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SALES REPRESENTATIVES AND SALES AGENTS

KEY U.S. LEGAL ASPECTS YOU SHOULD KNOW TO PROTECT YOURSELF AND PROBABLY DON'T

1. The Contract and Relationship
2. Termination and Non-Renewal by the Principal: Commission Payments; Damages; Indemnities
3. Other Potential Problem Areas

(Substantially Expanded and Revised Second Edition)

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PART I. PRELIMINARY REMARKS

Introduction

American law on "sales representative" and "sales agency" contracts of all types (written, oral, implied, de-facto) is complicated. Probably the most complicated in the world. That is so for the aspects dealt with in this guide.

The reasons are many but certainly, the U.S. federal system is a major one. The law in this area is predominantly state law, and by no means uniform from U.S. state to state.

Probably most business people and lawyers, American as well as foreign ones, are not well versed on the U.S. law in this area. Nor are they aware of the liability risks involved, particularly to the "principal", the one engaging and contracting with the sales representative or sales agent.

Before Reading Further: Two General Conclusions

There is little doubt that a first class, comprehensive, written sales representative agreement, signed by the parties, prepared by experienced U.S. counsel, that takes into the account the law in this area, is a must. Ideally, it should be signed before the relationship begins. That is true from the standpoint of both parties, but particularly, that of the principal.

The principal should give serious consideration to forming and using a U.S. subsidiary company to enter into the agreement with a sales representative or sales agent that will function as such in the USA (including its territories and possessions, and the Commonwealth of Puerto Rico), rather than doing so directly. That is particularly so for foreign (non-U.S.) companies and businesses.

The reasons should become apparent to you as you read on.

This Guide is written mainly from the standpoint of the "principal" and how it should protect its interests. Nevertheless, sales representatives and sales agents can profit as well from it, from an understanding the legal situation, and from adapting to their own interests certain of the author's conclusions and suggestions directed to principals .

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What is a "Sales Representative" (or Rep) or "Sales Agent" under U.S. Law and Practice?

In this Guide, we are dealing primarily with "sales representatives" and "sales agents" in regard to the main issues covered: (i) the legal requirements for contracts with them under U.S. law; (ii) their termination and non-renewal and whether the sales agent can claim damages, or multiple damages (double or triple the actual damages) and/or some of indemnity or damages for loss of the business relationship; and (iii) some other potential problem areas involving sales representatives and sales agents.

Under U.S. law and practice, a "sales representative or agent" does not purchase goods from its principal and resell them. If the principal is selling mainly services to its customers, the sales rep or agent does not render the services in its own name and for its own account to the customers---and typically, does not render them at all. Rather, it is the principal that sells its goods and services (and renders the latter) to the customers. The contractual relationship with the customers is with the principal, as the seller of the goods and services. The "sales rep or agent" generally seeks to obtain and obtains orders from customers and passes them on to its principal for acceptance (or rejection) and fulfillment. Typically, the rep or agent will have a contractually assigned territory, in which it can solicit and obtain orders for the contractually agreed products or services of the supplier-principal. That territory may be, for the sales rep or agent, an exclusive, quasi-exclusive or non-exclusive one, depending on the particular case. The sales rep or agent will typically be entitled to a commission from the principal for sales of the principal's goods or services (as agreed between them) generated by the sales rep or agent, or, sometimes, from all sales made in the sales rep's or agent's territory even if the rep or agent did not actually take or generate the particular order(s) or originate the particular customer.

A "sales agent" can be a legal person (e.g., a legal entity) or an individual. Sometimes, a "sales agent" is called, in general U.S. parlance, a "sales representative" or a "sales rep" and vice versa, without particular distinction.

A distributor or dealer (for purposes of this Guide, these two terms are used without distinction) buys and resells in its own name and for its own account, the products of its supplier. Or, if the supplier is selling services to customers, the distributor/dealer will sell those in its own name and for its own account. A distributor or dealer will normally not receive any commission from the supplier; rather, it receives its profit from the sale or resale of the supplier's goods or services. An enterprise marketing computer software might appoint one or more "authorized resellers" to sell software licenses and services. The reseller is a combination of master licensee/distributor, and will normally split the resulting revenues in various ways with the software supplier.

Sometimes, the same legal entity or individual will function as both the sales rep or agent <u>and</u> distributor of the particular supplier's products or services in its assigned or agreed territory. That is, it will act as that supplier's rep or agent at certain times and as its distributor (buying and reselling) at certain other times.

Other than a few comments here and there, we do not deal with these issues treated as they may apply to distributors, dealers, licensees and franchisees.

Terms used in this Guide: "SR"; "principal" and "statute"

Because the U.S. state statutes discussed below uses the term "sales representative" (rather than sales agent) and define it, we will mainly use that term throughout the rest of this Guide rather than "sales agent". We will use the abbreviation "SR" to mean "sales representative.

The "principal" means the other party, the one that engages the SR to render the SR services for it.

The term "statute" (as in "U.S. state statute" means a law passed by the legislature. Sometimes we use the term "law" to mean "statute".

PART II. U.S FEDERAL LEGISLATION

The main issues are not dealt with by U.S. federal legislation. It is the law of one or more particular U.S. states (state law) that will apply to and determine these issues. There are 50 U.S. States; and, there is the Commonwealth of Puerto Rico to consider.

PART III. U.S. STATE LEGISLATION, DOCTRINES AND CASE LAW

A. *STATE SR STATUTES: BE AWARE OF THEM AND THEIR PITFALLS*

There is legislation in around 35 U.S. States dealing specifically and directly with SR contracts and relationships. The Commonwealth of Puerto Rico has such a law as well.

Moreover, other state laws and principles of fairly may well come into play with respect to the issues dealt with in this Guide.

The state SR statutes clearly protect the SR and pose palpable risks for principals. **The main risk is the SR's double or triple damage remedy. Under many (if not most) of them, the SR can recover up to double, or triple, the actual damages it sustains for non-payment when due of earned commissions, including upon or after termination or ending of the SR's contract with its principal. Plus, under a number of these SR statutes, a non-resident of the particular state concerned will be subject to the jurisdiction of that state's courts because of engaging the SR.** Many business people and lawyers don't know they exist and what they provide.

Synthesis of U.S. State SR Statutes

Here is a synthesis and summary in not overly technical terms of the more than 30 state SR laws and the SR law of Puerto Rico. They are by no means uniform from state to state---far from it. Certain of them contain provisions not described in this section. In any particular real life situation, the particular, potentially applicable SR statute(s) and case law would require close scrutiny and interpretation by a legal expert.

Many of these state SR statutes:

- apply whenever a principal contracts with a SR for services to be rendered by the SR within the state to solicit wholesale orders for products and compensates the sales representative in whole or in part by a commission; and provide or are interpreted by case law to mean that the statute cannot be waived by contract or otherwise or by a contract provision stating that another jurisdiction's law applies. Some statutes declare void any contract provision stating that a court or tribunal outside of the statute state will decide disputes or claims falling with the statute's ambit.

- provide that a principal who isn't a resident of that state that enters into a SR agreement subject to its SR statute is considered to be doing business in that state and subject to personal jurisdiction in it (its courts have competence over it).

- require a written sales representation agreement between the parties, but do not invalidate or render unenforceable an oral one. Some SR laws state, directly or indirectly, that oral SR contracts are valid and enforceable. Those state SR statutes requiring a written agreement typically require it to contain the method by which the SR's commission is computed and paid, and that the principal provide the SR with a signed copy and obtain a signed receipt from the SR, and may impose other requirements and obligations on the principal regarding the written agreement. At least one SR law requiring a SR contract be in writing, a signed copy given etc, also requires that it state the SR's territory and whether or not it is exclusive for that territory.

- define "principal" broadly to include anyone (legal entity, physical person, association, estate, trust, etc.) that manufactures, produces imports or distributes one or more products for sale to customers who purchase them for resale (that is, wholesale orders), uses a SR to solicit orders for them, and compensates the SR in whole or in part, by a commission payment. Generally, these statutes don't apply to SRs who are "employees" of the principal (employed SRs). But some state SR laws apply to all orders, wholesale and retail (with sometimes a narrow exception for specific types), and not just to "wholesale" ones.

- define "SR" broadly as anyone (legal entity, physical person, etc.) that solicits on behalf of a principal orders for the purchase at wholesale (or, under some SR statutes, at wholesale or retail) of the principal's product(s). At least one state's SR law limits its definition to an "individual" (physical person) other than an employee of the principal, but that's a rare exception. Michigan's SR law and a few others

apply to "employed sales representatives" (individuals that are employees rather than independent contractor SRs) as well as independent contractor SRs.

- define "commission" essentially as compensation accruing to a SR from a principal the rate of which is expressed as a percentage of the dollar amount of orders or sales. But some state SR laws go further to include any other method of compensation agreed to between the principal and SR.

- state that the terms of the contract between the principal and SR determine when a commission is due. If it doesn't , then the parties' past practices control, absent which the custom and usage in that state for the business concerned control.

- provide that the principal must pay all commissions due the SR at the time of termination of a SR contract within a specified, relatively short number of days after the termination date. And, that commissions that become due the SR after the termination date also must be paid within a specified, relatively short number of days becoming due (often shorter than the number referred to in the previous sentence). Some SR statutes define "termination" broadly to mean any ending of termination of the services performed by the SR for the principal, even termination by the principal for cause and even pursuant to a written SR agreement giving the principal that right.

- **authorize the SR to recover actual damages (e.g., the unpaid commissions) in a civil action against the principal, and under probably most of the SR statutes, double or triple the amount of actual damages, its reasonable attorney's fees and court costs, for failing to pay a commission when and as required under the statute. A few SR statutes say "up to" double or triple damages rather than just double or triple damages, meaning that there is discretion to award some multiple of the proven, actual damages, normally, unpaid commissions, up to but less than double or triple them (as applicable). Some SR statutes that specifically require a written SR-principal contract and impose obligations on the principal regarding the written contract, extend their damage provisions to the principal's failure to comply with those as well. Most SR laws state that the rights and remedies in the SR statute are not preclusive: they don't bar the SR from claiming any other ones.**

- **make no distinction, as regards the SR's rights and remedies, between a termination or non-renewal of a SR contract by the principal for "just or good cause" and any other type of termination, ending or non-renewal.**

Some state SR statutes apply not only to orders for the principal's products, but to orders SRs solicit for the principal's "services", and even "intangibles"

Many SR laws say that the SR is to be paid his earned commission and, sometimes, all other compensation earned or payable, in accordance with the terms of the parties' SR contract, but may override contract terms on, e.g., when the principal must pay earned commissions to the SR on termination and after termination.

Some number of state SR laws state when a SR's commission is earned. In some (but not all of those), the written term of the contract controls, and if there is not, other criteria apply like e.g., past practices between the parties, and absent that, the custom and usage in that business in that state.

A few SR statutes require the SR to prove the principal acted in "bad faith" in not meeting its commission payment obligations under that statute, to prevail in a double or triple damage civil action. Some of those say that the principal's failure to respond within 30 days to the SR's written, certified mail demand for commission owed creates a rebuttable presumption of the principal's bad faith. Michigan's SR law states that the principal's "intentional" failure to pay commissions when due per that law results in its liability, without bad faith being necessary. Pennsylvania's SR statute requires only the principal's "willful failure" to pay commissions when due, but no bad faith. California's law requires for its triple damage remedy the principal's "willful" failure to enter into a written SR contract containing the law's prescribed terms or the principal's "willful" failure to pay the SR the commissions stated in the written contract: and "willful" has been interpreted to mean intentional (knowing and intending conduct, as distinguished from inadvertent or accidental), but not "bad faith" conduct. Massachusetts' SR law states "willfully or knowingly" failing. Michigan's SR law provides for double damages (2 times the unpaid commissions due) but subjects the doubled part to a dollar limit.

One state SR law does not mandate or permit multiple damages for the principal's failure to pay earned commissions when due on and after the SR contract termination, but along with actual damages, mandates an additional damage amount as if the SR were still earning commissions calculated on an annualized pro rata basis from the termination date to the date of payment.

At least one SR law requires commissions payment to be made within a specific number of days after termination only if the SR contract is not in writing, and ties a SR triple damage civil action (one for 3 times the commissions found to be due) to the principal's failure to do that.

Some exclude specific types of types of business, activities, professions and relationships, from their reach, such as insurance producers or insurers; certain financial and credit institutions; registered security brokers, real estate salespersons with claims for real estate commission against his/her affiliated real estate broker; and certain home solicitation sales.

Some state SR laws say that the SR's acceptance of a partial commission payment doesn't bar the SR from claiming any other commissions it believes the principal owes, unless the part payment is made pursuant to a binding and final written settlement agreement and release. But a few such laws go on to say that a SR's full release of all commissions it claims the principals owes given as a condition to a partial commission payment is null and void. Under those SR laws, the principal must be particularly carefully how a settlement contract and release are drafted.

According to at least one state SR law, if the principal is a legal entity (the term "corporation" is used which presumably means any type of legal entity), not only the entity but any of its officers or agents that knowingly permit the entity to violate the statute can be sued personally under it.

Several state SRs have a provision on "revocable commission offers". Summarizing one of them: if a principal makes a revocable offer of a commission to a SR not its employee, the SR is entitled to the commission if (i) the principal revokes the offer for the purpose of avoiding its payment after the SR obtained the written order for the principal's product due to the SR's efforts, and (ii) the principal's product concerned is shipped to and paid for by the customer.

The Illinois SR statute applies not only to orders solicited within that State, but essentially solicited anywhere by the SR, and whether or not the SR has a permanent or fixed place of business in Illinois. It has an "up to" triple damage remedy for unpaid commissions. At least one court decision found that the Illinois SR statute applies to an "employee" located and working outside of Illinois remunerated by his employer on a commission basis. Michigan's SR law applies to orders solicited and sales made outside the State as well as inside it, but requires that the principal either manufacture, produce, import or distribute a product in Michigan, or contract with a SR to solicit orders for or sell a product in Michigan for the law to apply.

According to Wisconsin's SR law, unless a written SR contract states otherwise, the principal must give an independent SR at least 90 days prior written notice of any termination, cancellation, non-renewal or substantial change in the competitive circumstances of the contract. Wisconsin's law is rather unique in that regard.

Some state SR laws like Minnesota's (which has two of them) are rather unique, and would require more space than feasible in this guide to describe.

A considerable number of these state SR statutes are not well drafted, leaving open for interpretation and doubt a number of issues---many of which have not been addressed by courts.

Commonwealth of Puerto Rico ("PR"): its SR statute; its Dealers Contract Act

PR's relationship to the USA is as a Commonwealth and not a state. It has a SR statute. It is different and in several ways, more protective of the SR than the counterpart laws of most US states. It applies to an independent SR or manufacturer's rep who or which has exclusive rights to represent the principal's product(s) for all or part of PR as a specific territory. The "exclusivity" requirement narrows its reach, as compared with counterpart state SR laws. It states that it is a "public order" law and that its provisions cannot be waived or circumvented. It prohibits termination or non-renewal of the contract or relationship by the principal except for "just cause" as the statute narrowly defined it---and a principal's termination or non-renewal based on a clause in its agreement with the

SR permitting termination for specified "just cause" that doesn't meet the PR SR "just cause" criteria is an civil wrong permitting the SR to claim damages and other remedies specified in the SR statute and perhaps others. It states that SR contracts regulated by it must be governed by PR law and that any attempted agreement to the contrary is null and void. It does, however, permit the principal and SR to agree to resolve their disputes and claims under it by arbitration or by a court outside of PR (or in it).

In passing, PR does have another statute, its Dealers Contract Act, that applies to distributors and dealers. It is a strict law protecting those parties in broad terms, the way its SR statute protect SRs.

Employed Commissioned Salespersons

With a few exceptions, the state SR statutes don't apply to employees (employed sales reps compensated by commissions) but only SR's that are "independent contractors". That point has been made above.

The courts of some states with SR statutes, however, do apply them to "out-of-state" employees remunerated in whole or part by commission. So, for example, if an individual is a "employee" remunerated by commission of a particular company under Ohio law but not Illinois', he may considered a SR under Illinois' SR statute if that statute's other requirements are met, and thus be able to assert claims under it.

Also, a number of U.S. states do have specific statutes applicable to "employed" commissioned sales people. California has a law applicable to an employer with no permanent fixed place of business in that State, that hires an employee for services to be rendered in that State to be remunerated in whole or part by commission. That law requires a written contract stating the method by which the commissions are computed and paid, the employer to give the employee a signed copy and get a signed receipt for it. Under that California law, such an employer that employs an employee with no written contract is liable to the employee for triple damages. One lower federal court has held that California law unconstitutional. New York State's law applicable to employed commissioned salespersons is somewhat similar to California's in terms of its requirements and obligations imposed on the employer. The New York law applies to New York employees but is not directed at employers with no permanent fixed place of business in that State, as does California's.

Principal's Unilateral Reduction of SR's Agreed Commission

Here is one situation—just one—in which a principal might run a risk of substantial liability to its SR. Assume the principal and SR have a binding agreement (written or oral) on a commission rate and structure. Without the SR's consent or a clause in the written contract giving the principal the right to do so, the principal reduces the SR's commission. Later--it might be 5-6 years later--, the principal-SR agreement terminates or otherwise ends. In those U.S. states that permit multiple damages under their SR statutes, the SR might obtain a sizeable judgment against the principal: for 2 or 3 times

the resulting unpaid commissions, plus the SR's reasonable attorney's fees and court costs.

Acting as Both a SR and a Distributor: Do State SR statutes apply?

Most state SR statutes exclude from their definition of "SR" someone that places orders or purchases products (or, sometimes, services) for his own account for resale, which, is typically what a distributor does, generally with an agreed geographic territory. Sometimes, an entity or physical person functions at different times both as a SR on a commission basis and a distributor for a principal-supplier's goods and/or services, for all or part of the American market. Does acting as a distributor prevent such otherwise applicable SR statutes from applying at all?

The answer is maybe yes, maybe no. The SR statutes themselves are unclear and there is very little case law to look to on the point. One lower court Minnesota case decided that a company that sometimes bought and resold the supplier's carpets for its own account didn't qualify as a SR under the Minnesota SR statute even that company's main business was acting as a SR on a commission basis for that supplier's same carpets to wholesalers. But that decision is not necessarily good authority for even the Minnesota SR statute. New Jersey's SR statute states that does not apply to someone that places orders or purchases "exclusively" for his own account, which may mean that that the statute can apply to someone doing that and functioning as a SR for the same principal's goods or services. Arguably, if the requirements of a particular state SR statute are met for a particular SR claim based thereon, e.g., for unpaid commissions, it should apply and the fact that the person also sometimes also functioned as a distributor for that same supplier and its goods or services should not change the result.

Can a State SR law Apply to a SR Contract for Soliciting Orders Outside the USA?

At least under one such SR law, that of Illinois, apparently so. Mr. L, a California resident, contracted with T&H, a tube steel manufacturer in Illinois to find a company in China willing to build a tube steel plant in China and if he was successful, to be paid a percentage commission from T&H based on the price of the plant. Through Mr. L's efforts, such a contract was negotiated and signed, worth more than $3 million. It appears that Mr. L did not solicit any orders or business for T&H within Illinois. The US federal appeals court decided that the Illinois SR statute applied to the contract between Mr. L and T&H, he was entitled the agreed commission and the remedies under that statute.

The Illinois SR statute applies to a SR compensated in whole or part by commission, soliciting orders for a product not only in Illinois, but anywhere, whether or not the SR resides or is doing business in Illinois and whether or not the principal has a permanent or fixed place of business in Illinois. So long as there is some constitutional connection with the Illinois, the Illinois SR statute can apply if its other requisites are met. In the above case, T&H had its place of business in Illinois.

Under most other state SR statutes, it is unlikely that the same result would occur, because they require solicitation of orders within the particular state. But if the SR did solicit orders for the principal within the particular state and, additionally, outside of it and even in other countries, that might be sufficient for purposes of those statutes to bring both under their ambit.

Competent Courts; Arbitration of Claims and Disputes under SR Contracts

Some state SR laws treat as void a provision in a SR contract fixing a venue (court, arbitral tribunal) for a lawsuit under that contract anywhere except in that state.

Normally, it will be possible include an arbitration clause in a SR agreement for purposes of resolving claims and disputes between the principal and SR. In states in which SR statutes so require, the arbitration will have to take place in that state. In a state with an SR law not imposing any requirement that litigation or arbitration pursuant to take place in that state and whose SR is applicable in the particular situation, the parties can arbitrate their claims and disputes essentially anywhere. Unless the parties have specified otherwise in an arbitration clause, the arbitrator (or arbitrators, if more than one) will normally have the authority to award multiple damages such as double or triple damages under a SR law or punitive damages.

Multiple Suits

Could a SR successfully sue the same principal for unpaid commissions, for example, triple or double damages under different state SR laws, in two or more US federal or state courts? Maybe, especially if no potentially applicable state SR statute permitted claims based on unpaid commissions arising from transactions outside of that state. If all of the SR's damage claims could be consolidated into one legal action, the courts would tend favor that result. That could, in a given case, possibly result in a U.S. court applying more than one state SR law.

In one case, the SR sued first in a federal court in Ohio claiming Ohio law and the Ohio SR statute applied; and then sued again in a federal court in Illinois claiming Illinois law and Illinois SR statute applied. The Illinois court dismissed its suit, leaving the SR to continue its suit in Ohio. It concluded that the claims should be resolved in a single court, the Ohio federal court where the SR first sued, because the parties' interests in both suits and the claims were substantially the same, and Ohio SR law offered materially equivalent rights and remedies to the SR as the Illinois one.

If the parties agreed to a valid, enforceable arbitration clause, that would normally prevent multiple law suits in U.S. courts; but could, in a given situation, lead to the arbitrator applying more than one state SR law.

Law Applicable to SR Contracts

Will a court or arbitral tribunal apply more than one state SR statute in a particular case to permit the SR to recover the maximum possible amount? One or more different state SR statutes might, hypothetically, come into play and their requirements arguably met. There might be a sufficient jurisdictional link with these different states. Applying two or more such statutes might provide the SR with more protection and benefit than just one of them, the one in the U.S. state whose laws the court determined applied.
The short answer is: that is not impossible. However, from the case law examined, U.S. courts would try to avoid applying two or more states' laws in the same situation if it can still find a way to protect and compensate fully the SR. If it could not do so otherwise, then perhaps it would apply more than one state SR law. What arbitrators would do is even less predictable.

Which law will be applied to a particular SR agreement? Will a choice of applicable law clause in the SR contract be enforced by the US court or tribunal deciding the case? There is no easy answer to that question.

As a general, and not entirely reliable rule of thumb, a U.S. court or arbitral tribunal might decide to apply to the SR or sales agency contract the laws of the U.S. state or foreign country with the predominant interest in the resolution of the main issues. That will often turn out to be the law of the U.S. state or foreign country that offers the SR the most protection. Where a particular U.S. state has a "SR statute" of the type mandating a double or triple damage and an attorney's fee award to the SR for the principal's failure to pay commissions as provided in that statute, that statute will often be a "fundamental public policy" law of that state and will often result in that state's law being held applicable. It may well prevail over a SR contract provision selecting some other law as being applicable.

In one case, the question of which state SR statute applied, the Texas one, where the SR was based, or the Louisiana one, where the main customer was located on whose orders the SR was claiming unpaid commission from the principal. The California court that decided the case applied Texas law and the Texas SL statute. That statute "mandated" tripling up the unpaid commissions owed and an award of those damages to the SR. The Louisiana SL law only "permitted" the trebling and "permitted" the SR's recovery from the principal of its attorney's fees. Thus, the Texas statute offered more protection to the SR than the Texas counterpart.

In another decision, the principal was located in Texas, the SR in Illinois. The parties' SR agreement stated that Texas law applied. The Illinois appeals court applied Illinois law and the Illinois SR statute, mandating triple damages (3 times the commissions owed) and mandating the principal to pay the SR's reasonable attorneys fees. The Illinois appellate court decided that Illinois law, including the Illinois SR statute, expressing a "fundamental public policy" of that State, applied, "because Texas has no law providing the strongest protection offered by [the Illinois SR statute]. The court found the Texas SR law to provide the SR less protection than the Illinois one. There are other Illinois decisions applying the same principles and arriving at the same result.

But not all courts will apply the same principles as above or come out the same way. Some American courts will apply the parties' contractual choice of law under certain circumstances without going through an analysis as above, even if it has its own SR statute" that would be thereby circumvented.

Summaries of Particular State SR Statutes: New York; New Jersey, Pennsylvania and Illinois

Annexes 1, 2, 3 and 4 contain summaries of those SR statutes.

B. *DAMAGES FOR IMPROPER TERMINATION OF SR CONTRACTS UNDER STATE LAW*

Leaving aside state SR statutes, there are several different legal theories that a SR might assert in a lawsuit for damages based on the principal's alleged "improper termination" or non-renewal of a SR contract . We will mention only a few of them.

The SR might claim damages for violation of one or more state SR statutes as well as damages under one or more of these other theories.

Before we discuss these other theories, a few words about "oral" or "de facto" SR contracts.

Is an Oral or "De Facto" SR Contract Valid and Enforceable under U.S. state law? The "Statute of Frauds"

Let us assume, hypothetically, that there is such an agreement. By "de facto" SR contract, one that the principal and SR have allowed to exist, without any written SR contract, by their course of conduct.

Typically, it will be the principal (e.g., supplier) who will want to end the oral or de facto agreement or relationship. The principal will usually want to claim that the agreement, understanding or relationship is void and enforceable.

Each US state has a "statute of frauds ("SofF"). In general, it is a rule requiring certain kinds of contracts to be in writing and signed by the party against which enforcement is sought (typically, for purposes of this Guide, that party will be the principal--the supplier). One kind is a contract that cannot be performed and completed within one year, which typically, under the state SofF, is void. The SofF of the U.S. state whose law applies to the particular contract must be reviewed, as the SofF does vary from state to state. By way of example only, New York's SofF states in part:

> "Every agreement, promise or undertaking is void,
> unless it or some note or memorandum thereof
> be in writing, and subscribed by the party to be charged
> therewith, or by his lawful agent, if such agreement,

promise or undertaking:
1. By its terms is not to be performed within one year of the making thereof…..”

Usually, it is the supplier or principal that will want to claim that the SofF makes the purported oral or “de facto” or implied agreement, promise or undertaking void or unenforceable because it is not in a writing signed by it, and/or cannot be performed within one year from its making.

The case law interpreting this type of SofF, like New York’s, is rather inconsistent, making it difficult to predict the result in any particular case. For example, some New York court decisions conclude that contracts of indefinite duration are capable of being performed within one year because they are terminable by either party “at will”, thus, are not void under the above quoted SofF. Other New York court decisions are less clear.

However, U.S. states may permit the plaintiff (e.g., the terminated SR or sales agent) to recover damages under against the supplier under one or another legal theory even if the agreement is found to be void under the state’s SofF.

Now, here are some of the other legal theories an allegedly improperly or abusively terminated SR might attempt to invoke.

Principal’s Breach of Written SR Contract

This is obvious and will not be discussed.

Principal’s Breach of Oral or De Facto SR Contract

There is case law authority in many U.S. states to the effect that if such a contract, exclusive or not to the SR, has no agreed term of duration, the contract can be terminated without cause by either party “at will” upon “reasonable” notice to the other.

But if the oral or de facto contract were subject to “prescribed conditions” established by the parties then such contract would continue in force indefinitely so long those conditions continued to be met and only terminable by the principal for some serious cause”. A plaintiff SR argued in one Pennsylvania litigation that there were the following “established prescribed conditions” that it had met until the defendant-principal’s alleged wrongful termination: (i) sending plaintiff’s mechanics to defendant-supplier’s schools; (ii) selling defendant-supplier’s products exclusively; and (iii) maintaining sales of defendant-supplier’s products in the SR’s distribution territory; and (iv)that the contract was terminable only for serious “cause”. In that case the SR didn’t convince the court that the it applied, it illustrates the theory.

The “Procuring Cause” Doctrine and Post-Termination Commissions

In abbreviated terms, the "procuring cause" doctrine may entitle a SR to recover commissions on sales made after the ending of his SR contract if the SR procured the sales through its efforts before its ending. It is a common law doctrine and thus, applies in most if not all US states. Most states may not require the SR to conclude and complete the sale itself, it being probably enough that the SR's efforts were the procuring cause for it. As the reader will appreciate, the fine details as to the "procuring cause" doctrine and its application may vary from state to state and case to case. An SR that generated and/or developed a particular customer for a principal's products or services through its efforts while its SR contract was in force might wish to claim commissions on all of the principal's sales to that customer made after the SR agreement ends, either for a specified time period or with no time limit. If the SR was granted exclusivity for a particular territory (e.g., all or part of the USA) and if the particular customers originated and developed by the SR (thus, arguably the "procuring cause") are within that territory, its commission claim argument may be stronger. Case law in some US states have allowed to recover post-SR contract commissions under an oral agreement for so long as the customer continued to purchase the principal's products. And, in some cases, because the principal didn't pay those commissions when and as the particular state's SR statute required, the SR could claim and recover damages, even multiple damages(e.g., 2 or 3 times the actual damages) under it. For how long after the SR contract's ending a court might award commissions to be paid to the SR based on the "procuring cause" doctrine is almost impossible to predict.

If, however, a written SR contract clearly specifies that the SR is entitled to no commissions on orders received by the principal after the SR contract's effective date of termination or ending even if the customer was originally procured or actively solicited by the SR or the post-termination order arguably resulted from the SR's efforts, or the contract provisions otherwise clearly excludes or limits such post-termination commission provisions, they stand a reasonably good chance of being valid and enforceable in most US states, despite any procuring cause or other argument. Of course, the law of the particular US state or states likely to apply to the particular SR contract and situation should be examined in advance of preparing the SR agreement.

Tortious Interference with Existing and/or Prospective Business Relationships

The general concept is that the principal's termination of the SR unlawfully interfered with the SR's contractual or business relationships with its existing customers and/or ones that the SR anticipated from prospective customers for the principal's products or services.

Unjust Enrichment (Quantum Meruit)

The theory is essentially that one party (the SR) has a "reasonable expectation" of payment from the other party (the principal) and it would be unjust enrichment for the other party to receive the benefits of the first party's services without payment. One of the main components of such a claim would be the principal benefited from the SR's

customer generation/development and marketing efforts on the principal's behalf; and the principal continue to sell to those customers generated and cultivated by the SR.

Principal's Breach of its general implied duty of "Good Faith and Fair Dealing"

That implied duty is recognized and applied by many U.S. states. In some, it is not recognized as a separate "cause of action" or legal basis for a damage claim, so would have to be used in connection with another recognized one. In the contract context, that implied duty is rule to prevent one party from exploiting ambiguities in a written, oral or even perhaps "de facto" contract to harm the other party. It might come into play if a supplier had an improper motive in terminating a SR, distributorship or similar contractual relationship. Even if a written contract exists providing for termination by the principal without cause or even for a specified cause, and its termination is based on the contractual provision, the "implied covenant" might be raised to claim that that the principal's termination was motivated by and done in bad faith, and would unfairly deprive the sales agent of future benefits which it reasonably could expect from the relationship.

The SR's argument based on this implied duty might run something like this: The principal cannot lawfully terminate (or possibly, not renew) my SR contract and deprive me of my future commissions, after I have invested money, time and effort in the contract and relationship, to appropriate more of the gain that my investments brought into being. An obligation to avoid "oppressive advantage-taking" is part of the principal's implied in law duty of "good faith and fair dealing" that is read into every contract, including my SR contract.

Insufficient Notice of Termination

The SR might argue that the termination notice given it is legally insufficient and base a damage claim thereon.

There are a number of legal bases that a SR might invoke to support that claim, which we will not mention or discuss here.

(i) Termination Notice Based on Written SR Contract's Termination Clause

If the principal's termination is based on a specific termination clause in a written SR contract providing for a specified notice period before termination becomes effective, whether termination is for a stated cause or reason, or not, it is likely to be upheld by most U.S. courts. If the clause invoked allows the principal to terminate immediately without prior notice for a specified reason or cause, including a material breach of contract, such termination it is also likely to be upheld as lawful by a U.S. court.

The above is only a "rule of thumb" and in any particular situation, the applicable law should be consulted prior to terminating and even before an SR contract is drafted.

Over the years, there have been a great deal of litigation around the USA over whether termination of SR, distributorship and other contract types under the written termination provisions providing for specified prior notice or no prior notice whether the notice period stipulated in a written contract is lawful.

(ii) Termination Notice For Oral, De facto or Implied SR contracts

Many U.S. states follow the rule that a SR contract that is oral, de facto or implied from the circumstances ---where the parties have not agreed even orally about how and on what basis it can be terminated---can be terminated at any time by either party, without cause or the necessity of stating any. Some states may follow that rule with the added concept that the parties must allow the SR contract to remain in force for a reasonable time before terminating.

But some U.S. states will require for a termination without good cause, particularly by the principal, that the other party be given "reasonable notification" of the relationship's termination. What "reasonable notification" is will vary from case to case. And, if the termination, particularly by the principal, is for "cause", then the issues may arise: is the cause really a serious one, like a material breach or similar conduct by the SR or even a serious occurrence not due to the SR going to the essence of the relationship, and can the principal prove that in case of litigation, and should I give the SR any prior notice of termination and how much, to avoid any SR claim of insufficient notice of termination.

Also, at least one state SR statute, Wisconsin's, unless a written SR contract states otherwise, the principal must give an independent SR at least 90 days prior written notice of any termination, cancellation, non-renewal or substantial change in the competitive circumstances of the contract. That seems to apply even where there is "good" or "serious" cause for the principal's termination.

Again, in any particular situation, the applicable law should be consulted prior to termination of a SR contract and even before a SR agreement is drafted. There has been considerable litigation all around the USA about termination of such SR contracts and other types and the required termination notice.

Indemnity or Damage Claims for Improper Termination or Non-Renewal Based on Foreign Law

Can a SR claim in a U.S. court that foreign law according it damages or an indemnity for unlawful or abusive termination or non-renewal of a SR contract by the principal should apply? Many countries around the world have laws that protect SR's and commercial agents in that way. The general answer is yes, if the court finds that that country's law is applicable to the SR contract and its termination or non-renewal. There are U.S. court decisions that have done just that. There are arbitral awards reaching that result as well.

So, for example, if a written SR contract stated that French law applies to it, and supposing that French law provides an indemnity or damage remedy in this situation,

even to a SR performing its services outside of the France, if the U.S. court found that French law generally and its particular termination or non-renewal indemnity or damage rules were applicable, then it might well apply them. Probably, the SR would have the burden of raising the point and proving what French law provided ---it is unlikely that the U.S. court would do that on its own. If the written SR contract was silent on the applicable law or it was an oral or de facto agreement, the same principles would probably apply.

Even if a written SR contract specified an applicable law, for example, New York law, it might be possible to convince a U.S. court to apply a foreign law according an indemnity or damages to a SR for the principal's unlawfully termination or non-renewal of that contract. One set of principles sometimes employed by U.S. courts to get there is roughly as follows:

(i) if the parties have specified an applicable law in their contract and it has a reasonable relationship to the transaction or matter, it will apply, but

(ii) if there is a jurisdiction with a materially greater interest in the determination of a particular issue and that law would apply to it if there were no specified applicable law provision in the contract, that other jurisdiction's law will apply to it---particularly if that other law is of a "public policy" nature.

If, however, the foreign country's law's application is clearly limited to the SR's or commercial agent's activities for the principal's goods or services performed in that foreign country, or even if potentially extraterritorial, requires as a starter that those activities include at least some performed within the home country (for a U.S. SR that would almost never apply), a U.S. court would probably not apply the foreign country's law.

PART IV. CONCLUSIONS AND SUGGESTIONS

Preparing the SR Contract; What the Principal Should and Should Not Do

There is absolutely no substitute for a very well thought out and drafted SR contract, U.S. style, prepared by an American lawyer, that protects the interests of the particular party and that takes due account of the legal framework in the USA.

If prepared properly for a principal, such a contract should reduce substantially the risks of damage claims by the SR for commissions, and improper contract termination or non-renewal.

The principal, through its lawyer, should try at all times to maintain the drafting initiative---it should prepare the contract drafts and not allow the SR or its lawyer to prepare any contract drafts, but only to comment/propose changes to the principal's drafts. That will usually result in a contract that properly protects the principal's interests.

The principal should seriously consider using a new or existing U.S. subsidiary company to be the principal and contract with SRs for the U.S. market. That company would have less assets and capital than the parent company. One important reason would be to exclude or at least reduce the risks of the parent company being sued in a U.S. court for unpaid SR commissions possibly involving triple or double damages under a U.S. state SR statute, for improper termination of the SR contract and the like. That applies in particular for foreign (non-U.S.) businesses. In this scenario, the U.S. subsidiary would probably be the one contracting with the customer for its goods or services. Many of the state SR statutes provide that a non-resident principal that enters into a SR contract subject to the SR statute is doing business in the state and can be sued there. Even where there is no such applicable SR statute, the non-resident principal might be subject to the courts of one or more U.S. states because of entering into and performing a SR contract.

The principal should definitely avoid the following with regard to SRs for the U.S. market or that might be subject to U.S. law:

1. having no written contract, only an oral one;
2. having a de facto SR relationship;
2. having only correspondence that establishes a contract with the SR;
3. having a SR contract that is not prepared by an experienced American lawyer.

These are the types of contracts and relationships that typically result in claims against the principal and litigation, including for unpaid commissions, improper termination or non-renewal. And, these are the type of cases that the principal often loses.

The majority of commercial lawsuits (or threatened ones) in the USA end up in a settlement between the parties. The SR may threaten to bring, or actually bring, a lawsuit only to pressure the principal into concluding a settlement for a considerable amount of money paid to the SR. The principal, particularly one in another foreign country, may be intimidated by the amount of damages that the SR may claim and possibly recover, and by the costs of fighting a litigation (or even an arbitration).

Examples of Clauses Intended to Protect the Principal against SR Claims for Unpaid Commissions and Others, including Damages for Improper Termination of the SR Contract

Here are some examples:

1. ones that comply and are compatible with any U.S. state SR statute that might be applicable to the contract and situation.

2. various clauses allowing the principal to terminate for specified cause. For example, the SR's failure to obtain a specified minimum orders amount within the agreed time period; termination due to the agent's breach of the sales agency contract or tortious or inappropriate conduct of the SR; termination for certain changes of circumstance;

3. clauses allowing the principal (or both parties) to terminate without cause on a specified amount of prior notice.

4. clauses stating that the principal will incur no liability to the SR due to the termination or other ending of the contract and relationship pursuant to the contract's terms and applicable law [but subject to certain specified exceptions].

4. clauses stating that both parties agree that the termination and termination notice provisions contained in the contract are reasonable, are not unconscionable or otherwise unfair and that neither party will ever so claim; that the contract is a negotiated one between equals; and that no presumptions against the contract's drafter will apply.

5. to the extent possible, a clause providing, as the applicable law, the law of a US state that is reasonably favorable to the principal regarding commissions due the SR, and termination and non-renewal issues.

6. a clause stating that no conflict of laws (the French call it "private international law- "droit international privé") doctrine will apply resulting in the law of any other jurisdiction being applied in place of the one stipulated in the contract .

7. a well thought out, properly drafted arbitration clause or competent court provision that is as favorable as possible to the principal.

These types of clauses may not be appropriate in a particular situation. Also, there are other clauses, not mentioned here, that the contract might contain to reduce the principal's.

Many of the points and suggestions made above apply where the "principal" is the US subsidiary or US affiliate of a foreign company.

Other Points regarding SR Contracts and Relationships

Here are a few other points to bear in mind in connection with SR contracts and relationships for the U.S. market.

(i) **Commission, Rate and Basis.** These terms must be carefully negotiated and drafted in the SR. On which sales does the SR earn its commission and at what point in time? If the principal has more than one SR for the USA, there is the potential for territorial customer overlaps. Who earns what commissions on which sales are questions that should be resolved in advance by contract.

(ii) **SR Accepting Orders.** The principal should avoid allowing its SRs to accept orders for its goods (or services). Allowing a SR to accept orders can result in U.S. tax and legal problems for the principal, particularly a foreign one. The principal should be the only one to accept (or decline) orders. Those points should be clearly specified in the SR contract; and the principal should, in actual practice, adhere to them.

(iii) **Advances:** If the principal plans to allow a SR to receive advances against future commissions, the contract should be very clear that these are advances to be repaid within a specified time—for example, if earned commissions do not equal the advances.

(iv) **Non-Competition Clauses and Other Restrictive Covenants After the SR Ends.** These subjects are beyond the intended scope of this Guide. Whether such clauses are valid and enforceable will depend on the applicable U.S. state law. In some states, post-contract non-compete clauses on the SR may not be enforceable at all. In others, they may be subject to certain requirements and narrow limits. Clauses prohibiting the SR's disclosure/use of the principal's confidential information after the SR contract ends, and clauses prohibiting the SR from soliciting customers of the principal or the principal's employees after contract end may, if properly drafted, also be enforceable. Again, though, the applicable state law will require prior review.

(v) **SR or Sales Agent Really the Principal's Employee?** If the SR or sales agent is an individual, it is quite possible that he/she will be legally characterized as the principal's "employee" for U.S. legal and tax purposes. Simply writing in the contract that he/she is not the principal's employee will probably not do the trick. There are specific American rules governing when an individual is or is not the "employee", rather than an independent contractor. If, in fact, the individual should successfully claim he/she is an employee and certain payments should have been made to him or on his behalf by the "employer" that were not made, the "employer" may have a serious problem. Even if the SR or agent functions as such through a company he/she owns (which is the contracting party), rather than as an individual, this danger might still exist, depending on the circumstances. Also, for income tax and other reasons, a foreign company will not want to have any U.S. employees soliciting and taking orders for good or services on its behalf within the United States.

No SR to Prepare: Preparing for Principal's Termination or Non-Renewal

Sometimes, it will be too late to start thinking about concluding a proper contract for a particular SR. The principal may already have a poorly written one or incomplete one, or an oral one, or a "de facto" one with a SR. The principal may wish to terminate that SR contract or allow it to expire (non-renewal), or even convert an SR contract that is or might be considered as exclusive for all or part of the USA into a non-exclusive one.

Before doing so, the principal should consult competent U.S. counsel. Typical such counsel would research, analyze and advise the client-principal on the legal situation, and how the principal might proceed. U.S. counsel would then typically draft for the principal, with the latter's input and approval, the termination or other letter to the SR.

Termination of Distributors, Dealers and Licensees: Damages and Indemnities under U.S. Law

While not the topic of this Guide, a few remarks on these points are in order.

A great many of the points made above will apply to the termination of distributors, dealers and licensee under U.S. law. There are some differences, however. The state SR statutes do not apply, they apply to SRs. There are few U.S. federal statutes that apply to the termination of certain types of distributors and dealers. Also, in a few U.S. states (Minnesota being one), and in Puerto Rico, there are specific laws dealing with the termination of distributors and dealers. There are as well certain provisions of the U.S. law of sales (which is a unified law applicable in all U.S. states, with some minor differences) containing general principles that might be used to attempt to justify improper termination claims by distributors, dealers and licensees. In addition, most U.S states have "franchise acts"----specific laws applicable to franchisor-franchisee relationships. Some of those franchise acts and the pertinent case law will characterize certain distributorship, dealership and license contracts as being "franchise contracts" subject to its franchise act. Some of those state franchise acts prohibit the franchisor from terminating the franchise other than for "good cause", which is often a rather narrowly defined term; and provide for multiple damage claims.

But again, as in the case of SR, well conceived and drafted contracts, prepared by a competent and experienced U.S. lawyer, can usually reduce the supplier's risk of improper termination claims and other potential ones by its distributor, dealer, or licensee.

Counseling the SR or Sales Agent

This Guide focuses mainly on the "principal" and its interests and protection. Obviously, if the author or his law firm were representing the SR or sales agent as a client in any particular real life matter, the focus would be protecting the client.

ANNEX 1: SUMMARY OF NEW YORK STATE'S STATUTE ON "SALES REPRESENTATIVES"

New York State has a law (statute) concerning "sales representatives", a term defined in the law. We'll continue to use the abbreviation "SR". A "sales agent" meeting that definition would also qualify. A "SR" is defined as an individual or a legal entity that solicits wholesale orders in New York State on behalf of a "principal", is paid on a commission basis, and is not an employee of the principal.

The New York law defines "principal" as "a person or company engaged in the business of manufacturing, and who (i) manufactures, produces, imports, or distributes a product for wholesale; (ii) contracts with a SR to solicit orders for the product; and (iii) compensates the SR in whole or in part by commissions.

In summary, the law provides

(1) Where the SR is to solicit wholesale orders in New York State, there must be a written contract between the principal and SR setting forth the method by which the SR's commission is computed and paid;

(2) The principal must provide the SR with a signed copy of the contract and must obtain a signed receipt for it from the sales representative;

(3) The SR must be paid his/her/its earned commission under the contract in accordance with its terms, but not later than 5 business days after the commission is earned (the term "earned commission" is defined in the law); and if the SR contract becomes terminated, within 5 business days after termination or within 5 business days after the commissions become due in the case of earned commissions not due for payment on the SR contract termination date;

(4) When the SR contract ends, all "earned commissions" must be paid to the sales representative at the usual place of payment unless the SR requests that commission payments be sent by mail, and if sent by mail, the earned commissions are deemed paid as of the date of postmark; and

(5) A principal that fails to comply with that law's provisions on timely payment of all "earned commissions" is liable for "double damages"; and the winning party in litigation (and presumably, arbitration) is entitled to recover its reasonable attorneys' fees, court costs and disbursements.

A few lower court decisions conclude that this statute does not apply at all to "oral" SR contracts.

As stated above, if the SR is really an "employee" of the other party, and not an independent SR (an "independent contractor"), then this SR statute does apply. Rather, New York State labor law provisions governing employees employed in New

York State, including possibly its special provisions on employees remunerated on a commission basis will apply (along with US federal employment laws).

There are several aspects of this New York State sales representation law which are unclear, due in large measure to poor drafting.

ANNEX 2: SUMMARY OF NEW JERSEY'S STATUTE ON "SALES REPRESENTATIVES"

1. The New Jersey statute (the "Act") defines these the following terms:

A "principal" is any person (whether or not having a permanent or fixed place of business in the New Jersey) that (i) manufactures, produces, imports or distributes a product or offers a service, and (ii) contracts with a SR to solicit orders for the product or service and compensates the SR in whole or part, by commission.

A "SR" is anyone not an employee of the principal, that contracts with a principal to solicit orders and is compensated, in whole or in part, by a commission, but does not include one that places orders or purchases exclusively for his own account for resale.

A "commission" means the compensation accruing to a sales representative for payment by a principal, earned through the last day on which the SR's services were performed, the rate of which is expressed as a percentage of the dollar amount of orders or sales or as a specified amount per order or per sale.

"Sales representative" is defined as "[a] person who contracts with a principal to solicit wholesale orders from retailers rather than consumers and is compensated in whole or in part, by commission. The term does not include one who places orders or purchases for his own account for resale or one who is an employee of a principal.

2. When a SR contract is terminated, the principal must pay to the SR its unpaid commissions and other compensation earned as a result of the relationship within the later of 30 days from the date of the SR contract's termination or 30 days from the date the commissions are due.

A SR must be paid its commissions on goods ordered up to and including the SR contract termination date even if accepted by the principal, delivered, and paid for after the SR contract ends. Those become due and payable within 30 days after payment would have been due under the SR contract if it had not been terminated.

3. "Termination" of means the end of the SR's services for the principal "by any means" (any type of termination or ending.

4. A principal violating or failing to comply with 2 above is liable for (i) all amounts due the SR; and (ii) 3 times the amount of commissions owed to the SR; and (iii) the SR's reasonable attorney's fees and court costs.

5. A principal not residing in New Jersey that contracts with a SR to solicit orders in New Jersey is deemed to be doing business in that State for purposes of personal jurisdiction over it.

6. The Act's provisions cannot be waived by contract, including by providing therein for the application of the laws of another jurisdiction.

7. The Act does not apply to certain narrowly defined persons, such as licensed or regulated real estate sales persons.

8. Nothing in the Act prevents the SR from asserting claims against the principal not specified in the Act (for example, for wrongful termination of the SR contract or relationship) or from seeking to recover in one lawsuit on all claims against the principal.

ANNEX 3: SUMMARY OF PENNSYLVANIA'S STATUTE ON "SALES REPRESENTATIVES"

"Principal" is defined in the Pennsylvania statute (hereafter "PA Law") as a person who does all of the following:

(1) engages in the business of manufacturing, producing, importing or distributing a product for sale to customers who purchase such products for resale.

(2) utilizes sales representatives to solicit orders for such product.

(3) compensates sales representatives, in whole or in part, by commission.

"Commission" is defined as "compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of orders or sales.

"Sales representative" is defined as "[a] person who contracts with a principal to solicit wholesale orders from retailers rather than consumers and is compensated in whole or in part, by commission. A court decision has interpreted "retailers" narrowly to mean sellers of products to ultimate consumers. The "sales representative" definition does not include one who places orders or purchases for his own account for resale or one who is an employee of a principal.

The PA Law states that "[w]hen a sales representative enters into an agreement with the principal for the solicitation of wholesale orders, a written contract shall be entered into setting forth the following:

(1) The form of payment and method by which it is to be computed and made.

(2) A specified period for the performance of services.

(3) The manner and extent to which job-incurred expenses are to be reimbursed.

(4) A specified geographical territory or specified accounts."

The principal must provide each sales representative with a signed copy of the contract.

The PA Law states that "[t]he terms of the contract, whether or not in writing, between the principal and sales representative shall determine when commissions become due". It continues on to say:: "If the time when commissions become due cannot be determined by a contract between the principal and sales representative, the past practices of the parties shall control, or, if there are no past practices, the custom and usage prevalent in this Commonwealth [of Pennsylvania] for the business is the subject of the relationship between the parties shall control."

Two important provisions of the PA Law are:

"A principal shall pay a sales representative all commission due at the time of termination within 14 days after termination." (writer's emphasis); and

"A principal shall pay a sales representative all commissions that become due after termination with 14 days of the date such commissions become due." (writer's emphasis).

It further states: "A principal who willfully fails to comply with the two 14 day rules just above is liable to the sales representative in a civil action for

(1) all commissions due the sales representative, plus exemplary damages in an amount not to exceed two times the commissions due the sales representative.

(2) The costs of the lawsuit, including reasonable attorney's fees".

The provisions of this Pennsylvania statute cannot be waived, whether expressly or by attempting to make a contract or agreement subject to the laws of another state.

By its terms, the PA Law applies to contracts that can be terminated at will.

ANNEX 4: SUMMARY OF ILLINOIS' STATUTE ON"SALES REPRESENTATIVES"

The Illinois Sales Representative Act (the "Act") defines or states that

- a "principal" is essentially anyone, having or not a permanent or fixed place of business in Illinois, that manufactures, produces, imports or distributes a product for sale, contracts with a SR to solicit orders for the product, and compensates the SR, in whole or in part, by commission.
- a "sales representative" ("SR") is a person that contracts with a principal to solicit orders and who is compensated, in whole or in part, by commission, but does not include one placing orders for products for his own account for resale, or is an Illinois employee of the principal.
- the SR contract determines when the SR's commission becomes due, but absent one clearly determining that, the parties' past practice controls; and absent that, custom and usage prevalent in Illinois for the parties' industry controls on that point. "Commission" means compensation accruing to a SR for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of orders or sales or as a percentage of the dollar amount of profits.
- all commissions due at the time of the SR contract termination must be paid within 13 days thereafter, and commissions that become due after termination, within 13 days from the date they become due.
- a principal that fails to pay commissions when due is liable in a civil action for damages of up to 3 times the amount of commissions owed the SR, and must pay the SR's reasonable attorney's fees and courts. Case law seems to require the principal's "bad faith" conduct in order for an "up to 3 times damage" claim to succeed.
- any clause in a contract between the principal and SR attempting to waive any provision of the Act is void.

The Act applies to all SR contracts having a constitutional connection to Illinois sufficient to confer jurisdiction. The Act also applies extraterritorially, to sales occurring outside of the State. While individuals qualifying as Illinois employees (for purposes of Illinois employment law) are excluded from the Act's coverage, out of state employees remunerated in whole or part on a commission basis and meeting the Act's other definitions and criteria are covered by it and treated as SRs.

ANNEX 5: LIST OF OTHER NO COST PUBLICATIONS OF THE ATTORNEY-AUTHOR

Unless otherwise stated, the author of the cost-free publications below is Aaron N. Wise, Attorney at Law and partner of the law firm, Gallet Dreyer & Berkey, LLP à New York City, USA. These (and others) can be obtained by contacting Mr. Wise or by downloading them from his law firm's website, www.gdblaw.com, by, on the home page, clicking "Practice Groups" and on the next screen, "International" and right under that, "Publications".

Doing Business in the USA" a "Bullet Point" Guide….." (available in English and several other languages).

What Type of American Legal Entity Should I Use for my American Business Operation ? A Guide for the Foreign Business Person

A Foreign Business Person's Guide to American Law – Business Practices - Taxation

American Product Liability: "Good News for Business!" Recent Trends and Developments: A Guide for Foreign Companies

General Terms of Sale for Exports to the USA, the Western Hemisphere Generally and Worldwide: A Guide for the Foreign (non-US) Exporter

Placing Your Goods "on Consignment" with your American Business Partner: What the Foreign Exporter and its Financing Bank or Factor should know

Debt Collection: Will United States Court Recognize and Enforce Foreign Country Judgments? A Practical Guide for the Foreign Lawyer and Business Person

Dealing with Employees under American Law: A Short Guide on Some Important Points

Purchase and Leasing of Real Property in the United States
(the authors are David L. Berkey, Partner, and Aaron N. Wise, Partner, Gallet Dreyer& Berkey, LLP)