent in the determination to employ either an agent or a distributor, there are other important implications that should be considered in the determination. It should be noted that in Latin America, unlike Europe, the distinction between agency and distributor is not as important. In Western Europe, failure to delineate within the dealer contract between agency and distributorship can have significant legal consequences because many European nations establish various obligations

15. Andre M. Saltoun & Barbara C. Spudis, *International Distributorship and Sales Agency Agreements: Practical Guidelines for U.S. Exporters*, 38 BUS. LAW. 883, 899-913 (1983).

16. 3 WILLIAM P. STRENG & JESWALD W. SALACUSE, *INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION* § 11.03 (1991).

17. *Id.* In comparison to agents, distributors carry the level of responsibility much further by "shouldering economic management and financial risks, including the risks of default by purchasers." George C.J. Moore, *International Agency and Distributors*, 10 INT'L L. Q. (Fla. Bar), Dec. 1991, at 8.

18. STRENG & SALACUSE, *supra* note 16, at § 11.03.

and rights based upon this distinction.¹⁹ In contrast, most Latin American and Caribbean countries, while recognizing the difference between agents and distributors generally, have nevertheless chosen to treat the two identically vis-à-vis their legislation.²⁰ Moreover, it is not uncommon for courts in Latin America to use interchangeably the terms of agent and distributor; to essentially disregard the sophisticated niceties and fine distinctions that has been established under U.S. law.²¹

While the legislation of most Latin American and Caribbean countries does not distinguish between agents and distributors, the label attached to the foreign dealer still has significance. For whether the exporter refers to dealers as agent or distributor contractually and in correspondence often impacts a foreign court's determination of the legal consequences of that relationship. This is particularly true where the label leads to application of the protective dealer legislation and local labor law.²² In addition, for those nations such as Brazil, Columbia and Puerto Rico that have enacted legislation covering only the agency relationship, it behooves the foreign exporter to utilize a distributor arrangement and thereby avoid the statutory obligations imposed on the agency relationship. Moreover, the appointment of an agent which has the authority to accept orders and conclude contracts on behalf of a foreign principal is considered "doing business" in many Latin American countries for purposes of subjecting the principal to local jurisdiction and taxation.²³ On the other hand, and as will be seen in the proceeding section, the compensation required for the unjustified termination of the agency contract is less than that for the distributor agreement because of the fact that agents do not put up the same risk capital. There are also other important issues, such as antitrust and intellectual property issues, which may also come into play depending upon the classification of the individual as either an agent or a distributor.²⁴ For these reasons, if the exporter does not

19. See A.H. Puelinckx & H.A. Tielemans, *The Termination of Agency and Distributor Agreements: A Comparative Survey*, 3 NW. J. INT'L L. & BUS. 452, 455-7 (1981); Wener Vanderhaeghe & Mark L. Jones, *Current Developments in European Agency Law*, 12 INT'L LAW. 671 (1978).

20. Two notable exceptions to this are Brazil and Colombia both of which have enacted much more stringent protective legislation than the agency arrangement than the distributor arrangement. See *infra* notes 28-30 and 38-41 and accompanying text.

21. Swacker, *supra* note 3, at 95.

22. *Id.*

23. THOMAS F. CLASEN, FOREIGN TRADE AND INVESTMENT § 10.01 (2d ed. 1987).

24. These issues, however, are beyond the scope of this comment. For a good discussion of these issues, please see: JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981); Jon R. Bauman, *Specific Contractual Arrangements: Interna-*

have a strong preference either way, the exporter is generally in a better position utilizing a distributor rather than an agent.

C. *Choosing the Agent or Distributor*

The most important decision after determining to utilize an agent or distributor over the other available business options, is selecting the individual who will serve in the agent or distributor capacity. There are numerous factors which should be considered including the foreign party's financial status, sales ability, location, organization, business reputation and products previously handled.²⁵ Further discussion of the various factors involved in such a selection is beyond the scope of this Comment. It is worth stating, however, that the U.S. Department of Commerce offers an Agent/Distributor Service (ADS) whose purpose is to help American businesses locate dealers in foreign countries.²⁶ In addition, there are numerous trade publications which routinely report on foreign representatives or distributors seeking to market specified types of foreign goods.²⁷

III. AN OVERVIEW OF AGENCY AND DISTRIBUTOR LEGISLATION IN LATIN AMERICA AND THE CARIBBEAN

There are many potential pitfalls for the unwary exporter in Latin America. What proceeds is a discussion of the provisions of Puerto Rico and those Latin American countries with protective dealer termination legislation. This discussion is not intended to be an exhaustive summary of the particular legislation; rather, it will focus on the requirements for termination without liability and the formulas for compensation for unjustified compensation. In addition, those statutory provisions which place specific, additional obligations on the exporter will be discussed. Many of the statutory provisions establishing when just cause exists are similar; nevertheless, they are repeated in full in the proceeding discussion because it is helpful in demonstrating how broad (and sometimes draconian) a particular nation's legislation

tional Sales Representative and Distributor Agreements, 4 N.C. J. INT'L L. & COM. REG. 141 (1979); Saltoun & Spudis, *supra* note 15, at 899-913; John E. Impert, *A Program For Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009 (1990).

25. STRENG & SALACUSE, *supra* note 16, at § 11.04.

26. For a fee of \$125 per country, this service identifies and evaluates potential agents and distributors based on an assessment of the individual's capability, interests, credibility and financial stability.

27. CLASEN, *supra* note 5, at § 10.03. Additional sources for locating potential agents or distributors include industry experts, banks, end-users, and purchasers of complimentary products.

is intended to be and because of the significance of statutory law in a civil law jurisdiction. Obviously, this discussion is not intended nor does it serve as a substitute for hiring local counsel. The discussion of these countries and the free associated state of Puerto Rico is presented in alphabetical order.

A. Brazil

In Brazil, the agency arrangement is governed by the law entitled "Regulating the Activities of Autonomous Commercial Representatives."²⁸ This law governs those situations in which an autonomous representative performs the activity of carrying on business, or acting as an agent for proposals and sends them along to the principal.²⁹ The Brazilian legislation only applies to agents. The distributor arrangement, in which companies acquire goods from the exporter for resale, is governed by the general provisions of the Brazilian Civil and Commercial Codes.³⁰ The Brazilian legislation refers to agents as commercial representatives. The following discussion will center on Brazil's agency legislation.

1. Termination

The commercial representative contract may only be terminated without having to pay compensation if there is a "just reason" for such termination as recognized in Article 35. These "just reasons" include: (1) sloth on the part of the representative in the fulfillment of the obligation arising from the contract; (2) the performance of acts which may bring about commercial discredit to the principal; (3) the nonfulfillment of any obligation pertaining to the commercial representative contract; (4) definitive condemnation by reason of a crime regarded as defamatory; and (5) force majeure.³¹

2. Compensation

Brazil requires that the amount of indemnity due to the agent upon the unjustified termination of the commercial representative contract is to be provided for in the agency contract itself. This amount should

28. Brazilian Federal Law No. 4886 (Dec. 9, 1965) translated in *COMMERCIAL LAWS OF THE WORLD-Brazil* (Foreign Tax Law Publishers, Inc. ed., 1983) [hereinafter *Brazilian Agency Law*].

29. *Id.* at art. 1.

30. The only exception to this is in the cases of automobile dealers whose activities are governed by Law No. 6729 (Dec. 28, 1979) and for the distribution of software products, which is governed by Law No. 7646 (Dec. 18, 1987).

31. *Id.* at art. 35.

not be less than one-twentieth (1/20) of the total compensation earned during the representation.³² Where there is no written contract evidencing the commercial representative contract, or where the contract does not include a provision for compensation, indemnification is to be determined as one-fifteenth (1/15) of the total remuneration earned in the course of the representation.³³

3. *Additional Requirements*

There are several additional provisions within the Brazilian legislation which should be noted. First, Brazil is one of several Latin American countries which require the individual who is to serve as a commercial representative to be registered with a governmental agency, here the Regional Council,³⁴ and to meet certain specified requirements in order to establish "competence."³⁵ If these requirements are not satisfied, the individual is precluded from acting in the capacity of a representative.³⁶

Another article within the legislation requires that certain provisions must be included within the contract. Article 27, in addition to requiring a contractual provision on indemnity in the event of unjustified termination of the agency contract, also requires the following items to be included: the general terms and requirements of representation; the products or services subject to the representation; whether the representation agreement is for a definite or indefinite period; the territory of the representative; and the method and schedule of compensation.³⁷

Finally, Brazil does not recognize a choice of forum or law provision; in the event of a disagreement, a Brazilian court must be used to resolve the issue.³⁸

B. *Colombia*

Commercial representative and agency agreements are governed by the Commercial Code of Colombia.³⁹ Under Colombian law, an

32. *Id.* at art. 27(j).

33. *Id.*

34. *Id.* at art. 2. The Regional Council is responsible for monitoring agents and ensuring that they do not commit "faults" against the foreign exporter. *Id.* at art. 18.

35. *Id.* at art. 3. In order to register as a commercial representative, the applicant must present: (a) proof of identity; (b) proof of release from military service; (c) proof that the dealer is up to date with regard to the requirement of the electoral legislation; (d) certificate of antecedents issued by the criminal register office of the judicial districts in which the applicant may have been domiciled in the past ten years; and (e) up-to-date payment of the Union contribution.

36. *Id.*

37. *Id.* at art. 27.

38. *Id.* at art. 39.

39. Colombian COMMERCIAL CODE, Decree No. 410, arts. 1317-1331 (March 27, 1971)

agency agreement is defined as a situation in which an individual is responsible for promoting or managing a business within a specified territory as either a representative or agent of a foreign enterprise or as a distributor of one or more products of a foreign enterprise.⁴⁰ Although the term "distributor" is included within the definition, distributor agreements are not covered under this legislation;⁴¹ rather, the distributor arrangement is governed much more loosely by Article 975 of the Colombian Commercial Code. In the proceeding section, the concentration will be on the agency legislation.

1. Termination

Colombian law requires there to be a "justification" for the termination of an agency agreement. Article 1325 lists those recognized justifications which permit unilateral termination of the agency agreement. These include: (1) an agent's breach of a contractual or legal obligation to the principal; (2) an act or omission by the agent which results in serious damage to the principal's business; (3) the agent's insolvency or bankruptcy; or (4) the agent's conduct which amounts to liquidation or termination of the agency relationship.⁴²

2. Compensation

The Colombian legislation recognizes two different methods of establishing compensation based on justified and unjustified termination. If the termination is justified (i.e. it falls under the "justifications" as enunciated in Article 1325), the principal is required to pay the agent one-twelfth (1/12) of the average commission or remuneration received during the previous three years of the contract.⁴³ If the contract has been for less than three years, then compensation is the average of all sums received during that period.⁴⁴

If the principal terminates the agency agreement without justification, the agent is also entitled to indemnification for establishing and

translated in *COMMERCIAL LAWS OF THE WORLD-Colombia* (Foreign Tax Law Publishers, Inc. ed., 1983) [hereinafter *Colombia Agency Law*].

40. Salvador Juncadella, Non-published translation and interpretation of Colombia's Agency laws 1 (on file with the F.S.U. *Journal of Transnational Law & Policy*).

41. In fact, the inclusion of "distributor" within the legal definition of Article 1317 has been criticized by Colombian legal theorists and case law. CFR Superintendency of Corporations Oficio 13534 (Oct. 4, 1971) and Supreme Court of Justice, Eduardo Gonzalez v. Ico Pinturas S.A. (Dec. 2, 1980) [Colombian Supreme Court distinguished distributor agreements from agency arrangements, and the concomitant legal implications, based on the fact that the distributor acts on his own behalf and for his own account] as cited in CLASEN, *supra* note 5, at § 1.7.

42. *Colombia Agency Law*, *supra* note 39, at art. 1325.

43. *Id.* at art. 1324.

44. *Id.* at art. 1324.

promoting the goodwill of the principal. Goodwill is to be established by expert appraisers (Colombian) based on duration, importance and value of the business handled during the agency relationship.⁴⁵

Finally, it should be noted that an agent or distributor who has secured a local judgment against a principal can levy against the principal's assets in Colombia.⁴⁶

3. *Additional Requirements*

There are four additional requirements in the Colombian agency legislation to which the U.S. exporter should be made aware. First, the agency contract must be recorded in the commercial registry and must include the following: (1) the scope of the agent's authority or power; (2) the duration of the contract; and (3) the territory of the agent.⁴⁷ Moreover, any modification or termination of the agency agreement must also be recorded.⁴⁸ In the absence of a written agreement, the agreement becomes de facto agency thereby precluding the principal from opposing the existence of the agency relationship to third parties acting in good faith.⁴⁹ Commercial agency agreements, however, are not subject to governmental approval.

The second provision worth noting is that which requires the principal, regardless of any contractual provision to the contrary, to pay remuneration to the agent in certain situations even though the agent has not concluded the transaction. The exporter is required to pay remuneration to the agent where: (1) failure to conclude the transaction is the fault of the principal; (2) the principal transacts business directly within the agency territory; or (3) the principal conspires with the other party to forego the transaction.⁵⁰

Two other requirements are worth briefly mentioning. Under Article 1318, an exporter may only engage multiple agents within the same territory if this right is explicitly provided for in the agency agreement.⁵¹ Thus, unless otherwise provided in the agency agreement, the agency is presumed to be exclusive. Finally, choice of law provisions are strictly prohibited in Colombia.⁵²

45. *Id.*

46. *Id.* at art. 1326.

47. *Id.* at art. 1320.

48. *Id.*

49. *Id.* at art. 1331.

50. *Id.* at art. 1322.

51. *Id.* at art. 1318.

52. *Id.* at art. 1328.

C. Costa Rica

Agency and distributor agreements are governed under the Costa Rican law entitled "Protection for the Representative and Distributor of Foreign Companies."⁵³ This Costa Rican legislation applies to all situations in which individuals, in continuous and autonomous fashion, prepare, promote, or improve the sales of goods or services sold or rendered by another foreign trader or industrialist.⁵⁴ This law treats agents (which are referred to in the legislation as representatives) and distributors identically.

1. Termination

If the principal or exporter unilaterally terminates the representative or distributor agreement, or refuses to renew a definite term contract at expiration, without "just cause," it shall be liable to the dealer. Law 6209 defines "just causes" as the following: (1) the commission of a crime by the dealer against the property or good reputation of the principal; (2) the negligence or incompetence of the dealer as judicially declared by a local court or the continuous stagnation and substantial decrease in sales due to the fault of the dealer; (3) the unauthorized disclosure by the dealer of confidential information or trade secrets; and (4) any other serious act by the dealer in breach of a contractual duty which results in harm to the principal.⁵⁵

2. Compensation

Where the dealer agreement has been terminated without "just cause," the principal shall be required to pay compensation as determined by the Ministry of Economy and Trade.⁵⁶ Essentially, the principal will be required to pay an amount equal to four times the monthly gross profit average for the duration of the contract. For representational contracts, this figure is to be determined by adding up the last four years' commissions divided by the number of months of contract duration.⁵⁷ For distributors, this amount is to be computed by the last four years of profits divided by the number of months of

53. Costa Rica Law. No. 6209 (Feb. 24, 1978) as amended by Executive Decree 8599 (May 8, 1978) translated in *COMMERCIAL LAWS OF THE WORLD-Costa Rica* (Foreign Tax Law Publishers, Inc. 1991) [hereinafter *Costa Rica Agency Law or Decree*] and supplemented by the Costa Rica *COMMERCIAL CODE*.

54. *Costa Rica Agency Law*, *supra* note 53, at art. 1(b).

55. *Id.* at art. 5.

56. *Decree*, *supra* note 53, at art. 1.

57. *Id.*

contract duration.⁵⁸ In addition, where the distributor agreement has been unjustly terminated, the exporter is also required to purchase the inventory of the distributor at a price which includes both the cost of the products and a "reasonable percentage of the investment [the distributor] has made."⁵⁹

Finally, until the claims of the terminated dealer have been resolved, the principal is barred from exporting goods to the country.⁶⁰

3. *Additional Requirements*

Costa Rica requires that in order to serve as a representative, the individual must: (1) be a Costa Rican national or foreigner permanently established in the national territory; (2) have exercised commerce in the country for a period of no less than three years; (3) have sufficient preparation in commercial matters and be solvent and of good reputation; and (4) be duly registered in the Mercantile Register.⁶¹ In addition, the prospective dealer must be licensed by the Ministry of Economy and Finance.⁶²

Finally, Costa Rican law explicitly provides that disputes or any questions arising from the dealer contract must be resolved by local tribunals which shall apply the laws of Costa Rica.⁶³

D. *Dominican Republic*

The Agency Law of the Dominican Republic governs the dealer relationship in that country.⁶⁴ The Dominican Republic defines the dealer agreement as occurring where a legal or natural person negotiates the importation, distribution, lease, sale or any other type of exploitation of merchandise, products or services of foreign and national origin, as well as the business of providing the services related to such promotion.⁶⁵ The Dominican Republic treats agents and distributors identically and refers to them collectively as "concessionaires."

58. *Id.*

59. *Id.* at art. 3. This "reasonable percentage" is to be determined by the Ministry of Economy, Industry and Commerce.

60. *Costa Rica Agency Law*, *supra* note 53, at art. 9.

61. *Costa Rica COMMERCIAL CODE*, *supra* note 53, at art. 361.

62. *Id.* at art. 362.

63. *Id.* at art. 365. This Article specifically provides that the rights established in the Costa Rican law may not be waived.

64. Agency Law of the Dominican Republic, Law No. 173 (April 6, 1966) *as amended by* Law No. 263 (Dec. 28, 1971) and Law No. 622 (Dec. 28, 1973) *translated in* COMMERCIAL LAWS OF THE WORLD-Dominican Republic (Foreign Tax Law Publishers, Inc. ed., 1983) [hereinafter *Dominican Republic Agency Law*].

65. *Id.* at art. 1(a).

1. Termination

Under the Agency Law of the Dominican Republic, a concessionaire whose contract has been terminated or has not been renewed, or who, if he is an exclusive dealer, has been replaced by a new distributor, may bring suit against the principal if the action was done without "just cause." "Just cause" is defined as the occurrence of any act or omission on the part of the concessionaire which results in substantial harm to the grantor's interest. The principal's interest includes: the promotion and development of imports, and the distribution, sale, lease, or any other kind of trade of the principal's merchandise or products.⁶⁶

2. Compensation

Where there has been termination or failure to renew without just cause, the concessionaire is entitled to compensation. The amount of compensation is to be established based on the following: (1) the personal losses incurred by the concessionaire as a result of the unjustified termination which is to specifically include any labor law employee compensation benefits to which the concessionaire's employees are entitled; (2) the operational expenses incurred such as the purchase or lease of adequate premises, equipment, installation and furniture which "has no alternative use"; (3) the value of the concessionaire's promotional services and goodwill; (4) and a payment of one-tenth (1/10) the average annual gross profits over the previous five years of the agency relationship.⁶⁷ If the relationship has been less than five years, then the amount is to be determined by multiplying by five the average annual gross profits achieved during the actual term.⁶⁸

3. Additional Requirements

The Dominican Republic agency law requires that all disputes between the concessionaire and the principal or exporter shall be submitted to the local Official Chamber of Commerce, Agriculture and Industry through which a three member Conciliation Commission will be appointed to resolve the disputes.⁶⁹ Appeals from decisions of the Conciliation Commission, though permitted, are discouraged.⁷⁰

66. *Id.* at art. 1(d).

67. *Id.* at art. 3.

68. *Id.*

69. *Id.* at art. 7.

70. *Id.*

Concessionaires are required to register with the Exchange Department of the Central Bank and must provide the following information: (1) the names of the foreign firms on whose behalf they operate; and (2) the capacity in which they are acting, that is, as an agent, representative or commission agent or any other designation, including distributor.⁷¹ These agreements must be registered within fifteen days after completion of the agreement.⁷²

Finally, the agency legislation of Dominican Republic provides that it is of public importance and may not be amended or revoked by private agreement of the parties.⁷³ This specifically includes a prohibition against choice of law and forum provisions.⁷⁴

D. Ecuador

The "Law on Protection for Representatives, Agents, and Dealers of Foreign Corporations in Ecuador"⁷⁵ governs the dealer relationship with foreign exporters. Under Ecuadoran law, the grantee-principal/exporter relationship occurs when an Ecuadoran national, or a foreign national who has been continuously residing in Ecuador for more than one year, has been designated as a representative, dealer or agent by a foreign corporation and has thereby agreed to distribute or sell the corporation's products in Ecuador.⁷⁶ The Ecuadoran law refers to agents, representatives and distributors collectively as "grantees" and the foreign corporation as the "principal."

1. Termination

The principal may not terminate or refuse to renew the dealer contract unless there is "just cause." Just cause is defined as: (1) a serious failure by the grantee to discharge the obligations as stipulated in the contract or provided in the Ecuadoran legislation; (2) any action or omission by the grantee which seriously affects the grantor's inter-

71. *Id.* at art. 10.

72. *Id.*

73. *Id.* at art. 8.

74. In *Warner Lambert, S.A. v. Juan J. Garcia, C. Por A.*, 708 Boletin Judicial 7201, 7208 (Nov. 26, 1969), the Supreme Court of the Dominican Republic refused to honor a choice of forum and law provision in an agency agreement between a U.S. and a Dominican corporation. The court, after recognizing that the essential purpose of the legislation was the protection of Dominican agents, stated that the law is of "public order" and may not be derogated from or modified by private agreement. *Id.*

75. Ecuador Supreme Decree 1038-A, Official Register No. 245 (Dec. 31, 1976) translated in *COMMERCIAL LAWS OF THE WORLD-Ecuador* (Foreign Tax Law Publishers, Inc. ed., 1986) [hereinafter *Ecuador Agency Law*].

76. *Id.* at art. 2.

ests; (3) the grantee's bankruptcy or insolvency; or (4) liquidation or termination of the grantee's activities.⁷⁷ These four just causes are the only recognized justifications for termination of the contract; any additional provisions included in the contract and providing for unilateral termination are not recognized and will subject the principal to liability for compensation.

2. Compensation

If the principal terminates the dealer contract or fails to renew without just cause, the grantee is entitled to compensation as determined based on the summation of three factors.⁷⁸ First, all operational expenses incurred by the grantee, including equipment, to the extent that these items cannot be readily used in the other activities in which the grantee is engaged.⁷⁹ Second, compensation must be paid for the current cost of the raw materials, inventory, spare parts, and advertising material of the grantee.⁸⁰ Finally, the principal must pay indemnification for any increase in the value of the business. This increase in valuation is to be determined by the following factors: (a) the number of years in which the grantee has acted as a dealer; (b) the current volume of sales or distribution of commodities and its proportion to the grantee's business as a whole; (c) the proportion of the market which the grantee commands in Ecuador and the volume it represents; and (d) other factors which are helpful in determining on an equitable basis the amount of resale value over the original value.⁸¹

3. Additional Requirements

There are two significant additional concerns for the U.S. exporter within Ecuador's dealer legislation. First, all disputes between the principal and the grantee may only be decided by a local court that has jurisdiction over the grantee.⁸² Second, Ecuador's Supreme Court has held that in a conflict of laws situation, an Ecuadoran court may only apply the procedural and substantive laws of Ecuador.⁸³

77. *Id.* at art. 3.

78. *Id.* at art. 4.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at art. 5.

83. See Swacker, *supra* note 3, at 104.

E. *El Salvador*

Both agency and distributor agreements in El Salvador are governed by Commercial Code and legislative decree.⁸⁴ Under El Salvadoran law, an agent or distributor is any natural person who is appointed by a principal, as evidenced by a contract, to discharge the agency or distribution of certain products or services in the country. The El Salvadoran law thus governs both agency and distributor agreements. The law itself refers to agents and distributors collectively as "representative agents."

1. *Termination*

A principal may not unilaterally terminate a dealer agreement unless there is a "just reason" for the termination of the contract. Just reasons are defined as including any of the following: (1) the nonfulfillment of the clauses of the contract; (2) fraud or abuse of trust on the part of the representative; (3) ineptitude or negligence; (4) continued decrease in the sales or distribution of the products for a reason imputable to the representative; (5) divulgence of confidential information; or (6) acts by the representative which result in the loss of the introduction, sale or distribution of the products with which the representative has been entrusted.⁸⁵

In addition, even if there does exist a just reason for termination, El Salvadoran law requires the principal to give three months written notice of termination of the agreement to the dealer.⁸⁶

2. *Compensation*

If the principal terminates the agreement without any just reason, the dealer is entitled to indemnity. This indemnity shall include: (1) those expenses incurred by the representative for the benefit of the negotiation of which the representative is deprived, provided that, such expenses cannot be recovered; (2) the value of investments in the place of business, equipment, installations, furniture and tools, to the extent that such investments have utility only for the negotiation to which the representative is deprived; (3) the value of the inventory to the extent that, due to the termination of the contract, the representa-

84. El Salvador COMMERCIAL CODE, as amended by Decree No. 247 (Jan. 9, 1973) translated in COMMERCIAL LAWS OF THE WORLD-El Salvador (Foreign Tax Law Publishers, Inc. ed., 1979) [hereinafter *El Salvador Agency Law*].

85. *Id.* at art. 399.

86. *Id.*

tive is precluded from selling;⁸⁷ (4) the amount of benefits obtained by the agent during the period of representation not to exceed the latest three years of representation; and (5) the value of the credits granted by the representative to third parties, to pay the value of the merchandise that the representative has distributed for the account of the representative.⁸⁸

If the principal has terminated the representative agreement without just reason and had a judgment entered against it, the principal or exporter is precluded from importing products or services into El Salvador until full compensation is paid to the representative.

3. *Additional Requirements*

El Salvadoran law requires that all controversies between a representative and a principal may only be resolved by a local El Salvadoran court which has jurisdiction over the representative.⁸⁹ In addition, unless otherwise provided in the representative contract, El Salvadoran law prohibits nonexclusive agency contracts for operations in a given period or region.⁹⁰ Further, unless it is stipulated in the agency agreement, the principal is required to pay all expenses, costs and taxes demanded for the exercise of the agency.⁹¹

Finally, the El Salvadoran legislation provides that if the dealer enters into a contract with a customer on behalf of the principal and then the principle subsequently terminates or modifies the contract, the dealer is entitled to receive the stipulated commission.⁹²

F. *Guatemala*

In Guatemala, the agency and distributor arrangement is governed by Congressional Decree as supplemented by the provisions of the Civil and Commercial Codes.⁹³ These provisions provide that a dealer agreement exists where a principal appoints a natural or juridical person to serve as an agent or distributor for the sale, distribution, pro-

87. This value is to be determined by the acquisition cost plus shipping charge to the place of the agent's establishment and the taxes and other charges incurred by the representative on such inventory.

88. *Id.* at art. 399. Once the value of the credits are paid, the indemnifying principal shall have a right to them.

89. *Id.*

90. *Id.* at art. 386.

91. *Id.* at art. 389.

92. *Id.* at art. 396.

93. Agency Law of Guatemala, Decree No. 78-71 (Sept. 25, 1971) *supplemented* by the Civil and Commercial Codes *translated* in *COMMERCIAL LAWS OF THE WORLD-Guatemala* (Foreign Tax Law Publishers, Inc. ed., 1991) [hereinafter *Guatemala Agency Law*].

motion or introduction into Guatemala of merchandise or services (whether manufactured internally or abroad).⁹⁴ The Guatemalan legislation governs both agency and distributor agreements without distinction.

1. *Termination*

Guatemalan law prohibits the termination (while saying nothing of the refusal to renew) of the dealer agreement unless there exists "fair cause" for such termination. Fair cause is defined as: (1) the nonfulfillment or breach of the contract; (2) a commission of a crime against the principal or its assets; (3) any unreasonable refusal by the dealer to produce reports or accounts or to carry out pertinent financial accounting as agreed upon by the parties; (4) the disclosure of confidential information to third parties which is not authorized by the principal; and (5) those situations in which evidence exists that a decrease in sales or services as compared to the previous year was due to the ineptitude or negligence of the dealer.⁹⁵

Even where there exists "fair cause" for terminating the contract, the principal is required to give the dealer three months notice of the termination.⁹⁶

2. *Compensation*

Where termination has been without fair cause, the principal shall pay compensation which shall include the following: (1) all direct expenses incurred by the dealer for the purposes of the contract during the preceding year; (2) those investments which were made in furtherance of the contract and which cannot be recovered; (3) the cost of all inventory in stock; (4) fifty percent of gross profits which could have been realized from the sale of inventory on hand; (5) an amount equal to the gross profits generated by the dealer in the previous three years; and (6) an amount paid to the employees of the dealer as a result of the termination of the contract.⁹⁷

3. *Additional Requirements*

Guatemalan law also has several specific requirements in regard to the contract itself. First, the contract must adhere to all external formalities of the nation in which it is drafted. Second, the contract must

94. *Id.* at art. 1(b).

95. *Id.* at art. 4.

96. *Id.*

97. *Id.* at art. 6.

be consistent substantively with Guatemalan law. Third, the signatures on the document must be authenticated. Fourth, the text of the agreement must be translated into Spanish by an authorized Guatemalan translator. And finally, the agreement must receive approval by the head of the Judicial Division.⁹⁸

G. Honduras

The "Law of Representatives, Distributors and Agents of Foreign and National Commercial Firms"⁹⁹ governs agent and distributor agreements in Honduras. The Honduran legislation is intended to control all contractual and commercial relations between foreign firms and those juridical and natural persons appointed to represent the firms and to distribute, sell or promote their products.¹⁰⁰ The Honduran law refers to agents and distributors collectively as "cessionaires" and the foreign firm as "grantors." The Honduran law does not make any distinction between agents or distributors.

1. Termination

A grantor may not terminate, dissolve, modify or refuse to renew a concessionaire agreement without "just cause."¹⁰¹ Just cause is defined as: (1) the failure by the concessionaire to comply with the central terms of the agreement; (2) fraud or breach of trust in negotiations entrusted to the concessionaire; (3) the inability or ineptitude of the concessionaire which results in decreases in the sales and distribution of the goods and services; (4) the refusal by the concessionaire to abide by the procedural requirements of the contract, that is, to present reports and statements of account or to deliver the firm's balance sheet statements; (5) where the concessionaire discloses confidential information of the industry or commerce to which the contract refers; (6) the bankruptcy or insolvency of the concessionaire; or (7) any other act of the concessionaire which would harm the importation and sale of the products or services.¹⁰²

It should be noted that Honduran law explicitly provides that any type of corporate restructuring or change in trademarks will not con-

98. *Id.* The Head of the Supreme Court of Justice is the head of the Judicial Division of Government. The Guatemalan legislation does not provide any criteria by which the head of the Supreme Court of Justice will evaluate and determine whether to issue an approval.

99. Honduran Decree No. 50 (Oct. 8, 1970), as amended by Decree No. 549 (Nov. 24, 1977) and Decree No. 804 (Sept. 10, 1979) translated in *COMMERCIAL LAWS OF THE WORLD-Honduras* (Foreign Tax Law Publishers, Inc. ed., 1985) [hereinafter *Honduras Agency Law*].

100. *Id.* at art. 1.

101. *Id.* at art. 11.

102. *Id.* at art. 12.

stitute a "just cause" permitting the termination, modification or refusal to renew an agency contract without indemnification.¹⁰³

2. *Compensation*

Where the grantor violates the terms of the agency or distributor agreement or terminates, modifies or fails to renew without just cause, it shall be liable for compensation to the concessionaire.¹⁰⁴ Under Honduran law, when such a violation occurs the interested parties shall negotiate the appropriate indemnity. Where the parties are unable to reach agreement, however, the grantor is required to compensate the concessionaire based on the following factors: (1) those expenses incurred by the concessionaire that were made on behalf of the grantor and which cannot be recovered; (2) the cost of the invested amount realized on behalf of the grantor to the extent that this was not reasonably utilized by the concessionaire; (3) the cost of the concessionaire's inventory that cannot be sold due to the unjustified cessation of the dealer agreement; (4) the gross profits obtained during the last five years of the relationship or, if the relationship was for less than five years, five times the average gross profits during this period; and (5) the amount of the credits that have been granted by the distributor during the period of the concession.¹⁰⁵

The Honduran decree includes two provisions for ensuring that a grantor who is determined to be liable to the concessionaire pays the compensation. First, after it has been determined that the grantor is liable, the concessionaire is to be considered a preferred creditor for all inventory in the concessionaire's possession.¹⁰⁶ Second, after a grantor has been directed to pay compensation by a final, irrevocable judgment, it may not import any products or conduct any services until the judgment has been satisfied.¹⁰⁷

Where the principal has been found liable for an unjust termination of the agency agreement by means of an irrevocable judgment, it is precluded from importing products or services until the appropriate indemnity has been paid.¹⁰⁸

3. *Additional Requirements*

There are several additional provisions in the Honduran legislation which should be noted. First, Honduras is one of three Latin Ameri-

103. *Id.* at art. 16.

104. *Id.* at art. 13.

105. *Id.* at art. 14.

106. *Id.* at art. 15.

107. *Id.* at art. 22.

108. *Id.* at art. 22.

can countries which has a nationality requirement for all people or entities serving as dealers.¹⁰⁹ Under Honduran law, in order to be a concessionaire a party must be: (1) either a Honduran citizen or a Honduran commercial firm and (2) be a member of the corresponding local chamber of commerce.¹¹⁰ Moreover, the Honduran legislation requires that all imported products or services which are offered through concessionaires must first be determined by the Ministry of the Economy to be "necessary to the country, to the consumers, and to the State."¹¹¹

The Honduran decree also provides that direct sales by the grantor in the Honduran market are generally prohibited and only permitted if done on a "nonsystematic basis."¹¹² Finally, Honduras does permit the parties to agree to submit any dispute to conciliation or arbitration procedures.¹¹³ If the parties are unable to agree on a conciliation procedure, however, their dispute may only be resolved by a competent national court located in the domicile of the concessionaire.¹¹⁴

H. Nicaragua

In Nicaragua, the dealer arrangement is governed by the "Law on Agents, Representatives or Distributors of Foreign Companies."¹¹⁵ This law applies in those situations in which a juridical or natural person has been designated by a principal or exporter for the representation, agency or distribution of the particular products or services of the principal.¹¹⁶ The Nicaraguan agency legislation refers to agents, representatives and distributors collectively as "concessionaires" and treats agents and distributors identically.

1. Termination

Nicaraguan law prohibits the termination or refusal to renew the agency or distributor agreement unless there is "just cause." The just causes recognized under Nicaraguan law are: (1) for any crime com-

109. *Id.* at art. 4; *Costa Rica Agency Law*, *supra* note 53, at art. 361; *Dominican Republic Agency Law*, *supra* note 64, at art. 12.

110. *Honduras Agency Law*, *supra* note 99, at art. 4. The other nation which also has enacted a nationality requirement, is Costa Rica. *Costa Rica Agency Law*, *supra* note 53, at 362.

111. *Id.* at art. 5. There is no criteria provided as to how this determination will be made.

112. *Id.* at art. 6.

113. *Id.* at art. 21.

114. *Id.*

115. Nicaragua Decree No. 1979 (Dec. 22, 1979) translated in COMMERCIAL LAWS OF THE WORLD-Nicaragua (Foreign Tax Law Publishers, Inc. ed., 1991) [hereinafter *Nicaragua Agency Law*].

116. *Id.* at art. 2.

mitted by the concessionaire against the property or interests of the principal; (2) for the nonfulfillment of the central terms of the dealer contract; (3) for the continued decrease in the sale or distribution of the principal's products because of the negligence of the concessionaire; (4) for other acts which are imputable to the concessionaire and that result in the loss of the introduction or distribution of the products; and (5) the bankruptcy of the concessionaire.

The Nicaraguan agency legislation also provides that changes in the organizational structure of the principal does not constitute a "just cause" for termination of the agency relationship.¹¹⁷

2. Compensation

Where the principal has refused to renew the agency contract or terminated it without just cause, the dealer is entitled to compensation. The parties are permitted to negotiate for the appropriate indemnity. In situations in which the parties are unable to agree, the indemnity is to be determined based on the following factors: (1) the value of the investment made by the dealer on behalf of the principal;¹¹⁸ (2) the portion of the unearned increment, or goodwill, of the concessionaire's business attributable to the sale of the merchandise under the contract;¹¹⁹ and (3) the gross profit obtained by the concessionaire during the last three years (or less) of the agency arrangement.¹²⁰ The principal is also required to purchase all of the concessionaire's inventory within a period of no more than six months after the unjustified termination or refusal to renew.¹²¹

Finally, once it is determined that the principal is liable to the concessionaire, the concessionaire may appeal to the Ministry of Industry and Commerce to suspend all importation by the principal until full compensation has been made. Moreover, the concessionaire is entitled to retain all property of the principal in its possession until such compensation has been made.¹²²

117. *Id.* at art. 11.

118. This is determined based upon the depreciation tables for machinery and commercial property in the Nicaraguan income tax law.

119. This is to be determined based on the following factors: (1) the number of years in which the dealer has served; (2) the annual volume of sales of merchandise and the proportion which they represent in the business of the concessionaire; (3) the proportion of the Nicaraguan market which said volume represents; and (4) any other factor which is deemed applicable for the equitable determination of the appropriate unearned increment. *Id.* at art. 11.

120. *Nicaragua Agency Law*, *supra* note 115, at art. 4.

121. *Id.* at art. 6. This purchase price shall include: the acquisition cost; all taxes paid on the purchase and expenses incurred for importation of the goods; internment and introduction; freight up to the place of warehousing; and costs of promotions and financial expenses.

122. *Id.* at art. 9.

3. *Additional Requirements*

There are several additional provisions which impose significant obligations on the principal. Probably most significant is Article 5 which provides that any time the principal unilaterally increases the number of concessionaires, the principal must pay each of the preceding concessionaires individually eighty percent of the indemnity as determined in Article 4.¹²³ There is no further discussion provided on this Article. This provision and the other protective provisions and obligations established in the Nicaraguan Agency Law may not be waived.¹²⁴

Finally, choice of forum and law provisions are strictly prohibited under Nicaraguan law.¹²⁵

K. *Puerto Rico*

Dealer agreements are governed under the Puerto Rican law entitled "For Regulating the Termination, Prohibiting the Impairment of the Relation Established and the Refusal to Renew Contracts of a Sales Representative."¹²⁶ The Puerto Rican law provides protection for sales representatives who are defined as autonomous business persons which establish an exclusive contract to create or expand a favorable market for the products or services of the principal.¹²⁷ While this legislation governs both the distributor and sales representative (or agency) contract, the statutory language concentrates primarily on the distributor type arrangement. Nevertheless, the terms for termination and compensation are equally applicable to the sales representative.

1. *Termination*

There must be "just cause" in order for the principal to be able to terminate the dealer agreement without liability. Just cause is defined as: (1) the nonfulfillment of any of the essential obligations of the dealer contract by the dealer; or (2) any act or omission by the dealer which adversely and significantly affects the interests of the principal or licensor in the development of the market or sales of the merchandise or services.¹²⁸

The Puerto Rican law also provides that the nonfulfillment of particular contract provisions regarding dealer performances shall not

123. *Id.* at art. 5.

124. *Id.* at art. 12.

125. *Id.* at art. 14

126. Puerto Rico's Dealer's Act, Law No. 25, P.R. LAWS ANN. tit. 10, § 278(b) (1968) [hereinafter *Puerto Rico Agency Law*].

127. *Id.* at art. 1(a), (c).

128. *Id.* at art. 1(d).

constitute just cause.¹²⁹ Specifically, the violation by the dealer of any disposition in the dealer contract establishing rules of conduct, quotas, or goals for sales, marketing or promotion which are not adjusted to the Puerto Rican market at the time of the violation shall not constitute just cause.¹³⁰

In addition, any contract clause reserving the right to unilaterally terminate the contract that is inconsistent with the just cause criteria established in Article 1(d) will not be recognized.¹³¹

2. Compensation

If the sales representative agreement is terminated without just cause, the principal shall be required to pay compensation taking into account the following factors: (1) the actual value of all investments and costs incurred by the dealer to the extent these costs cannot be utilized in the dealer's other activities; (2) the profit¹³² from the transaction, or that part of it which is attributable to the representation of the merchandise or rendering of the services in question; and (3) the amount of profits generated during the last five years, or, if less than five years, five times the average annual profits obtained during those years.¹³³

In addition, Article 5 provides that irrespective of any compensation provided in Article 4, Puerto Rican courts may grant, on petition by the plaintiff, compensation up to five percent of the total volume of sales of the product or service during the duration of the dealer agreement.¹³⁴ The only limitation on the court in employing this provision is that it may not "propitiously unjustly enrich or onerously burden the principal or licensor."¹³⁵

3. Additional Requirements

The agency law of Puerto Rico explicitly provides that its provision represents public policy, and, thus, choice of law or forum stipula-

129. *Id.* at art. 3.

130. *Id.*

131. *Id.* at art. 2.

132. As determined by: (a) the number of years the dealer has been in charge of the representation; (b) the actual volume of the representation of the merchandise or rendering of services in question, and the proportion it represents in the transaction; (c) the proportion in the Puerto Rican market which that volume represents; and (d) any other factor which helps to establish the amount equitably. *Id.*

133. *Puerto Rico Agency Law, supra* note 126, at art. 4.

134. *Id.* at art. 5.

135. *Id.*

tions will not be honored¹³⁶ and nor may any of the provisions of this law be waived.¹³⁷ In *Pan Am Computer Corp. v. Data General Corp.*, the court rejected the plaintiff's choice of law provision in derogation of the protection expressly provided in the Puerto Rico Dealer's Act.¹³⁸

IV. CONSIDERATIONS IN DRAFTING THE AGENT OR DISTRIBUTOR CONTRACT

While several Latin American and Caribbean nations have enacted legislation that is protective in nature and may subject the unwary U.S. exporter to considerable expense and delay, this legislation should not discourage the U.S. exporter from investing in these markets. There are several way in which the U.S. exporter can avoid costly and complex litigation and minimize potential liability. This section will broadly discuss several of the essential issues necessary to consider in drafting agency and distributor contracts in light of the protective legislation discussed in the previous section.

NAMES AND CAPACITY: The dealer agreement should include the full names and addresses of the parties to the agreement. In addition, it is essential to specifically define in the dealer agreement the scope of the dealer's powers. This is because several Latin American countries permit the agent to bind the principal if the agent is acting within the presumed authority of the principal.¹³⁹

IDENTIFY THE PRODUCTS: Some Latin American nations such as Brazil require that the products subject to the representation must be identified in the dealer contract.¹⁴⁰ Whether or not it is specifically required, those products to which the dealer agreement applies should be explicitly identified in the contract.¹⁴¹ If the principal has numerous product lines but only intends to employ the agent for one particular line, this, of course, should be stated in the agreement. Further, the principal should reserve the right, upon its determination to introduce another product line into the foreign market, whether to employ the same agent or another.

IDENTIFY THE TERRITORY AND EXCLUSIVITY: The dealer agreement should also specify the territory in which the dealer is re-

136. *Id.* at art. 7 (however, this does not include an arbitration stipulation).

137. *Id.* at art. 8.

138. 467 F. Supp. 969 (D. P.R. 1979); see also *Walborg Corp. v. Superior Court*, 104 P.R. Dec. 184 (1975).

139. Carolita L. Oliveros, *International Distribution Issues in Product Distribution and Marketing*, A.L.I.-A.B.A. 481, 494 (1991); see also *supra* notes 5-9 and accompanying text.

140. *Brazilian Agency Law*, *supra* note 28, at art. 27.

141. Oliveros, *supra* note 139, at 495.

sponsible. Brazil and Columbia also require this to be explicitly defined in the agreement.¹⁴² The Columbian and El Salvadoran law also provides that the exporter may only utilize multiple agents within the same territory if this right is expressly provided for in each of the agency agreements.¹⁴³ This will avoid disputes between the agents of the principal.

In addition, the agreement should provide whether the dealer will have the exclusive right to promote, sell or distribute the principal's products or services in a particular territory. This also must include a provision as to whether the principal itself may make direct sales in the territory or region. It should be noted, however, that the Honduran agency legislation precludes all but "nonsystematic" sales by the principal in the agent's territory.¹⁴⁴

TRADEMARKS, PATENTS AND CONFIDENTIALITY: There should be a provision in the agreement with respect to the protection of trademarks, patents and other property rights of the principal.¹⁴⁵ The dealer should also be required to notify the principal upon information of any infringements of the principal's property rights.¹⁴⁶ The contract should also state that the dealer may not disclose to any unauthorized third parties the trade, business or manufacturing secrets or clientele of the principal.¹⁴⁷ Several Latin American nations expressly provide in their legislation that unauthorized divulgence of the trade secrets of the principal is a justifiable reason for terminating the agency contract.¹⁴⁸ Finally, it is essential that confidentiality survive the termination of the contract.

NON-COMPETE CLAUSE: It might be a good idea to include a non-compete clause which would preclude both the dealer from entering into any agreement with the principal's competitors to sell or dis-

142. *Brazilian Agency Law*, *supra* note 28, at art. 27; *Colombia Agency Law*, *supra* note 39, at art. 1320.

143. *Colombia Agency Law*, *supra* note 39, at art. 1318; *El Salvador Agency Law*, *supra* note 84, at art. 386.

144. *Honduras Agency Law*, *supra* note 99, at art. 6.

145. One author has recommended as an important precautionary measure in this regard to require the dealer to acknowledge the exporter's (or principal's) exclusive right to apply for local patents or trademark registrations, and to sue for any infringement in the foreign jurisdiction. *CLASEN*, *supra* note 5, at § 12.02.

146. Oliveros, *supra* note 139, at 496.

147. In several of the developing countries in Latin American, these confidentiality clauses may not be recognized to the extent they may apply to technological information that is deemed "to have transferred outright to the foreign distributor after the expiration of a specified number of years." Herold & Knoll, *supra* note 7, at 951.

148. *Costa Rica Agency Law*, *supra* note 53, at art. 5; *El Salvador Agency Law*, *supra* note 84, at art. 399; *Guatemala Agency Law*, *supra* note 93, at art. 4; *Honduras Agency Law*, *supra* note 99, at art. 12.

tribute their products and, upon termination of the relationship, prevent the dealer from competing for a specified and reasonable period of time.¹⁴⁹

CHOICE OF LAW AND FORUM: The dealer agreement should explicitly include a choice of law and choice of forum provision. Most of the nations discussed in the previous section expressly prohibit or simply will not honor a choice of law or forum provision.¹⁵⁰ Nevertheless, it is still a good idea to include these types of provisions in the dealer contract because where they do exist, U.S. courts might be persuaded to refuse to recognize and enforce foreign judgments against U.S. exporters.¹⁵¹

AVOIDING APPLICABILITY OF FOREIGN LABOR LAWS: Regardless of whether the U.S. exporter opts for an agent or a distributor to develop the particular foreign market, it is important to take measures to avoid the applicability of foreign labor laws. Where these labor laws apply to the dealer agreement, upon termination of the agreement, the exporter will be liable for severance pay, social security, disability, pension, health and other benefits.¹⁵²

There are several precautions which can be taken to reduce the exposure of the U.S. exporter to these labor laws. First, the U.S. exporter should either hire an incorporated dealer or encourage an unincorporated dealer to become incorporated. If the dealer is incorporated, the labor law protection generally does not apply.¹⁵³ Where it is necessary to hire an agent, every effort should be made to avoid the appearance of an employer-employee relationship.¹⁵⁴ Second, the dealer agreement should not specify matters that include employment. Compensation should be based on a commission rather than a salary.

149. Oliveros, *supra* note 139, at 497.

150. *Brazilian Agency Law*, *supra* note 28, at art. 39; *Colombia Agency Law*, *supra* note 39, at art. 1328; *Costa Rica Agency Law*, *supra* note 53, at art. 365; *Dominican Republic Agency Law*, *supra* note 64, at art. 3; *Ecuador Agency Law*, *supra* note 75, at art. 5; *Honduras Agency Law*, *supra* note 99, at art. 21; *Puerto Rico Agency Law*, *supra* note 126, at art. 7.

151. Herold & Knoll, *supra* note 7, at 949 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 105, 117 (1964) and UNIFORM FOREIGN MONEY JUDGEMENTS RECOGNITION ACT, 13 U.L.A. 417 (1980 & Supp. 1986)). As an alternative to a choice of forum and law provision, an exporter may want to consider an arbitration clause as another way to minimize the potential liability for compensation for an unjustified termination. CLASEN, *supra* note 23, at § 12.02. While there is no guarantee that an arbitration clause will be recognized, the chances of a foreign court honoring an arbitration clause are better than a choice of forum or law clause. For example, the Honduran agency law explicitly countenances an arbitration provision in the contract but forbids a choice of law or forum clause. *Honduras Agency Law*, *supra* note 99, at art. 21.

152. CLASEN, *supra* note 23, at § 11.01; Saltoun & Spudis, *supra* note 15, at 889.

153. Herold & Knoll, *supra* note 7, at 954.

154. Saltoun & Spudis, *supra* note 15, at 891. Many U.S. exporters have avoided the problem and the expense of local taxation by defining agents as independent contractors. King, *supra* note 1, at 94.

Third, the dealer contract should provide wide flexibility and autonomy to the dealer to arrange and operate the day-to-day affairs of the agency.¹⁵⁵ Finally, the principal should seek to include from the dealer a waiver in the contract from all claims of the dealer's employees for compensation or severance, disability or social benefits.

CONTROLLING LANGUAGE: Where the dealer agreement is drafted in two or more languages, it is essential to state which language version of the contract is to control. Under Guatemalan law, it is important to remember that the dealer contract must be translated into Spanish by an official Guatemalan interpreter.¹⁵⁶ This article does not, however, require that the Spanish translation be treated as the controlling language.

COMPLIANCE WITH LOCAL REGULATIONS: The dealer agreement should state that the dealer is responsible for complying with all regulations for serving as a dealer (if the particular nation has requirements for dealers) and is also responsible for arranging all necessary governmental approvals. There are several Latin American countries which require, for example, that both the dealer and the dealer agreement have to be registered.¹⁵⁷ In addition, it is a good idea to require the dealer to inform the principal of any changes in the law which might impose substantive and procedural requirements on the principal. One author has recommended that as a check for this responsibility, the U.S. exporter should periodically contact the U.S. Department of Commerce which monitors changes in foreign business laws.¹⁵⁸

COMPENSATION: The agreement should specify precisely the manner and method of compensation. Generally, a sales agent is paid on a commission basis while a distributor is paid on a markup basis. The agreement should specify exactly how the commission is to be determined and, where a markup is used, the agreement should specify the manner in which selling prices will be set within the designated territory.¹⁵⁹

It is also a good idea to include a clause in the contract which gives the dealer the ability to reject any order made by the dealer for any cause which it may deem sufficient without having to pay the dealer

155. Herold & Knoll, *supra* note 7, at 954.

156. *Guatemala Agency Law*, *supra* note 93, at art. 6.

157. *Colombia Agency Law*, *supra* note 39, at art. 1320 (requiring the dealer and the contract to be registered); *Dominican Republic Agency Law*, *supra* note 64, at art. 8 (requiring only the dealer to be registered); *Brazilian Agency Law*, *supra* note 28, at art. 2 (requiring only the dealer to be registered).

158. See King, *supra* note 1, at 100.

159. STRENG & SALACUSE, *supra* note 16, at § 11.07.

the commission.¹⁶⁰ The exporter should be made aware, however, that the legislation of Columbia¹⁶¹ and El Salvador¹⁶² expressly provides that once a dealer enters into a contract, he is entitled to the commission even if the principal cancels or modifies the contract.

TERMINATION CLAUSE: There are several ways in which a U.S. exporter can maintain some ability to terminate the agency agreement without being required to indemnify the dealer. First of all, it is important to note that it is more difficult and costly to terminate a long-term contract, either a single term or evergreen clause, than it is to terminate a short-fixed term contract because, fixed-term agreements are generally allowed to expire without creating any responsibility or obligation on the exporter's part to pay compensation.¹⁶³ For this reason, it should be clearly stated within the contract that the appointment is only for a fixed and definite period.¹⁶⁴ This is an important clause and should be utilized by the exporter in the agency contract even when it fully anticipates rehiring the agent or distributor. It is for this reason that automatic renewal clauses should be avoided because many jurisdictions interpret these clauses as an intention to create a contract of indefinite term.¹⁶⁵ Moreover, if a renewal clause is necessary, it should be specified that only one renewal is foreseen or that particular acts by both parties must occur before the renewal comes into effect.¹⁶⁶

MISCELLANEOUS CLAUSES: In addition, there are several other clauses which should be considered for inclusion in the dealer agreement for the protection of the U.S. exporter. These include: (1) a clause requiring the dealer to follow all instructions of the principal in regards to prices, terms of delivery, payment and storage; (2) a clause requiring the dealer to establish procedures for servicing the product; (3) a clause requiring the dealer to give the principal access to the dealer's premises for purposes of inspection; (4) a clause requiring the

160. Swacker, *supra* note 3, at 97.

161. *Colombian Agency Law*, *supra* note 39, at art. 1322.

162. *El Salvador Agency Law*, *supra* note 84, at art. 396.

163. Herold & Knoll, *supra* note 7, at 959. In South America, however, many of the nations with protective legislation preclude the exporter from failing to renew the dealer contract without just cause and thereby making all agent contracts run indefinitely. *Puerto Rico's Dealer's Act*, *supra* note 126, at art. 278(a); *Costa Rica Agency Law*, *supra* note 53, at art. 2; *El Salvador Agency Law*, *supra* note 84, at art. 395; *Honduras Agency Law*, *supra* note 99, at art. 11; *Nicaragua Agency Law*, *supra* note 115, art. 3.

164. Authors Herold, Knoll and Clasen each recommend a fixed and definite term contract of no more than two years so as to reduce the potential liability in the event of unjustified termination. Herold & Knoll, *supra* note 7, at 959; CLASEN, *supra* note 23, at § 12.02.

165. Saltoun & Spudis, *supra* note 15, at 891.

166. *Id.*

dealer to file written reports and maintain all technical publications provided by the principal; (5) a clause requiring the dealer to maintain an adequate inventory; and (6) a clause requiring the dealer not to extend any additional warranties other than that provided by the principal.

V. CONCLUSION

The decision to employ an agent or a distributor to develop a market in South America or the Caribbean involves significant obligations for the U.S. exporter vis-a-vis the domestic legislation of the particular country. Several countries have adopted very protective legislation which limits the ability of the exporter to terminate the dealer contract without having to pay compensation to the dealer. In addition, this legislation contains specific formulas for determining the appropriate compensation. While this legislation frequently appears draconian, there are several ways in which the U.S. exporter may minimize its potential liability for unjust termination and thereby not deny itself the opportunity of investment abroad.

