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Legal Aspects of Appointment and Termination of Foreign Distributors and Representatives

by Henry T. King, Jr.*

I. INTRODUCTION

More than half of the U.S. export trade is handled by agents and distributors, amounting to hundreds of billions of dollars worth of goods. Surely this figure would be multiplied many times internationally. It can be concluded, therefore, that foreign agent and distributor relationships have great significance in the international business sphere. Moreover, foreign sales agent and distributor relationships are, without a doubt, of special importance to the business community, since one cannot directly invest in, manufacture and sell to all the countries in which one wishes to achieve market penetration. And for many U.S. companies most export sales will normally be transacted through foreign sales representatives or distributors.

Most companies engaged in sales abroad have had problems with agents or distributors. Primarily these difficulties arise from the appointment or termination of agents or distributors. This article, then, will focus on the legal aspects of the appointment and termination of agents and distributors.

Before going further, a definition is in order for the terms sales agent and distributor. A sales agent represents a manufacturer for selling purposes. The agent solicits or obtains orders for the sale of the principal's products subject to the principal's acceptance. If the principal accepts such orders, the principal sells directly to the customer, bills the customer and generally assumes the credit risk. Title to the goods remains

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4 Id.
5 Id.
in the principal until the completion of the sale. The agents must act on behalf of the principal, but may not bind the principal unless authorized to do so. The agent may be on a salary or commission basis. In contrast, a distributor purchases goods on the distributor's own account for resale. The distributor bears the credit risk and will normally warehouse the goods and effect delivery of them.

An agency or distributorship relationship is a contractual relationship and should be defined as such in writing with regard to the law of the particular country involved, and the law of the principal's own nation, if it can be made applicable. To avoid challenge, a contract should state that it represents the full understanding between the parties—in effect, that it is self-contained. The relationship's effective date should be stipulated so that there is no doubt as to when it becomes effective. Preferably the contract should only be in the principal's native language, but if it is in two languages the contract should explicitly state which language, optimally the principal's, is controlling. Generally, the contract should be as full and detailed as possible.

Unfortunately, no one form of contract will be universally applicable for the appointment of either agents or distributors, because of the varied impact of local laws which regulate agency and distributor relationships throughout the world. However, it is important to note that generally in common law countries such as the United States, the United Kingdom, New Zealand, Canada and Australia, and those countries whose legal systems are largely derived from the common law

6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
13 Note, however, that some nations by law forbid application of any law but their own, even if stipulated otherwise in the contract. See infra text accompanying notes 21-22.
14 For a discussion of what elements are necessary for a "full" understanding, see Saltoun & Spudis, supra note 3, at 895-98.
15 As an alternative O. GIBERGA, supra note 2, at 3-4, suggests the parties agree that the definitions in U.S. CHAMBER OF COMMERCE, THE REVISED AMERICAN FOREIGN TRADE DEFINITIONS or those in INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS be controlling.
16 While an extensive number of laws will be cited infra, this paper will not attempt an all-inclusive summary of every existing agency and distributorship law.
17 See the principles set forth in U.C.C. §§ 1-103, 2-204.
18 The United Kingdom, New Zealand, Canada and Australia have no specific laws governing such contracts. Only common law principles, which are quite deferential, apply. O. GIBERGA, supra note 2, at 21.
tradition, such as India, the parties to a relationship contract are largely free to establish their own mutually agreed upon terms and conditions. This freedom includes the right to express and limit the grounds for terminating the relationship, with violation of such termination provisions usually subjecting the offending party to damages, primarily for loss of earnings.

However, in many other countries, especially certain civil law countries, the parties are more restrained in contract terms, and statutory provisions may exist which override the expressed desires of parties on the grounds of overriding public interest. In particular, these countries stipulate that the law of the situs forum is the sole applicable law to a principal-agent dispute. Thus, regardless of a contract’s terms, the governing law would be the law of the country in which the agent is located.

Even after, or in spite of, the determination of what nation's law controls, a jurisdictional question may still arise as to whether a principal is "doing business" or otherwise legally present in a country so as to be subject to suit. This, of course, depends upon the terms of the agency relationship and the provisions of local law giving jurisdiction over non-residents. Some nations require that principals recognize the jurisdiction of that nation when nationals are hired as agents of the principal. Others define what is meant by "permanent business establishment" (or like terms) with agents, such that the principal would fall under the nation's jurisdiction.

In addition, tax treaties may offer guidance in determining the jurisdiction of the principal to be sued. The model Organization for Economic Cooperation and Development (OECD) tax treaty defines a permanent establishment in an attempt to deal with the problem at least

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19 India Contract Act, ch. X, §§ 182-238.
20 For a discussion of termination agreements under U.K. law, see O. Giberga, supra note 2, at 21. Other commonwealth nations follow suit.
22 Belgian distributorship Law, supra note 21, at art. 4; Commercial Code of Bolivia, Law of March 29, 1977, art. 1251; Legislative Assembly of the Republic of Costa Rica, Law No. 6209, art. 7 (April 3, 1978) [hereinafter cited as Costa Rica Agency Law].
23 Costa Rica Agency Law, supra note 22, at art. 7; Agency Law of the Dominican Republic, supra note 21, at art. 12; Commercial Agency in Lebanon, supra note 12, at art. 5.
in regards to taxing jurisdiction. Bilateral tax treaties may also define "doing business" and thus provide some answer to the jurisdictional question.\(^{26}\) Most U.S. companies have been able to structure their agreements to avoid the application of local taxes, and have found helpful contract clauses which define agents as independent contractors and specify that the agent is not authorized to finalize contracts on the principal's behalf.\(^{27}\)

II. A Preliminary Checklist Before Deciding to Enter a Contract

Because of the wide variety of statutory provisions governing the agency or distributorship relationship, it is always wise to obtain as much information about local law as possible.\(^{28}\) In reviewing these laws the checklist below, while quite probably incomplete, should serve as an extensive guideline to formulating an agency or distributorship agreement.

A. Company or Individual?

Is the proposed agent or distributor an individual or a company? In certain countries a principal is more secure when dealing with a company rather than an individual as its agent. For example, in Spain,\(^{29}\) Argentina,\(^{30}\) and Mexico\(^{31}\) an individual will fall under the protective umbrella of the nation's labor laws, which of course are inapplicable to companies. These protections can result in cost consequences to the principal both at the time of appointment\(^{32}\) and the time of termination.\(^{33}\) For these reasons, this determination should be made early when choosing one's representative.

B. Agent or Distributor?

Are agents and distributors distinguished by statute or are they

\(^{26}\) For one example, see the discussion of the current and proposed U.S.-Canadian tax treaties in Hawkins & Eidnier, supra note 24, at 3-4.

\(^{27}\) Saltoun & Spudis, supra note 3, at 890.

\(^{28}\) This will aid in the drafting of contracts, but it is still not a substitute for final review by local counsel of agency or distributorship contracts, particularly where significant amounts of sales are involved.

\(^{29}\) Law of Work Contract, art. 6, Law of July 21, 1962 (Spain).


\(^{32}\) In Italy, for example, the employer will have to begin contributing to Italy's workers compensation and social security fund, ENASARCO. Puclinckx & Tielemans, The Termination of Agency and Distributor Agreements: A Comparative Survey, 3 NW. J. INT'L L. & BUS. 452, 483 (1981).

\(^{33}\) See generally, Saltoun & Spudis, supra note 3, at 889; see, e.g., Labor Law of Argentina, 1929 C. ANALES 11,554, amended by 1958 C. ANALES 14,546.
treated the same? When differences exist in the treatment of agents and distributors, a principal is generally in a better position with a distributor as the principal's representative rather than an agent, since agents are protected in many countries' statutes and distributors are not.\textsuperscript{34} For example, the only European nation which extends statutory protection to distributors is Belgium.\textsuperscript{35}

Having a distributor as one's representative may, however, have antitrust consequences which an agency relationship would not.\textsuperscript{36} For example, the rules of the European Economic Community (EEC) will affect the styling of exclusive distributorship agreements, but have less effect on agency agreements.\textsuperscript{37} Some distributorship agreements will be exempt under de minimus rules, but most agreements involving U.S. companies will not be exempt on that basis.\textsuperscript{38} As illustration, an exclusive distributor for one EEC country may be prohibited from actively soliciting business outside his territory, but he may not be prohibited from selling outside his territory, nor may a principal impose upon a distributor any obligations to observe resale price maintenance or observe minimum prices.\textsuperscript{39} So, in the case of distributorship, especially in the EEC,\textsuperscript{40} competition rules are an early checkpoint.

C. Common Law Country?

A primary consideration is whether the country in which the agent or distributor is being hired is a common law country. As a general rule, in common law countries parties are free to contract as they desire to fix

\textsuperscript{34} This is particularly true in Europe. See Puclinckx & Tielemans, \textit{supra} note 32, at 466-68. However, most Latin American nations do not make such a distinction. Swacker, \textit{Dealer and Agent Relationships: Avoidance of Common Pitfalls} in \textit{CURRENT LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA} 95 (ed. S. Stairs 1981). The same is true in other parts of the world. See, e.g. Spoliansky, \textit{Modern Business Law in the Sultanate of Oman}, 13 INT'L LAW. 101 (1979) (discussing agency law in Oman). Furthermore, some nations do not explicitly grant agency statutory rights to distributors, but nonetheless apply these statutes to distributors, e.g. Brazilian Federal Law No. 4886, art. 27(5) (Dec. 9, 1965), especially if the distributorship is an exclusive distributorship. See \textit{generally} Puclinckx & Tielemans, \textit{supra} note 32, at 462 (citing West German cases).

\textsuperscript{35} Belgian Distributorship Law, \textit{supra} note 21. Puclinckx & Tielemans, \textit{supra} note 32, at 476, call Belgium "the paradise for distributors."

\textsuperscript{36} For a general discussion of this issue, see Saltoun & Spudis, \textit{supra} note 3, at 892-902.

\textsuperscript{37} Saltoun & Spudis, \textit{supra} note 3, at 903.


\textsuperscript{40} Bear in mind that the EEC Regulations now cover France, Germany, Italy, the Netherlands, Luxembourg, Belgium, the United Kingdom, Ireland, Denmark and Greece, and may well cover Spain and Portugal in the near future.
the terms of the relationship agreement.\textsuperscript{41} No provisions exist, for example, regarding termination indemnities,\textsuperscript{42} or foreclosing choice of law agreements.\textsuperscript{43} This includes, of course, the former British colonies in all areas of the world.\textsuperscript{44}

\textbf{D. Nationality Requirements?}

Some nations require that an agent or distributor must be a national of the country in which the agent or distributor will operate. In the Middle East this is generally true.\textsuperscript{45} As a result, rules which define a national or a national country are significant when selecting a representative.

\textbf{E. Registration Requirement?}

Another checkpoint is whether the agency arrangement has to be registered with any governmental body. Some countries require that a governmental body be notified that such a contractual relationship exists,\textsuperscript{46} while others will require that the contract itself be filed or registered with a government bureau.\textsuperscript{47} Once again, this requirement is found predominantly in Middle East countries.\textsuperscript{48}

\textbf{F. Statutory Definition of Just Cause for Termination?}

In countries which give agents and distributors some form of protection from termination, just cause is often the only reason a representative may be terminated before the contractual or statutory termination date.\textsuperscript{49} Therefore, it is important to determine whether just cause is defined by

\textsuperscript{41} See supra text accompanying notes 17-22.

\textsuperscript{42} Compare with other countries provisions, such as Puerto Rico's Dealer's Act, Law No. 25, P.R. LAWS ANN. tit. 10, § 278(b) (1968); Dominican Republic Law No. 6080 (Oct. 22, 1962); EEC Directives on Commercial Agency, art. 25, 20 O.J. EUR. COMM. (No. L 13) 2 (1977) (patterned after West Germany's indemnification laws).

\textsuperscript{43} Compare with text accompanying notes 21-22.

\textsuperscript{44} See, e.g., O. GIBERGA, supra note 2, at 11 (Cyprus); id. at 22 (Hong Kong); id. at 15 (Kenya); id. at 23 (Pakistan); id. at 16 (Zambia).


\textsuperscript{46} Commercial Agency in Lebanon, supra note 12, at art. 2; Law Governing Commercial Agencies, supra note 24, at art. 3.


\textsuperscript{48} For a thorough listing see supra note 45.

\textsuperscript{49} Brazilian Federal Law, supra note 34, at art. 34; Agency Law of the Dominican Republic, supra note 21, at art. 2; Puerto Rico Dealer's Act, Law No. 25, P.R. LAWS ANN. tit. 10, § 278(a).
Also, other statutory provisions may exist which specify other reasons beside just cause for termination. In sum, before entering into an agency or distributorship contract a principal should know how to get out of it.

**G. Notice Requirements?**

A nation’s statutes may set forth pretermination notice requirements, which a principal would be wise to give full effect in an agency or distributorship contract.

**H. Termination Indemnity Provisions?**

Nations which protect agents and distributors in termination proceedings often set forth statutory indemnification requirements. These requirements are by no means uniform and vary widely from nation to nation. For example, in Costa Rica if an agent has been terminated without just cause, the principal will be required to pay compensation equal to four months' average gross profits for each year the contract was in force, up to nine years. As a more extreme example, the compensation required under Guatemalan law is equal to the sum of:

a) the direct promotional expense incurred by the agent in carrying out the agency;

b) the cost of all unrecoverable investments made by the agent pursuant to the contract;

c) the value of any unsold merchandise in the agent’s possession;

d) fifty percent of the presumed gross profits on the sale of such unsold merchandise; and,

e) an amount equal to the gross profits made by the agent during the period of the contract or during the three years prior to the termination, whichever is less.

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50 Examples of "just cause" definitions are Mercantile Agents Law of May 11, 1921, art. I, as amended July 30, 1960 (Austria); Brazil Federal Law, supra note 34, at art. 35; Agency Law of the Dominican Republic, supra note 21, at art. 1(d); Law on Protection for Representatives, Agents and Dealers of Foreign Corporations in Ecuador, art. 3, OFFICIAL REG. 245 (Dec. 31, 1976) [hereinafter Ecuador Agency Law]. In some nations just cause is defined to be what a governmental agency believes it to be in the particular situation before it. See, e.g., O. Giberka, supra note 2, at 11 (discussing Amiri Decree of October 1975 (Bahrain)).


52 Belgian Distributorship Law, supra note 21, at art. 3; Agency Law of the German Federal Republic, Handelsgezetebuch [HGB] § 89(1), (2). A statute may also prescribe that notification be given to the local government within a certain time period. See, e.g., U.A.E. Agency Law, supra note 24, at arts. 12-15.

53 Defined at Costa Rica Agency Law, supra note 22, at art. 5.

54 Id. at art. 2.

55 Agency Law of Guatemala, art. 6, Decree No. 78-71 (Sept. 25, 1971).
The principal is also liable to the agent for labor law compensation claims dismissed employees may have against the agent as a result of the termination.56

In contrast, the laws of Brazil would probably result in much lower termination costs. In Brazil, the statutory compensation for termination is not less than one-twentieth of the compensation earned during the representation,57 a relatively low figure whose minimality is compounded by the fact that the judiciary of Brazil has traditionally been conservative in its indemnity awards.58 Moreover, the judicial process is usually slow and no provisions exist for increasing the valuation to reflect inflation.59 These factors together can lead to relatively low indemnification awards.

Furthermore, in Brazil fixed term agreements terminate on the date provided in the contract.60 If the contract is silent in regards to a termination date, the agreement may be terminated even without just cause after the first six months of the relationship.61 In all cases, however, if the contract does not stipulate otherwise, pretermination notice is required.62 If the principal fails to serve such notice, compensation is due the agent equaling one-third of the earnings accrued during the last three months prior to termination.63

An important consideration in some countries is that, until the claims by a terminated agent or distributor have been resolved, the principal may be barred from exporting goods into that country.64 In addition, an agent or distributor who has secured a local judgment against a principal could levy against the principal’s assets in that country,65 or even in the principal’s native country or a third country.66

These examples illustrate that before entering into a contract in a country, a potential principal must determine whether the contract is worth the possible costs upon termination. Moreover, it is vitally impor-

56 Id. at art. 6(f). A calculation of damages in a hypothetical termination would indicate potential liability in the millions of dollars for termination of major contracts.

57 Brazil Federal Law, supra note 34, at art. 27(j). However, if this amount is not set in the contract, then minimum indemnification is one-fifteenth. Id.

58 Swacker, supra note 34, at 103.

59 Id.

60 Brazil Federal Law, supra note 34, at arts. 27(c), 34.

61 Id. at art. 34.

62 Id.

63 Id.

64 Costa Rica Agency Law, supra note 22, at art. 9; Agency Law of Guatemala, supra note 55, at art. 8; Honduras Agency Law, supra note 24, at art. 220; Commercial Agency in Lebanon, supra note 12, at art. 4(4).

65 Commercial Code of Columbia, supra note 47, at art. 1326; Honduras Agency Law, supra note 24, at art. 15.

66 See Saltoun & Spudis, supra note 3, at 894 n.28 for the limitations placed on foreign attachment by U.S. state statute.
tant that a principal know fully those with whom the principal may contract before entering into an agency or distributorship agreement.\textsuperscript{67} If all goes well, neither party will have a need to call upon termination provisions, but if an agent or distributor does not perform adequately, in a number of countries terminating the agreement will be a costly exercise.

\textbf{I. Disputes Settlement Provisions?}

What freedom of action does a principal have in settling disputes with an agent or distributor? A principal should determine whether an objective forum is available for dispute settlement.\textsuperscript{68} A principal should also check the availability of arbitration.\textsuperscript{69} For example, in El Salvador,\textsuperscript{70} Honduras,\textsuperscript{71} and Ecuador\textsuperscript{72} all controversies between a principal and his agent may only be decided by a local court having jurisdiction over the agent. It can be assumed that many countries will be, at the least, more sympathetic to their own nationals than the foreign principal and, in some countries, courts inexperienced in the disposition of commercial disputes, such as the religious courts (Sharia) in some parts of the Middle East, will be the courts of primary jurisdiction.\textsuperscript{73} In addition, a principal may assume that even in those nations where arbitration is allowed, the arbitration will have to occur in the country involved\textsuperscript{74} or before a particular forum of that country, such as the local chamber of commerce,\textsuperscript{75} which will invite some local bias into the dispute settlement process.

\textbf{J. Changes in Laws?}

The laws governing agents and distributors and their protection are

\textsuperscript{67} O. Giberga, \textit{supra} note 2, at I, states that the primary reason for agency terminations after World War II was the lack of care in selecting representatives in the first place during the postwar international business surge.

\textsuperscript{68} A principal may discover that in some countries objective fora are impossible to find, which illustrates one further reason to spell out as clearly as possible the conditions and goals of the representative goals.

\textsuperscript{69} Countries whose statutes provide for arbitration include Indonesian Agency Law, \textit{supra} note 21, at art. 32(2); Israel's agency law, discussed in O. Giberga, \textit{supra} note 2, at 12; \textit{id.} at 23 (Japan); and those nations who are signators to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997. O. Giberga, \textit{supra} note 2, at 4, and Saltoun & Spudis, \textit{supra} note 3, at 894, suggest use of the model contract clause and arbitration rules of the American Arbitration Association or the International Chamber of Commerce.

\textsuperscript{70} El Salvador Commercial Code, art. 399, Decree No. 247 (Jan. 9, 1973).

\textsuperscript{71} Honduras Agency Law, \textit{supra} note 24, at art. 21.

\textsuperscript{72} Ecuador Agency Law, \textit{supra} note 50, at art. 5.

\textsuperscript{73} O. Giberga, \textit{supra} note 2, at 14 (Muscat); \textit{id.} at 15 (Saudi Arabia).

\textsuperscript{74} See, \textit{e.g.}, Honduras Agency Law, \textit{supra} note 24, at art. 21.

\textsuperscript{75} See, \textit{e.g.}, Agency Law of Dominican Republic, \textit{supra} note 21, at art. 7, para. I; O. Giberga, \textit{supra} note 2, at 11-12 (Dubai).
continually changing. These changes can have far reaching significance and may by law be applied to existing as well as prospective agreements. Thus, a principal must constantly keep up-to-date with the status of local legislation dealing with agents and distributors, changes that cannot be anticipated when first drafting an agency or distributorship contract. Moreover, an existing contract may have to be amended to respond to changes in local laws. A good business practice for American principals would be to make periodic contact with the foreign Business Practices Division of the U.S. Department of Commerce, which will keep a principal or the principal’s counsel appraised of changes in foreign laws.

III. A CHECKLIST FOR DRAFTING THE CONTRACT

After the key questions above have been reviewed, the principal may still wish to draft a contract. Once again, a checklist approach may be the best way to guard against omissions or other mistakes. The following contract considerations should be part of that checklist.

A. Legal Requirements for Appointment of Agent or Distributor

1) Nationality,
2) Registration of agent with local government;
3) Approval of agency by government;
4) Filing of agency contract with government;
5) Special requirements applicable to agents or distributors selling to the government.

B. Local Statutory Protection Afforded Agents and Distributors (Usually Termination Rights)

1) Legal restriction against termination and economic sanctions for

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76 Belgian Distributorship Law, supra note 21, at art. 6; Indonesian Agency Law, supra note 21, at art. 33; Commercial Agency in Lebanon, supra note 12, at art. 6.
77 The current contact person is Ovidio M. Giberga.
78 Ecuador Agency Law, supra note 50, at art. 2; Egypt Law No. 107, supra note 45, at art. 1; Honduras Agency Law, supra note 24, at art. 4; Kuwait Law to Regulate Commercial Activity, supra note 45, at art. 1.
79 Commercial Code of Bolivia, supra note 47, at art. 1250; Brazil Federal Law, supra note 34, at art. 2; Egypt Law No. 107, supra note 45 at art. 4; O. GIBERGA, supra note 2, at 123 (discussing Korea).
80 Decree No. 58-1348, art. 4(2) (Dec. 23, 1958), reported in DOING BUSINESS IN FRANCE (p 4.04[3] (Bejot et. al. ed. 1984)); Indonesian Agency Law, supra note 21, at art. 10; Iraq Law No. 8 of 1976, supra note 47, at art. 2(9); Commercial Agency in Lebanon, supra note 12, at art. 2; Regulation for the Control of Agents, Chinese Foreign Exchange and Trade Comm. Reg. (March 19, 1965) (Taiwan), reported in O. GIBERGA, supra note 2, at 23 [hereinafter cited as Taiwan Agency Law].
81 Honduras Agency Law, supra note 24, at art. 7; Iraq Law No. 8 of 1976, supra note 47.
unjust termination;\textsuperscript{82}

2) Validity of choice of law or venue clause;\textsuperscript{83}

3) Validity of waivers by agents or distributors of termination rights;\textsuperscript{84}

4) Applicability of labor laws to agents or distributors, particularly individuals;\textsuperscript{85}

5) Specification or limitation of allowable causes for termination;\textsuperscript{86}

6) Specification or computation of compensation for unjust termination;\textsuperscript{87}

7) Contract clauses required by law.\textsuperscript{88}

C. **Clauses Necessary for Protection of Principal**

1) Clear definition of parties, especially when delineating corporate versus individual agents;\textsuperscript{89}

2) Nature of representation, i.e., whether agent or distributor;\textsuperscript{90}

3) Level of services to be performed, in particular distributorship agreements which will require the stocking of products for repair services;\textsuperscript{91}

4) Exclusivity of representation;\textsuperscript{92}

5) Specification that creates independent contractor rather than employer/employee relationship;\textsuperscript{93}

6) Power of agent or distributor to appoint sub-agents or sub-distributors without written consent of principal;\textsuperscript{94}

7) Extent to which local laws and customs govern the contract and, where possible, what laws of principal’s domicile are controlling;\textsuperscript{95}

8) Term of contract, and conditions for extension of the contract and determining duration of extension;

\textsuperscript{82} See supra Sections II(F) to (H).
\textsuperscript{83} See text accompanying notes 21-22, and Section II(I).
\textsuperscript{84} Id.
\textsuperscript{85} See supra Section II(A).
\textsuperscript{86} See supra Section II(F).
\textsuperscript{87} See supra Section II(H).
\textsuperscript{88} See, e.g., Brazil Federal Law, supra note 34, at art. 27.
\textsuperscript{89} See supra Section II(A).
\textsuperscript{90} See supra Section II(B).
\textsuperscript{91} Honduras Agency Law, supra note 24, at art. 17; Indonesian Agency Law, supra note 21, at art. 12; U.A.E. Agency Law, supra note 24, at art. 21.
\textsuperscript{92} Commercial Code of Bolivia, supra note 22, at art. 1250; Brazil Federal Law, supra note 34, at art. 27(e); Taiwan Agency Law, supra note 80.
\textsuperscript{93} This clause will be advantageous in avoiding some agency laws entirely. Saltoun & Spudis, supra note 3, at 890-91.
\textsuperscript{94} Belgian Distributorship Law, supra note 21, at art. 5; Commercial Agency in Lebanon, supra note 12, at art. 3(c).
\textsuperscript{95} See text accompanying notes 21-22.
9) Saving clause in the event a particular clause is held invalid;

10) Limitation of agent's or distributor's right to incur costs, particularly extraordinary costs, without principal's permission and the principal's right to terminate with just cause in event the limitation is violated;

11) Requirement that agent or distributor comply with laws of both principal's nation and the local government, and that no illegal or improper payments will be made to any government official, other agent, or other party to whom a direct payment by the principal would be unlawful, and that a breach of either requirement will be just cause for termination;

12) Right of agent or distributor to carry competing lines or represent competing principals and, if not, ability of principal to terminate relationship with just cause;

13) Description of conditions for termination of relationship, provisions for termination, and required period in which pretermination notice must be given, or compensation in lieu of such notice;

14) Price at which inventory will be repurchased from distributor upon termination of relationship, and directive that technical property be returned to principal upon termination;

15) Availability of arbitration to settle contract disputes, and rules under which arbitration will take place.

IV. PRACTICAL OPERATING PRINCIPLES FOR DEALING WITH PROBLEMS.

Despite having reviewed the governing local laws, determined the statutory protection afforded the agent or distributor, and including in the contract those clauses which will protect the principal, problems will inevitably still arise. The following solutions to common problems are based on personal experience.

A. Check Export Controls

A principal should affirm before beginning exporting operations that no controls exist which will hinder the exporting of the principal's products or the technical property which will be necessary to operate.

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96 Brazil Federal Law, supra note 34, at art. 29; Honduras Agency Law, supra note 24, at art. 12(a).

97 Brazil Federal Law, supra note 34, at art. 35(d); Costa Rica Agency Law, supra note 22, at art. 5(a).

98 See supra Sections II(F)-(H).

99 See supra Section II (I).
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B. Make the Agreement Work for the Principal

Draft all agreements as assertively as possible. Provide where possible that no compensation will be given for termination and insert other clauses which will give the principal freedom of action when terminating a representative. This will give the principal leverage when handling terminations. A principal should always keep in mind, however, that waivers of compensation may be invalid in some countries.\footnote{This is one example of a contract clause “against public policy” referred to in the text accompanying note 21.}

C. Keep An Agreements Calendar

A principal should keep an agreements calendar so the principal can monitor performance and keep aware of approaching termination dates. In this way a principal can avoid creating a contract of indefinite duration by allowing a representative to continue working under an expired contract.\footnote{E.g., EEC Directive on Commercial Agency, supra note 45, at art. 25; Judgment of Feb. 16, 1970, Cass. civ. com., 1970 Receuil D.S. Summ. 135 (France); HGB § 89 (W. Ger.). Even a fixed term may become of indefinite duration after a certain number of renewals, for example in Belgium. Belgian Distributorship Law, supra note 21, at 3bis.} The safest approach may be to begin each new relationship with a one or two year definite term contract, and require affirmative action on the part of one or both parties to renew the contract. This approach forces the principal to make a decision as to what term should be contracted and, more importantly, helps prevent the perpetuation of a relationship which would have been terminated upon reflection by the principal.

D. Include an Arbitration Clause

An arbitration clause is always important as a bargaining tool, even where arbitration carries less recognition or significance as a means of settling disputes.\footnote{See supra Section II(I).} If an arbitration clause exists the other party may more likely dispose of differences and accept offers of compensation without the principal having to resort to the local courts, an even more undesirable recourse than arbitration.

E. Pay Attention to the Choice of Law Clause

A principal should always focus on the choice of law clause. While it will be invalid or inapplicable in some countries,\footnote{See text accompanying notes 21-22.} it can be of great significance in other countries.
F. Focus Upon the Representative Before Termination

When a termination is on the horizon it will be wise to discuss the potential termination with the representative. If the discussion is timely it will serve as reasonable pretermination notice and may lead to settlement of many problems without litigation. Moreover, the avoidance of problems and a trouble free termination may will be the only guarantee that a principal may continue operations in the country.¹⁰⁴

G. Focus on Representatives Before Acquisition

Before acquiring a foreign business, the potential principal should examine any existing agency or distributorship agreements, and the laws under which the existing agreements operate. This will illuminate problems which could arise in future terminations. Furthermore, a principal may already have existing relationship agreements in areas an acquired agent would operate. A dual representation might be a violation of one or more contracts, and could be a violation of local law.

H. Update Contracts in Light of Legislative Changes

A principal must remain current as to the agency and distributorship laws where the principal operates. This will better insure that contracts are valid and operate as the principal believes they are or will operate, and that revisions or entirely new contracts are drafted upon renewal of an agreement to reflect new laws.

I. When Feasible, Transfer Title Overseas.

Many U.S. companies have excess foreign tax credits¹⁰⁵ and so will want to generate as much foreign income as possible to utilize their credits. Transfer of title to foreign production facilities will create more foreign income. However, the principal should beware that transfer of title does not subject the principal to new local taxes. In most countries this will not be the case, but in a few the principal will become subject to taxation upon the transfer.¹⁰⁶

V. Conclusion

As agency and distributorship agreements become more numerous and more needed by businesses around the world, they also become more varied and complex as nations pass legislation to protect their nationals and regulate foreign business operations. The checklists developed above may serve both to clarify the factors of which a principal should be aware

¹⁰⁴ See text accompanying note 64.
¹⁰⁵ Such credits are determined by I.R.C. §§ 861(a)(6), 862(a)(2) (1982).
¹⁰⁶ Saltoun & Spudis, supra note 3, at 912.
when entering an agreement, and correct the errors or alleviate the problems which arise from outmoded or misunderstood notions of foreign agency and distributorship law. In the ever changing arena of agency and distributorship agreements no principal should become too complacent, but at least with the checklists provided a well informed principal need not feel dangerously unprepared for pitfalls of foreign agency and distributorship agreements.