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# SALES TRANSACTIONS IN LATIN AMERICA: THE FUNDAMENTAL ISSUES†

SHELLY P. BATTRAM*

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## I. INTRODUCTION

One can no longer view the subject of international commercial transactions as an area about which only a few specialists in private international law need be concerned. Changing patterns in world trade and international business during the last decade, cou-

pled with the increasing complexity of modern commerce, reflect the greater importance of this area of law. A significant obstacle to expanding the export base of U.S. businesses is the perception of the business community and, to some extent, the legal community, that international commercial transactions involve unmanageable risks and uncertainties. Once a lawyer identifies and defines the risks involved, the lawyer may address the legal uncertainties as he or she would any other business risks. The central objective of this article is to remove some of the mystery surrounding international sales transactions, particularly those with Latin American countries, by focusing on certain key areas in which international sales transactions differ from domestic ones.

U.S. exporters, as well as their legal counsel, should be aware of U.S. legislation that affects international sales transactions but lie beyond the scope of this article, including: 1) Foreign Corrupt Practices Act;[1] 2) the Export Administration Act;[2] 3) Anti-Boycott Regulations;[3] 4) Export-Import Bank Regulations;[4] 5) antitrust matters; and 6) the International Economic Energy Powers Act.[5]

While this article does not explore cross-cultural aspects of international sales transactions, the importance of minimizing misunderstandings arising out of differing cultural traditions should not be underestimated during the negotiating process. These differences often cause each party to view an identical situation differently, often leading to misunderstandings and conflicting goals. It is important before entering into negotiations with individuals from another cultural background to be familiar with those social customs and norms which influence their attitudes and behavior.

Geared mostly for practitioners, this article emphasizes legal considerations in penetrating foreign markets for the sale of goods. In so doing, it focuses on methods of penetrating markets, negotiating and structuring sales representation contracts in Latin America, and selling goods to the foreign customer. Part II of this article outlines briefly considerations in retaining foreign counsel. Part III then examines contractual provisions and concerns which are common to international agency, distribution, and sales contracts. Part IV describes the elements of sales representation con-

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1. 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1988).
2. 50 U.S.C. app. §§ 2401-2420 (1982).
3. 15 C.F.R. § 769 (1989).
4. 12 C.F.R. §§ 400.735-1 to -76 (1988).
5. 50 U.S.C. §§ 1701-1706 (1982).

tracts and focuses on concerns central to Latin America. Part V describes the elements of an international sales contract, again reviewing issues applicable to selling goods to customers in Latin America. Finally, Part VI reviews the United Nations Convention on the International Sale of Goods and its implications on drafting international sales contracts.

## II. Retaining Foreign Counsel

While the selection of foreign counsel in an international sales transaction is an important component of a lawyer's duties, it can also be one of the most difficult and confusing duties. In any type of international transaction, a lawyer cannot conduct the matter in the same way as he or she would a client's domestic affairs. To do so would be not only inefficient, but also could result in serious business and legal errors. In Latin America, a client's business will be subject to pressures which are often different from those experienced in the domestic arena. However, before retaining foreign counsel, a lawyer should have a basic understanding of applicable foreign law in order to ask relevant and appropriate questions and to ensure that the transaction is appropriately structured to the factual situation in light of the foreign legal system. Because there are many ways to structure international transactions, a clear understanding of the legal systems of both contracting parties and the manner in which the legal systems interact is vital.

In communicating and dealing with foreign lawyers, one should bear in mind that while U.S. attorneys play a significant role in business transactions, in many other countries, counsel's role is limited to the legal issues at hand. Also, in many countries, the legal profession is not a unified profession, but is comprised of several professions whose functions often overlap.

Before actually seeking foreign counsel, it is important to identify those basic attributes of foreign counsel that will facilitate the transaction. For example, fluency in English, access to telex and telecopy equipment, and some familiarity with common law concepts are essential.[6]

In seeking competent and affordable foreign counsel, one

6. *See generally* M. Cohen, Selection of Foreign Counsel, Remarks at the Autumn Meeting of the Section of International Law and Practice of the American Bar Ass'n (Fall 1987).

should solicit recommendations and always check references. For instance, it is advisable to ask a lawyer who has worked with counsel in a foreign country to recommend qualified counsel. Failing this, one can consult several international legal lists.[7] The Section of International Law and Practice of the American Bar Association has recently published new lists, based on the recommendation of members of the Section of foreign lawyers with whom they have had dealings.

Although selecting foreign counsel can be time-consuming and frustrating, it will often determine the success or failure of a client's foreign transaction. Despite the added complications, working with foreign counsel may prove to be one of the more interesting and exciting aspects of the practice of international law.

## III. Issues Common to International Agency, Distribution, and Sales Contracts

### A. *Choice of Language*

Language and cultural differences between a U.S. businessperson and a Latin American counterpart may cause misunderstandings at a later date concerning the intent expressed in the contract. For instance, a buyer in Brazil relying on the Portuguese text of the contract may argue that the goods do not meet contractual specifications, while the foreign seller may argue that the products comply with the specifications set out in the English translation of the agreement.[8] To avoid such problems, an international contract should have an official language text that the parties regard as definitive.[9] Second, the contract should provide an official language for all future communications between the parties which would usually be the same as the official language of the contract. Third, the parties cannot assume that any resulting arbitration proceedings arising out of the contract will be conducted in English merely because the contract is in English. Overall, then, the choice of lan-

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7. *See generally* American Bar Ass'n, Guide to Foreign Law Firms (H. Hill & J. Silkenat eds. 1988); The International Law List (1990) (published by L. Corper-Mordant & Co.); Kime's International Law Directory (J. Matthews ed. 1989); Allen's International Directory, The International Directory of English-Speaking Attorneys (1986); The Martindale-Hubbell Law Directory (1989).

8. *See* Kurth, *Adjudicative Resolution of Commercial Disputes Between Nationals of the United States and Mexico*, 14 St. Mary's L.J. 597, 601 (1983).

9. *See* W. Fox, Jr., International Commercial Agreements 98 (1987).

guage clause should be exclusive and should govern future relations between the parties.

### *B. Choice of Law and Jurisdiction and Related Problems*

The choices of applicable law and jurisdiction of courts may appear, at first impression, to no longer be as important elements in an international contract as they once were because of the increased use of alternative dispute resolution mechanisms. However, it is as crucial as ever that any international contract include clauses providing for exclusive choice of law and jurisdiction. In selecting the applicable law and/or the jurisdiction of the courts of a particular country, the potential outcome of any disputes under such clauses should be analyzed prior to finalizing the clause. It is also important in selecting the applicable law of a jurisdiction to consider whether or not the scope of the clause should be limited to its domestic law or should include its law of conflicts. The contract should provide clearly that these choices are exclusive.

#### 1. Choice of Law

The law governing the contract, whether international or domestic, may incorporate into the contract certain provisions without the express consent of the parties. The parties may avoid many undesired incorporations by setting out in meticulous and voluminous detail all of the interpretative and substantive rules necessary to deal with any contingencies or disputes which may arise.[10]

Given the many unforeseen contingencies, particularly in international transactions, some law would eventually govern the contract. A U.S. businessperson entering into a commercial transaction with a Latin American national would likely be surprised at the provisions the contract had incorporated by implication of the foreign law. The legal systems of Latin American countries are based upon the civil law of continental Europe rather than the Anglo-American common law. Therefore, the parties should try to agree on a law which would govern not only the contract, but also those aspects of the transaction not expressly covered in the contract. In general, the parties may choose the law of the seller's, buyer's or a third country's jurisdiction, provided the transaction has a reasonable connection to that forum. For sales contracts, the

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10. *Id.* at 99.

parties from contracting countries have the additional option of the United Nations Convention on the International Sale of Goods (the "Sales Convention").[11]

However, the parties' choice of law may be restricted because some countries have a nationalistic view concerning their courts' jurisdiction in specific situations. In certain instances, if a foreign country asserts the jurisdiction of its court and applies its own laws, a U.S. court might be persuaded not to recognize and enforce any judgment against a U.S. supplier, if the contract contains exclusive provisions which apply U.S. law and grant exclusive jurisdiction to a U.S. court.[12] In some countries, such as Chile and Peru, contracts performed within their territorial limits are subject to that country's domestic law. In addition, Mexican courts have been described as reluctant to allow the contracting parties to specify the governing law.[13]

Where the parties are free to choose the governing law, a number of considerations may influence their choice. First, the choice of law is fettered to the extent that the transaction must bear a reasonable relation to the jurisdiction chosen, place of performance, and the contracting parties.[14] In addition, the parties' freedom to choose any law may be limited by the fact that their choice must be *bona fide* and not contrary to public policy.[15] Another major consideration in choice of law is that the country chosen should have a well-developed body of commercial law and a high degree of political stability. If both parties' national legal systems meet this requirement, the parties may decide that, while one law will govern most of the contract, a particular clause should be governed by the laws of another country or the Sales Convention.[16] Absent special circumstances, however, it is not advisable to have more than one applicable law. Prudent drafters of contracts should provide that the law of one country is exclusive. Furthermore, the parties

11. United Nations Convention on the International Sales of Goods, Apr. 11, 1980, 15 U.S.C.A. app. at 29, (West Supp. 1989), *reprinted in* 3 I.L.M. 668 (1980) [hereinafter Sales Convention]. For a more specific discussion of the Sales Convention, see section VI *infra*.

12. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 115, 117 (1971) [hereinafter RESTATEMENT]; Unif. Foreign Money Judgments Recognition Act § 5, 13 U.L.A. 261 (1964). *See generally* Walberg Corp. v. Superior Court, 104 P.R. Dec. 184 (1975).

13. Kurth, *supra* note 8, at 616.

14. RESTATEMENT, *supra* note 12, § 187(2)(a).

15. S. EZER, INTERNATIONAL EXPORTING AGREEMENTS 16-10 (1988). *See also* Vita Food Products v. Unus Shipping Co., 1939 App. Cas. 277, 290 (P.C.).

16. The Sales Convention provides that it can be applied in part to a sales contract. *See* Sales Convention, *supra* note 11, art. 6.

should consider the costs associated with litigating in the chosen jurisdiction. For example, there may be substantial costs associated with obtaining expert legal advice on the laws of the jurisdiction both at the negotiating stage and during performance of the contract as well as any subsequent dispute. A final consideration in choosing the governing law of the contract is that the choice should be settled in conjunction with the place where the dispute will be settled. Because the procedural law is usually governed by location, choosing the law of the forum to govern the contract minimizes the number of legal systems and the complications inherent in attempting to prove a foreign country's law in a foreign court.

### 2. Choice of Jurisdiction

The choice of jurisdiction is significant. An important criterion for judging the validity of the contractual choice of forum in the United States is its reasonableness. The failure to provide for a forum for dispute resolution may have grave consequences. If there is no choice of forum clause and there are a number of fora which would satisfy the reasonableness test, a U.S. plaintiff may be unable to avoid litigating the dispute under an undesirable legal system. In general, the fact that the substantive law and resulting remedies in the foreign forum are not as favorable to the plaintiff as those in the United States has not been a factor in determining whether or not U.S. courts invoke jurisdiction.[17] Again, the parties should avoid this situation by expressly stating their choice of forum in the contract. However, unlike countries with an Anglo-American common law heritage, many civil law countries guard quite zealously the jurisdiction of their courts in certain situations and refuse to adhere to choice of law and/or jurisdiction clauses.[18] One should bear in mind, however, that if an arbitration clause is included in the contract, the jurisdiction clause does not supercede the arbitration clause. The jurisdiction clause should unambiguously specify that the parties intend for the arbitration clause to prevail in the event of any dispute, difference, controversy or claim and, in the event that the dispute is outside the ambit of the arbi-

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17. *See, e.g.*, In re Union Carbide Class Action Litigation, 648 F. Supp. 1322 (S.D.N.Y. 1986).

18. For example, Puerto Rico views clauses forcing an intermediary to litigate or arbitrate outside their jurisdiction concerning a representation contract as contravening public policy and therefore null and void. *See* Puerto Rico Dealer's Act, Act No. 75 of June 24, 1964, (codified as amended at 10 P.R.L.A. §§ 278-278d (West 1975 & Supp. 1985)).

tration provisions that the parties agree to the exclusive jurisdiction of the courts of the chosen state or country.

3. Enforcement of Judgments

Drafting effective choice of law and choice of forum clauses does not, however, guarantee that the plaintiff in a dispute will be able to reduce its claim to the point where it enforces an award. Because it is likely that, for example, a Brazilian defendant will not have any assets in the United States, a U.S. plaintiff ultimately may have to pursue the defendant in the defendant's country. A significant issue for the plaintiff is whether the foreign state enforces judgments from other states.[19] A major gap in international law is that there is no comprehensive international convention regarding the enforcement and recognition of judicial decisions. Given the tendency of most civil law countries to adhere strictly to the principle that the plaintiff must pursue the defendant in the defendant's forum, particular difficulties may arise in connection with Latin American jurisdictions.[20] An exception to this rule may occur when the defendant consents to another forum although in certain situations foreign courts will not recognize a defendant's agreement to submit to a foreign jurisdiction set out in a contract.

4. Drafting a Choice of Law Clause

Once the governing law of the contract is chosen, the drafter must consider the wording of the clause. Simply stating that a contract shall be governed by the law of state A is inherently ambiguous. The phrase could mean the laws of state A, including its conflict of laws rules, which could lead to application of the domestic

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19. For example, in Venezuela, foreign judgments cannot be enforced or be given res judicata effect unless granted *exequatur* by the Venezuelan Supreme Court. The foreign judgment will not be entered in Venezuela unless the foreign country enforces Venezuelan judgments. This is the general rule of several Latin American countries, namely, Chile, Colombia, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and Uruguay. Some countries, however, such as Argentina, do not require reciprocity as a condition for enforcement of foreign judgments. Subject to the reciprocity requirement of certain countries, most Latin American countries, absent a controlling treaty, will enforce a foreign judgment provided 3 conditions are met: 1) it was rendered by a competent judicial authority; 2) the parties were properly summoned and given an opportunity to appear; and 3) neither the judgment nor the underlying contract contravene public policy or the laws of the foreign country and the enforcing forum.

20. For example, the Argentinean Code of Civil Procedure provides that the defendant's domicile prevails in connection with certain conflict of laws issues. CÓDIGO CIVIL art. 5.

law of state B. To avoid such interpretation, the clause should expressly refer to the domestic laws of state A.

If the parties cannot agree on a particular system of law, whether domestic or international, they could provide for the appointment of arbitrators who would apply fundamental principles of equity, fairness, and common sense to resolve disputes so that the arbitrators are not relying on any particular municipal or international body of law.[21] In the event the parties cannot come to an agreement on which laws or arbitrators should govern, the choice of law question will be resolved at a later date by a court or arbitrator according to conflict of laws rules.[22] Although this process does not provide a high degree of certainty or predictability, it may be the only way that the parties can conclude an agreement.

### C. *Dispute Resolution*

The globalization of world markets and economies has made traditional methods of dispute resolution in courts of law often inappropriate for the needs of modern commerce. As a result, international contracts increasingly are incorporating arbitration clauses and resorting to alternative methods to resolve international commercial disputes.

Dispute resolution clauses govern the management of disputes on a wide variety of issues. They are particularly important in sales transactions with Latin America because the parties in the transaction are separated by long distances and must rely on others to ensure that the contract is performed. Furthermore, because cultural differences may exacerbate the tensions between the parties, the particular methods of dispute resolution chosen for that contract should reflect such differences.[23] Such methods may include conciliation, renegotiation, mediation, a mini-trial or arbitration.

The advantages of international arbitration are well known. Arbitration will often provide a more acceptable means of dispute resolution than resorting to foreign courts which often may involve delay and expense. Generally, the process is speedier than litigation, confidential, and is usually conducted by an expert in the industry. The parties may choose whether to conduct the arbitration

21. W. FOX, JR., *supra* note 9, at 100.
22. *Id.* at 102.
23. *Id.* at 68.

under a domestic arbitration system or under the auspices of an international arbitration institution such as the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) or the international commercial arbitration rules of the American Arbitration Association (AAA).

In drafting the arbitration clause, the parties should clearly focus on exactly what issues they wish to settle by arbitration, such as disputes arising out of the contract itself or disputes arising out of or relating to the relationship established by the contract. The arbitration clause should specify, among other things, the forum for arbitration, a cost provision, the number of arbitrators, and the arbitrators' credentials. In choosing the forum, the parties should determine whether or not the country is a signatory to an applicable international arbitration treaty. If the country is not a signatory, any award obtained in that country may not be enforceable in other jurisdictions where the debtor may have assets located.

In general, Latin American countries, especially those in South America, have been hostile to the notion of international commercial arbitration and to the recognition and enforcement of arbitral awards on an international basis.[24] Not All Latin American countries have acceded to either the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[25] or the Inter-American Convention on International Commercial Arbitration (the "Inter-American Convention"),[26] a convention similar to the New York Convention.[27] The main hurdle to the acceptance of these conventions in Latin America appears to be a concern about foreign economic and political domination, a sentiment which has found expression in the

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24. *Id.* at 259.

25. United Nations (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter New York Convention]. This agreement entered into force for the United States on December 29, 1970, subject to declarations. *See* 9 U.S.C. §§ 201-208 (1988).

26. Inter-American Convention on International Arbitration, OAS T.S. 42 (1975), *reprinted in* 14 I.L.M. 336-39 (1975) [hereinafter Inter-American Convention].

27. The Inter-American Convention has two purposes, which are essentially the same as the New York Convention: 1) to make agreements to arbitrate enforceable—offensively by being eligible for a judicial order to compel arbitration, and defensively by being used to avoid or postpone judicial action in respect to the dispute; and 2) to recognize and enforce arbitral awards— offensively to collect sums payable under an award, and defensively as res judicata if a party attempts to litigate the same dispute in another forum. *See* W. FOX, JR., *supra* note 9, at 260.

Calvo Doctrine.[28] The major effect of this doctrine, as it extends to private international claims, is to oust the jurisdiction of any foreign country in disputes involving one of these countries.

Despite this reluctance towards international commercial arbitration in Latin America, arbitration may still be an effective dispute resolution method. As of mid-1987, the Inter-American Convention and the New York Convention have been ratified or acceded to by several Latin American countries.[29] Furthermore, virtually all Latin American countries have domestic systems of commercial arbitration. Depending on the Latin American country, a U.S. company may consider using a domestic arbitration process in one of those countries where international commercial arbitration is not recognized.

## IV. Penetration of Foreign Markets Through Sales Agents and Distributors

### A. *Overview*

The purpose of this section is to discuss briefly the various forms of foreign market penetration through agents and distributors and the legal issues and implications of using foreign sales agents and distributors (collectively "foreign intermediaries") in international sales transactions.

There are five basic ways in which a foreign supplier consummates an international sale. Although there are numerous combinations, variations or hybrids, the following are the most commonly encountered situations:

1) The foreign supplier makes the sale from its home country without any formal presence, representation or relationship with the foreign market. Sales are effectuated through the foreign sup-

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28. *See* D. Shaw, The Calvo Clause 5 (1955). The Calvo Doctrine, as originally stated by the Argentine jurist, Carlos Calvo, provides that a government is not bound to indemnify aliens for losses or injuries sustained because of domestic disturbances or civil war where the state is not at fault. Therefore, foreign states are not justified in intervening to secure settlements of claims by their citizens on account of such losses or injuries. For a discussion of the Calvo Doctrine, see Bunge & Bunge, *The San Jose de Costa Rica Pact and the Calvo Doctrine*, 16 U. Miami Inter-Am. L. Rev. 13, 25 (1984).

29. Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Uruguay, and Venezuela have ratified or acceded to the Inter-American Convention. Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Mexico, Panama, Peru, Trinidad, Tobago, and Uruguay have ratified or acceded to the New York Convention.

plier's reputation in the marketplace, assigning a salesperson employed by it in the home country to that market, participating in trade shows or fairs, and utilizing brokers and/or advertising. This form of market penetration may take place in either a haphazard fashion or through a market development plan;

2) The foreign supplier enters into an agreement with a U.S. trading company to handle its export sales;

3) The foreign supplier enters into an agreement with a foreign sales agent;

4) The foreign supplier enters into an agreement with a foreign distributor; or

5) The foreign supplier establishes a business presence in the foreign market by hiring a local salesperson or transferring an employee to the foreign market. This form of market penetration is not usually encountered among smaller businesses or new entries in the foreign market as it would subject the foreign supplier to local taxes, employment laws, and other regulatory laws. Rather, one generally confronts this form of market penetration after the foreign supplier has successfully entered the market through a foreign intermediary.[30]

Although most clients consider the decision to choose one of the foregoing methods to penetrate a foreign market, there are many legal ramifications that one should consider and analyze prior to making this decision. This portion of the article focuses primarily on market penetration through agents and distributors. If the foreign supplier markets through the first method set out above, its main concerns will be covered in Sections C and D below. Regardless of the method chosen, to achieve maximum market penetration (other than by establishing a foreign subsidiary or branch operation), a foreign sales agent or distributor is usually necessary.

### B. *Agent or Distributor?*

Once a foreign supplier decides to attempt to penetrate a foreign market through foreign intermediaries, the decision must be made as to which type of foreign intermediary is not only most

30. If foreign suppliers market through this method, the market penetration is essentially in the form of a foreign investment or a joint venture, a subject which is beyond the scope of this article.

effective for a client's needs, but also most advisable from an economic and legal standpoint.

The term "sales agent," as used in this article, defines a person who represents the foreign supplier for the purpose of selling defined products in a particular territory. The sales agent is an independent contractor and, despite the nomenclature, is not the legal agent of the foreign supplier. The sales agent usually does not (and should not) have authority to bind the foreign supplier. Rather, the sales agent merely solicits orders for the products, with the sale being subject to acceptance or rejection by the foreign supplier. The sales agent does not accept possession of or title to goods. Title passes from the foreign supplier to the customer directly and should be subject to an international sales contract. The customer pays the foreign supplier and the foreign supplier, in turn, pays the sales agent a commission determined under the agency contract entered into by the foreign supplier and the sales agent.

A hybrid form of a sales agent is known as a "*del credere* agent" who acts as a surety to the foreign supplier by guaranteeing the payment for the goods by the ultimate customer. In civil law jurisdictions, an undisclosed principal has no standing before the courts to enforce rights under a sales contract entered into by the sales agent and the customer.[31] Therefore, in situations where the foreign supplier is to remain undisclosed to the customer or where the foreign supplier wants a guaranty for payment of the goods by the customer, the agency contract should expressly create a *del credere* relationship between the foreign supplier and the sales agent.

In contrast to an agent, the "distributor" purchases the goods on its own account from the foreign supplier for resale to customers in its market. The distributor, unlike the foreign supplier in an agency relationship, bears the credit risk and is responsible for warehousing the goods, delivery of the goods to the customer, and repairing and servicing the goods after the sale. The supplier must be careful when choosing a distributor in order to protect the reputation of the product in the foreign market.

In deciding whether to enter into an agency contract or a distributor contract (collectively "representation contracts"), there are several important considerations that will vary depending upon

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31. *See* L. RYAN, AN INTRODUCTION TO THE CIVIL LAW 75 (1962).

the factual situation and the applicable laws of the particular country in which the foreign intermediary is located. These considerations include:

1) Control. An agency relationship provides the foreign supplier with greater control over the goods and more market penetration than a distributorship. However, unless maintaining control is important, it is usually preferable to proceed through a distributorship, which carries fewer risks and potential liabilities for the foreign supplier.

2) Miscellaneous Local Laws. Another important consideration in determining which relationship to choose is the impact of local taxation, antitrust, and intellectual property laws on the foreign supplier in an agency relationship as opposed to a distributorship contract. These issues will vary significantly from jurisdiction to jurisdiction.[32]

3) Restrictive Legislation. Many countries have restrictive laws which apply to sales agents and/or distributors. They include, *inter alia*, protective legislation, application of labor laws, and laws prohibiting or restricting the use of foreign intermediaries. These laws may impact substantially on U.S. businesses regarding the termination of the agency relationship.[33]

4) Risks. An advantage of using a distributorship is that it shifts many of the responsibilities and liabilities from the foreign supplier to the distributor, which does not occur in an agency relationship. For example, a distributor will bear the burden of obtaining government approvals, warehousing the goods, delivering the goods to the customer, providing service and repairs, and paying tax liabilities. However, agents are often awarded less damages than distributors on the termination of representation contracts because agents do not make the same capital investment as distributors.

### *C. Foreign Protective Legislation and Termination of the Foreign Intermediary Relationship*

Most of the problems encountered with foreign intermediaries

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32. For a general discussion of these issues, see Herold & Knoll, *Negotiating and Drafting International Distribution, Agency, and Representative Agreements: The United States Exporter's Perspective*, 21 INT'L LAW. 939, 977-82 (1987).

33. *See infra* notes 34-44 and accompanying text.

occur when the relationship terminates. This is particularly true in countries with protective laws relating to foreign intermediaries. Foreign protective provisions essentially focus on two issues, namely, minimum notice requirements and compensation for the termination.[34] In fact, many of these restrictions extend beyond termination of the relationship to non-renewal of the representation contract. Although most of these provisions cannot be avoided through drafting, many of the problems can be minimized by addressing the protective provisions of a country's laws prior to drafting the international representation contract.

The prototype for protective legislation for foreign intermediaries was enacted in Puerto Rico in 1964.[35] Today, over thirty countries have similar legislation; certain states such as Connecticut, Delaware, and Wisconsin have such legislation as well.[36] Latin American jurisdictions which have enacted protective legislation include, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Puerto Rico, and Venezuela.[37]

The impetus for the enactment of such legislation evolved from the perception that foreign suppliers took advantage of the foreign intermediary who did not have a comparative advantage of strength in negotiating the terms of the original representation contract and any renewals of it. Often the foreign supplier would enter into the representation contract with the foreign intermediary in order to develop goodwill and a customer base in the territory for its products. Several years later, when the penetration of the market was at an acceptable level to justify a more significant investment, the foreign supplier would terminate the foreign inter-

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34. Saltoun & Spudis, *International Distribution and Sales Agency Agreements: Practical Guidelines for U.S. Exporters*, 38 Bus. Law. 883, 886-89 (1983).

35. *See* Puerto Rico Dealer's Act, *supra* note 18.

36. *See* Herold & Knoll, *supra* note 32, at 965 n. 67; Saltoun & Spudis, *supra* note 34, at 885, 914-16.

37. *See, e.g.*, Brazilian Federal Law No. 4886 of Dec. 10, 1965 [hereinafter Brazilian Federal Law]; Costa Rican Law 6209 of 1978, *as amended by* Decree 8599 of May 5, 1978, art. 7; Dom. Rep. Law 173 of 1966, *as amended by* Law 263 of 1971, Law 664 of 1977, and Law 622 of 1973 [hereinafter Dom. Rep. Law]; Ecuadorian Supreme Decree 1038-A of Dec. 1976 [hereinafter Ecuadorian Supreme Decree]; El Sal. Commercial Code, arts. 392-399b; Guatemalan Decree 78-71, Official Gazette of Oct. 1, 1971; Honduran Decree 50 of Oct. 8, 1970, *as amended by* Decree 549 of Nov. 24, 1977 and Decree 804 of Sept. 10, 1979; Nicaraguan Decree 13 of Jan. 5, 1980 (re-enacting and modifying Decree 227 of Dec. 1979 and Decree 287 of Feb. 2, 1972 and further modified by Sandinista authorities); Puerto Rico Dealer's Act, *supra* note 18.

mediary and substitute the relationship with an actual presence through an affiliate, branch or subsidiary operation. Often this action would coincide with the time frame in which the intermediary was close to realizing a return on its investment. To avoid having its dealers unfairly taken advantage of, Puerto Rico enacted foreign protective legislation. The Statement of Motives of the Puerto Rican Dealer's Act states:

> The Commonwealth of Puerto Rico cannot remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaires [sic], or agents, as soon as they have created a favorable market and without taking into account their legitimate interest.
>
> The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power, it deems it necessary to regulate, insofar as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices.[38]

Although foreign restrictive provisions limit the autonomy of the foreign supplier, careful drafting can mitigate some erosion of the foreign suppliers authority.

1. Compensation

The purpose of foreign protective legislation is to protect foreign intermediaries by requiring a minimum period of notice of termination to be given to the foreign intermediary and compensation to be paid to the foreign intermediary upon termination of the relationship, including lost profits during the period required to reestablish commercial operations and moral damages as an additional percentage over lost profits. For example, the legislation of many Latin American countries prohibits a foreign supplier from terminating the foreign intermediary or refusing to renew the contract without just cause.[39] The protective provisions have a more significant impact on contracts of an indefinite term or contracts

38. Puerto Rico Dealer's Act, *supra* note 18, §278(a).
39. *See* Herold & Knoll, *supra* note 32.

containing "evergreen" renewal provisions.[40] Although a waiver of entitlement to such compensation is usually included in the representation contract, in many instances it will be ineffective to refute the intermediary's entitlement to compensation.

The basic measure in determining the compensation owed to a foreign intermediary on the termination of the relationship is its net profits resulting from the termination. In situations where a foreign supplier terminates a relationship without just cause and fails to give "reasonable notice," the intermediary will usually be entitled to damages equal to the net profits it would have earned during the notice period, fixed costs, and an estimate of goodwill.[41] In calculating the amount of lost profits, the courts may take the following factors into consideration:

1) average profits of the intermediary;

2) length of the relationship;

3) profits usually earned by the intermediary in a time period equal to the statutory notice period;

4) unexpired term of the contract, if any, and in certain instances likely renewals;

5) goodwill developed by the foreign intermediary;

6) labor, warehousing, and other capital costs incurred by the foreign intermediary which cannot be recovered; and

7) repurchase by the foreign supplier of inventory, parts, and accessories.[42]

In certain situations, several Latin American countries interpret their local labor laws to apply to a foreign intermediary because such laws are considered an integral component of public policy. They, therefore, require the foreign supplier to pay severance monies and sometimes other employment benefits. This liability for the foreign supplier will only arise when the intermediary is an individual as opposed to some form of legal entity. Additionally, the risk that the courts will deem the foreign intermediary to

40. An "evergreen clause" is a clause in a contract that calls for the contract to renew itself from year to year in lieu of notice by one of the parties to the contract. *See* Chemplex Co. v. Tanber Oil Co., 309 F. Supp. 904, 908 (D.C. Iowa 1970).

41. *See* Herold & Knoll, *Drafting International Distributorship and Agency Agreements: The United States Exporter's Perspective*, in AMERICAN BAR ASS'N, NATIONAL INSTITUTE ON NEGOTIATING AND DRAFTING INTERNATIONAL COMMERCIAL CONTRACTS 20, 38 (1988).

42. Saltoun & Spudis, *supra* note 34, at 888-89.

be an employee of the foreign supplier is greater in an agency relationship than in a distributorship which is conducted at a greater arm's length.[43]

2. Notice

As in any commercial agreement, the right to notice and its appropriate length depends upon whether the representation contract is being terminated for cause, without cause or simply not renewed. The termination clause should track the provisions of the local legislation, provide for liquidated damages, and distinguish between events giving rise to immediate termination and those providing for a period of rectification of the breach.

3. Just Cause

Many Latin American countries have statutory justification for termination of the foreign intermediary.[44] If a foreign intermediary is terminated without the existence of a cause designated by statute, the foreign supplier will usually be required to pay compensation to the intermediary. In addition to statutorily recognized causes, many countries allow the parties to set out in the contract "just cause" behavior or events that will give rise to termination. However, the drafter should be careful to include a statement that the list is not intended to be exhaustive to avoid an *ejusdem generis* interpretation of the clause by a court.

*D. Negotiating and Drafting Agency and Distributorship Contracts*

When drafting a contract, the following criteria can distinguish the various forms of intermediation: the scope of powers granted, the degree of subordination and dependency between

43. Note, however, this principle does not always hold true. Mexican law, for example, holds the foreign supplier jointly and severally liable for any labor obligations of the dealer to its own employees.

44. *E.g.*, Brazilian Federal Law, *supra* note 37; Dom. Rep. Law, *supra* note 37, Ecuadorian Supreme Decree, *supra* note 37. For a discussion of the laws of several Latin American countries, see Swacker, *Dealer and Agent Relations: Avoidance of Common Pitfalls*, in DOING BUSINESS IN LATIN AMERICA 95 (S. Stairs ed. 1985).

principal and agent, the degree to which representation is formally invoked, and the degree of professionalism of the foreign intermediary.

As discussed above,[45] in jurisdictions having foreign protective legislation it is desirable in all instances that the appointed foreign intermediaries be a legal entity rather than an individual in order to avoid the application of local labor laws.

Distributor contracts, unlike agency contracts, contain the actual terms of the sale of goods by the foreign supplier to the distributor.[46] The considerations and clauses are equally applicable whether they are incorporated into a distributor contract or stand alone in a sales contract.

### 1. Scope of Appointment

The appointment clause of a representation contract is extremely important because it is the provision which sets out the parameters of the relationship. The appointment clause should be clear, precise, and comprehensive. In addition, it should specify:

1) Whether the relationship or appointment is exclusive or non-exclusive;

2) The products which the foreign intermediary is authorized to represent. Additionally, it should provide for revising or amending of the product list upon the occurrence of certain events (*e.g.*, low sales, obsolescence, and new technology);

3) Whether or not the foreign supplier can continue to export directly into the territory, either generally or to specified accounts. If this is not clearly set forth in the contract, the foreign intermediary may be entitled to commissions on any direct sales made by the foreign supplier;

4) The scope of the geographic territory;

5) Who is responsible for obtaining government approval required for delivery of the product. In an agency agreement, the responsibility would usually fall upon the foreign supplier and a provision should be included requiring the agent to notify the sup-

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45. *See supra* notes 34-44 and accompanying text.

46. These terms will not be discussed in this section of this article covering representation contracts, but are discussed at length in part V *infra* in the context of international sales contracts.

plier of any changes in any relevant laws or regulations. In a distribution relationship, when representing a foreign supplier, it is advisable to impose complete responsibility on the distributor for obtaining any government approvals, making requisite filings, and keeping the foreign supplier advised of any amendments to the relevant laws and regulations; and

6) Whether the foreign supplier can suspend or cease to supply any products as a result of applicable law or regulation or other *force majeure* occurrences.

2. Term of Appointment

As indicated in the prior discussion of foreign protective provisions,[47] the term of appointment is an essential element in the negotiation of a representation contract. Where a representation contract does not have a definite term, some courts, such as those in Brazil and Ecuador, interpret foreign protective laws in favor of the foreign intermediary to the detriment of the supplier.

Foreign suppliers usually prefer to limit the term of employment to a short period to assess adequately the performance of the foreign intermediary and to maintain flexibility as to other options for penetrating the foreign market. In contrast, the foreign intermediary usually attempts to negotiate as long a period as possible (with substantial renewal provisions) to achieve greater security in the relationship.

To avoid extensive compensation payments on the termination of the representation contract, it is important for the foreign supplier to limit the representation contract to no longer than a two year period and avoid including any renewal provisions. The foreign intermediary will usually argue strongly in favor of a renewal period. If such a period is included, it should be limited to a single term renewal as opposed to an "evergreen" clause. At the end of the first renewal period, the parties can enter into a new representation contract. In a distributor relationship, as opposed to an agency relationship, the distributor may require greater concessions from the foreign supplier concerning the terms of employment because often there are significant capital commitments involving warehousing, sales, and inventory.

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47. *See supra* part IV, sec. C.

### 3. Principal-Principal Relationship

Whether a distributor or an agency contract is entered into, it should provide indicia that the foreign intermediary is an independent contractor and the relationship is principal to principal. It is critical that the intermediary not appear to be the foreign supplier's legal agent (and not a sales agent) in the territory and not be able to have the power to bind the foreign supplier or act on its behalf.

### 4. Payment Clauses

The agency contract should specifically state when commissions accrue to the agent's account and when those commissions become payable. The usual provision included in such a contract establishes that the commissions become payable when the foreign supplier actually receives the customer's payment for the goods.

Whether dealing with a distributor or an agent, it is crucial to review the regulations of the country regarding remittances (*e.g.*, exchange rates, withholding tax, and currency control) to the United States. The representation contract should place the onus on the foreign intermediary to arrange for any approval from or notice to authorities responsible for currency exchange or payment. In addition, the representation contract should provide for:

1) a currency account (in most South American, developing, and centrally controlled market countries, the currency of account must often be expressed in local currency terms);

2) a date of accounting (with a right to audit);

3) a currency of payment (possibly in an alternative currency if subsequent restrictions prevent the exchange into U.S. dollars);

4) the date of payment;

5) the location of payment (this should, if permissible under local laws, be the foreign supplier's U.S. bank); and

6) a regular date for currency conversion that is beyond the control of either party.[48]

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48. Herold & Knoll, *supra* note 32, at 977.

5. Protection of Goodwill, Trademarks, and Intellectual Property

Prior to entering into negotiations, all intellectual property rights should be registered before shipping any product into the country. It is usually advisable to provide for intellectual property protections with a foreign intermediary in a separate licensing agreement.[49] In both the licensing or user agreement and the representation contract, the foreign intermediary should acknowledge the supplier's ownership of all rights, title, and interest in any intellectual property to be used. The foreign intermediary should also contractually acknowledge that it will not acquire any interest in the intellectual property by virtue of any of its activities. The foreign supplier should consider restricting the intermediary's use of intellectual property in a manner and in the media specified. It is advisable to have the foreign intermediary agree to use the trademark or service mark only in connection with sales of the foreign supplier's goods. It is also prudent for the intellectual property agreement to prohibit the foreign intermediary from incorporating the foreign supplier's marks on its letterhead, company name or other promotional items. The intellectual property agreement should reflect the foreign supplier's retention of total ownership of the intellectual property and permit the foreign intermediary to have limited use of the property. Furthermore, a provision should be included stating that the foreign intermediary agrees to report all infringements or illegal uses of trademark or trade names that come to its attention and assist the foreign supplier in protecting such items in the territory. The foreign intermediary should also acknowledge that only the foreign supplier has the right to sue for any such infringements.

6. Confidentiality

The foreign intermediary should contractually agree not to disclose any confidential information conveyed to it in the course of the performance of its duties under the representation contract.

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49. For example, the Andean Pact countries require registration of any intellectual property agreement, and, as such, they are usually contained in a separate document. *See* Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, Nov. 30, 1976, *reprinted in* 16 I.L.M. 138 (1977). *See generally* Comment, *The Andean Pact's Foreign Investment Code Decision 220: An Agreement to Disagree*, 20 U. MIAMI INTER-AM. L. REV. 649 (1989); *but c.f.* Andean Commission Decision 85, Decision on Intellectual Property, June 5, 1974, *reprinted in* 13 I.L.M. 1489 (1974).

A provision to this effect should also declare that it survives termination of the representation agreement for a specific period. In many developing countries, confidentiality clauses may be ineffective to the extent they may apply to technological information which is deemed to have been transferred outright to the foreign distributor after the expiration of a specified number of years. For Andean Pact countries,[50] this period may not be greater than the period of the industrial property rights granted by the respective law.[51]

7. Choice of Law and Jurisdiction[52]

In most jurisdictions having foreign protective legislation regarding intermediaries (such as labor laws and professional charters), such laws will apply notwithstanding any contractual provision attorning the laws and jurisdiction of the United States or any other jurisdiction more favorable to the foreign supplier.[53]

8. Alternative Dispute Resolution[54]

One should consider drafting an arbitration clause in any representation contract with Latin America. First, it may provide a means of limiting or even avoiding payment of termination compensation under foreign protective legislation. Second, if the foreign intermediary ignores the arbitration clause and resorts to litigation in a court in his or her own jurisdiction and the court does not recognize the agreement to arbitrate as a condition precedent to bringing a suit, any foreign judgment obtained by the foreign intermediary under those circumstances may not always be judicially enforceable against a supplier in the United States.

9. Termination

Events or failure in performance of the foreign intermediary's

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50. Colombia, Ecuador, Peru, and Venezuela, for example.

51. *See* Decision 24 of the Commission of the Cartagena Agreement, Andean Foreign Investment Code, Dec. 31, 1970, *translated in* 11 I.L.M. 126 (1972).

52. *See supra* part III, sec. B(1), (2).

53. *See, e.g.*, Pan Am Computer Corp. v. Data General Corp., 467 F. Supp. 969 (D.P.R. 1979) (rejecting plaintiff's choice of law because it derogated from Puerto Rico's foreign protective legislation).

54. *See supra* notes 23-29 and accompanying text.

duties that justify termination under the laws of the foreign jurisdiction should be set out in the representation contract. The parties should also negotiate significant conditions which lead to automatic termination. The language should clearly establish that such a list is exhaustive to avoid an *ejusdem generis* interpretation. Furthermore, the representation contract should contain a clause dealing with violative acts of either party which do not justify immediate termination, but rather trigger a period for rectification of the breach by the violating party. A provision of this type should usually focus on defective or unsatisfactory performance such as low sales.

10. Sales Quotas

The contract should expressly set minimum sales quotas which the foreign intermediary must achieve. The quotas may often be increased on a regular basis, either semi-annually or annually during the term of the representation contract.

11. Notice of Termination

In order to be upheld by a court, any termination provision should provide that its notice period be generous. Further, the method of giving notice should be set forth with clarity.[55]

12. Duties of an Intermediary

The foreign supplier should delineate clearly and precisely the functions and activities it expects a foreign intermediary to perform. For example, the duties of an intermediary can include:

1) Registration Requirements. Some countries require foreign intermediaries to notify the government of the representation through registration. Certain countries require that both the foreign intermediary and the representation contract actually be registered and approved. The representation contract should state that the foreign intermediary is required to undertake and fulfill all registration requirements at the time of the commencement of the relationship and any renewals or subsequent filings as may be required;

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55. *See supra* part IV, sec. C(2).

2) Terms and Conditions of Sale in Distributor Agreements. In the distributor relationship, the actual terms and conditions of sale contained in international sales contracts are usually included in distributor contracts;[56]

3) Performance and Goodwill. In order to develop goodwill for products in a foreign market in the context of a distributor relationship, the representation contract should include provisions requiring the distributor to maintain an adequate inventory of goods and service parts, fill all orders promptly, establish procedures for servicing the product (including hiring and training of personnel), and provide the foreign supplier with access to the distributor's premises for inspection purposes. Additional clauses should set out the parties' respective duties related to promotional literature, responsibility for translation, (where appropriate), and apportion costs of any advertising;

4) Indemnification. The parties should agree upon an indemnification clause in the representation contract requiring the intermediary to protect the foreign supplier against any third party liability in the event that any representations made by the intermediary to any customers extend beyond the warranty terms the foreign supplier authorizes;

5) Non-assignment. The representation contract should contain a restriction against assigning the representation contract and rights thereunder of the intermediary;

6) Customs. The parties should carefully define the responsibility of the distributorship for customs clearance. In agency situations, the responsibility would usually fall upon the customer or the foreign supplier;

7) Non-compete. Limitations on the right of the intermediary to represent products in competition with the supplier's products should be set forth clearly;

8) Quotas. Minimum annual sales quotas should be established explicitly in the representation agreement;

9) Service. Responsibility for repairs and warranty claims should be delineated clearly;

10) Reporting Requirements. The contract should require the

56. *See infra* part V for a discussion of these provisions within the context of international sales contracts and such provisions would be equally applicable to a distributor contract.

intermediary to supply information related to the products, including sales reports, sales forecasts, local competitive situation, and customer lists;

11) Government Approvals. The representation contract should establish the distributor's responsibility to arrange for any necessary government approvals for delivery of the product;

12) Taxes. The representation contract should hold the distributor liable for local taxes, such as excise or sales taxes; and

13) Change of Law. The contract should provide that it is the foreign intermediary's obligation to advise the foreign supplier of any changes in the law of the foreign country.

### 13. Miscellaneous Manufacturer's Rights

In addition to items covered in Section V relating to sales, the representation contract should also contain: a) pricing provisions; b) conditions under which foreign supplier must deliver goods (acceptance of order and availability of products, for example); c) right of foreign supplier to inspect books and facilities, among other things; and d) a limitation on damages excluding liability for indirect, special or consequential damages or loss of anticipated profits on any claim arising under the representation contract.

## V. Drafting the Contract for Sales Transactions in Latin America

A buyer and seller execute a sales agreement to remove uncertainty and reduce risks of dealing with each other. In a sales transaction involving a region of the world as diverse and turbulent as Latin America, the uncertainties are considerable. The usual risks inherent in any international trade transaction are exaggerated in certain countries due to the prospect of war, dangers of carriage on the high seas, expropriation by a foreign government, currency fluctuations, boycotts, changes in governmental controls (for example, tariffs), and export and import regulations.[57] It is therefore more difficult for the parties to ensure that the seller will deliver the goods and that the buyer will accept delivery and pay for them. This difficulty is frequently exacerbated by the geographical distance between the United States and many Latin American coun-

57. W. Fox, Jr., *supra* note 9, at 38.

tries as well as the absence of a long-standing business relationship between the parties. Without a common bond of trust and a common language, the parties should leave as few eventualities to happenstance as possible. Parties to an international sales contract may experience the additional uncertainty of not knowing which jurisdiction's laws will govern the interpretation of the sales contract. As discussed previously, a legal system which is unexpectedly incorporated by reference into the contract may govern any aspect of the transaction not expressly covered in the contract.

The function of the agreement is to manage such risks and uncertainties. To this end, this section will focus on key categories of provisions to be included in a contract for the sale of goods between a U.S. supplier and a Latin American customer.

### A. *Delivery Terms and Pricing*

The principal obligations of the seller under a sales contract are to convey the goods and to deliver them to the buyer. In an international sales transaction, the seller's duties and obligations must be set out in great detail. Indeed, one of the more important provisions in an international sales contract is the place of delivery. Given that delivery provisions define a significant obligation of the buyer and seller, it is essential to use terms that are understood by both parties.

When trade terms are used in domestic trade, they have relatively precise meanings set out in definitions in a commercial code or developed through adjudication. In international commercial agreements, however, they are not necessarily as precise.[58] As a consequence, a number of international bodies have attempted to standardize certain definitions to provide uniformity in interpreting agreements. For example, the International Chamber of Commerce has developed a manual entitled *Incoterms 1980*[59] which defines precisely the obligations of the buyer and seller under each delivery term to avoid mistakes and misunderstandings. Incoterms have also been revised to take into account developments in integrated and multimodal transportation. Whatever the source of various delivery terms used, the contract should specify and account for any deviation from the source to ensure that the parties are not

58. *Id.* at 104.

59. *See* INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS (2d ed. 1980). For the purposes of this article, only Incoterms relating to delivery are used.

using different "standardized" definitions for the various terms.

The term defining the place of delivery usually covers other obligations as well. For instance, the delivery terms define the manner of shipment as well as the responsibility to pay for the costs of shipment. Similarly, the delivery terms will typically cover the arrangement and payment of insurance. Although the parties should agree on both the insurance value and other major terms of the contract, the insurance policy itself is usually concluded in a contract ancillary to the main sales contract.

Because the seller typically bears the risk and costs incurred until delivery has occurred, the delivery provisions are incorporated into the price specification. For instance, the parties may specify that the price in an international sales contract is "$100,000 F.O.B.[60] New York." Such a quote means that it is the seller's duty to place the goods free-on-board a ship to be named by the buyer. The seller is responsible for all charges incurred before this time including loading charges, excluding freight or insurance expenses.

Because delivery provisions are an integral element in determining the purchase price of the goods to both the buyer and the seller, it is a provision sensitive to the relative bargaining strengths of the buyer and seller. The seller may wish to limit its expenses by bargaining for an "early" delivery point such as "ex warehouse" (also known as "ex works" or "ex factory"). The buyer, however, will usually prefer that the seller make arrangements for export boxing, containerization, inland freight, handling, and formalities at the point of shipment. As a result, the buyer will usually prefer to purchase on C.I.F.[61] or equivalent terms.

The choice of delivery term may also be affected by whether the buyer is purchasing sufficient merchandise to fill an entire ship (in which case the buyer will usually charter a ship), or whether the buyer is not purchasing an entire cargo (in which case the

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60. F.O.B. means "free on board" which requires the seller to deliver the goods on board the ship with the risk of loss passing from the seller to the buyer when the goods have passed the ship's rail. The seller must furnish the buyer with a "clean" document showing delivery on board the ship. The cost of the chartering of the ship or reserved space is the liability of the buyer.

61. C.I.F. means "cost, insurance, and freight." In this situation, the seller must transport the goods to the port of destination and provide insurance for the risk of loss during the carriage of the goods to the port of destination. Under Incoterms, the risk of loss passes to the buyer when the goods have passed the ship's rail.

buyer will likely book shipping space on a ship in the "liner" trade). If the liner is overbooked, it may close for cargo before the entire shipment under the sales contract is loaded aboard. The question of who pays for storage costs and the delay in payment caused by the goods not being loaded as expected should, therefore, be explicitly addressed in the particular delivery term inserted into the sales contract. If the sales contract is F.O.B., the seller will be responsible for placing the cargo on board and receiving a "clean" on-board bill of lading. As a result, unless the contract otherwise provides or unless the buyer fails to book space, the seller will usually bear the expense of the delayed shipment. Under F.A.S.[62] terms, however, the buyer will bear the costs of delay because the seller's only obligation is to deliver the goods to a freight forwarder chosen by the buyer.

### *B. Payment Provisions and Security Interests*

While the seller is required to deliver the goods under the sales contract, it is the buyer's obligation to accept and pay for them. To address the problem of uncertainty of payment, the price quotation can specify a number of possible options. First, the exporter can require advance payment. However, this option is unlikely to be feasible given the financial burden it imposes on the buyer and the risk which the buyer has to assume (for example, paying before seller's performance). Second, a third party can enter the transaction as a guarantor or a trustee to reduce the seller's risk. For instance, if an escrow account is used, a trustee would release funds to the exporter once certain "triggers" in the escrow agreement have taken place. The buyer, however, may balk at this option because its funds will be tied up for what could be a considerable time.

A common method of payment in the international sales contract is the letter of credit requirement which may be inserted in the price quotation.[63] The advantage of the letter of credit is that it offers security to the seller and facilitates the transfer of funds between the parties. It does this by treating the seller's delivery of documents (such as a bill of lading, the seller's invoice, and a pol-

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62. F.A.S. means "free alongside ship" and requires the seller to deliver the goods alongside a vessel to be designated by the buyer. Risk of loss passes from the seller to the buyer when the goods have been delivered alongside the ship.

63. S. EZER, *supra* note 15, at 9-6.

icy of insurance) to a bank as tantamount to delivery of the goods themselves. The seller's presentation of evidence of the seller's performance under the letter of credit contract triggers payment. In this process, the seller is paid much sooner than if it had to await the arrival of the goods at the buyer's port. There is also a greater degree of security for the seller because a bank in the buyer's own country issues the letter of credit in which that bank undertakes to honor a specified demand for payment made by the seller (that is, if the letter of credit is confirmed and irrevocable). Thus, the bank, which is much more competent to investigate the buyer's creditworthiness, assumes the risk of non-payment by the buyer.

Variations of the letter of credit will offer the seller more or less security. An irrevocable letter of credit which the buyer opens and the seller's bank confirms is payable against the specified documents to be submitted to the confirming bank. It is one way for the seller to insulate itself against the risk of nonpayment. The confirming bank's fees may be significant, reflecting the risk that the bank undertakes in less developed countries. If an individual bank does not wish to confirm a letter of credit, the seller may consider pursuing the possibility of a syndicate of banks each taking a portion of the confirmation. Although this alternative may involve larger fees, it may effectively spread the risk and complete the transaction.

Another method of securing confirmation for a letter of credit is to use a revolving confirmation whereby a bank is willing to commit for portions of the transaction on a revolving basis. Such a letter of credit allows the exporter to make partial shipments. As documentation is presented, the confirming bank pays to the extent of its partial confirmation. Once the confirming bank receives payment from the issuing bank for the partial shipments, it will be prepared to issue the next segment of its confirmation under the letter of credit.

Despite the seller's wishes, the buyer may not desire to bear the expense and trouble of opening a letter of credit because the buyer's bank may require the buyer to deposit the full amount of the letter of credit before the bank will issue the letter. In that event, the seller may have to accept the risk that the buyer's bank will refuse to pay and have to agree to an unconfirmed letter of credit. If this happens, it will be important to agree that payment will be effected by telegraphic transfer of funds directly from the buyer's bank to the seller's account at its bank. In the event that

the buyer does not open a letter of credit, the contract should provide that payment will be effected by telegraphic transfer within a fixed number of days after presentation of specified documents to the buyer or the buyer's bank. Even if the seller does not obtain a letter of credit from the buyer, it may still be able to insure itself against credit risks under a government program or under private insurance programs.

The international sales contract should also specify what will happen if a seller does not receive payment for the goods. The sales contract could provide that the seller or the seller's bank will release documents of title, such as the bill of lading, only upon payment. However, this option may actually be neither negotiable nor practical. Another protection for the seller is to negotiate an assignment by the buyer of rights under the contract to the seller. Such a provision would be suitable where the sales are included in inventory or income-producing assets. The seller may also protect itself against commercial risks by obtaining guarantees for payment and performance from several persons. If a parent company's guarantee is sought, the seller should establish whether such a document is enforceable under the applicable local law and whether it is in accordance with the parent company's charter. If the buyer is a state-owned corporation or agency, it may also be worthwhile to pursue the government as guarantor. Finally, one of the seller's chief means of ensuring against complete loss is to expressly reserve a security interest in the goods until payment is received. Although perfection and enforcement of such a security interest will depend upon the laws and customs of the buyer's country, the seller will at least have some measure of protection.

The law governing the sales contract may also incorporate provisions regarding the seller's recourse against a buyer who has not paid. If U.S. law governs the sales contract, the Uniform Commercial Code (the U.C.C.) will offer the unpaid seller protection.[64] In general, the U.C.C. provides that title passes in the manner and subject to the conditions agreed upon by the parties.[65] However, in the absence of agreement, Section 2-401 prescribes that title passes "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods"[66] despite any reservation of a security interest and even though a document

64. *See* U.C.C. § 2-703 (West 1987) [hereinafter U.C.C.].

65. *See id.* § 2-401(1).

66. *Id.* § 2-401(2).

of title is to be delivered at a different time and place.[67] In the case of a shipment contract (where the seller sends goods to the buyer but is not required to deliver them at a specific destination), the buyer acquires title at the time and place of shipment.[68] In contrast, a destination contract (where seller is required to deliver the goods to the buyer at the destination), title does not pass to the buyer until the goods are tendered at the destination.[69]

In order to ensure that the seller receives payment before the goods come into the possession of the buyer, the seller should ship the goods under "reservation."[70] Under U.C.C. Section 2-505(1)(a), any shipment of goods under a negotiable bill of lading reserves a security interest in the seller.[71] By taking a negotiable bill of lading to its own order, the seller may structure the transaction so that the buyer will have to receive and surrender the bill to a carrier before the buyer receives the goods.[72] Thus, the seller can require the buyer to pay for the goods before the buyer receives the documentation necessary to obtain possession of goods.[73] A non-negotiable bill of lading to the seller or its nominee reserves possession of the goods as security, but there is no automatic reservation of a security interest in the seller. Where the bill of lading names the buyer as consignee, the seller retains neither a security interest nor possession and loses its control against the carrier, unless the seller may validly exercise rights such as stopping the goods in transit. Therefore, especially in the case of a non-negotiable bill of lading, the seller can reserve in the sales contract or the bill of lading a security interest in the goods until it receives payment, although the perfection and enforcement of the security interest will depend upon the laws of the country in which the goods are located.

The U.C.C. also protects the unpaid seller from non-payment

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67. *Id.*

68. *Id.* § 2-401(2)(a).

69. *Id.* § 2-401(2)(b).

70. T. Quinn, Uniform Commercial Code Commentary and Law Digest at 2-280 (1978).

71. This section states:

> (1) Where the seller has identified goods to the contract by or before shipment:
> (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

U.C.C. § 2-505(1)(a).

72. *Id.*

73. *Id.*

in other ways. Where the buyer is insolvent, the seller may stop delivery of goods in the possession of a carrier.[74] Where the buyer fails to make payment, the seller may stop delivery of the shipload or planeload.[75] Such rights may be exercised until the happening of a number of events,[76] including the negotiation by the buyer of any negotiable bill of lading.[77] In addition to its remedy under this section, the unpaid seller may also withhold delivery of the goods prior to shipment under U.C.C. Section 2-703(a) or recapture the goods even after delivery has been completed and the goods are in the possession of the buyer under U.C.C. Section 2-702(2) upon discovery of the buyer's insolvency. Finally, the unpaid seller may also sue the buyer in an action for the price of the goods, together with incidental damages, including commercially reasonable charges and expenses incurred in stopping delivery, transportation, obtaining possession, and return and resale of the goods.[78]

### C. *Acceptance and Warranties*

A well-drafted international sales contract should set out in considerable detail the specifications of the goods and whatever performance standards and acceptance terms are appropriate. These provisions are particularly relevant on an international level, given the divergence among provisions implied by law under various domestic jurisdictions' legislation on sale of goods. If specifications are expressly included in the sales contract, a time limit on conformity with these standards should be stated. The buyer's options and the seller's obligations if the goods do not conform to the contract should also be spelled out.

If acceptance terms and warranties are not stated in the sales contract, they may be incorporated by operation of the law governing the contract. If the seller wishes to exclude certain rights or warranties implied by law, it should ensure that the sales contract contains a clause effecting such exclusion, because many jurisdictions, including the United States, permit the parties to negate

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74. *Id.* § 2-705(1).
75. *Id.*
76. *See generally id.* § 2-705(2).
77. *Id.* § 2-705(2)(d). It is noteworthy that the insolvency of the buyer covers situations other than traditional bankruptcy. "Insolvent" also describes a person who has ceased to pay his or her debts in the ordinary course of business or cannot pay his or her other debts as they become due. *Id.* § 1-201(23).
78. *Id.* §§ 2-709, 2-710.

provisions which arise by operation of law.

Under the U.C.C., the buyer has the right to inspect the merchandise to determine whether it conforms to the contractual specifications where goods are tendered or delivered or identified to the contract for sale.[79] The general rule is that the buyer has the right to inspect the goods before it pays for them unless the parties have contractually agreed to alter this arrangement, or unless the contract is for a C.I.F., C.O.D. or a documentary sale (except where such payment is due after the goods are to become available for inspection.[80]) Even if the buyer has the right to inspect the goods only after payment, this does not mean that the buyer has accepted the goods. To put it simply, time of acceptance of the goods is important because the buyer's responsibility for the goods increases dramatically after this point.[81] For instance, after acceptance has taken place, the buyer is liable for the full purchase price[82] and may not return the goods if accepted with knowledge of any non-conformity.[83] Acceptance of the goods occurs when the buyer, after reasonable opportunity to inspect, signifies the goods are conforming (or non-conforming but acceptable anyway[84]), fails to reject them effectively[85] or does any act inconsistent with seller's ownership.[86]

Unless excluded or modified,[87] if the specifications for the goods are not sufficiently detailed, the U.C.C.'s implied warranties may be operative.[88] These specifications will define generally when the goods conform to the contract. In drafting the sales contract where the U.C.C. governs, one must be aware that Section 2-316 requires specific language to exclude the implied warranty of merchantability in Section 2-314 and the implied warranty of fit-

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79. *Id.* § 2-513(1). The buyer has this right of inspection at any reasonable time and place and any reasonable manner. *Id.*

80. *Id.* § 2-513(3). *See also id.* § 2-514(3) comment 5.

81. T. QUINN, *supra* note 70, at 2-355, 2-607[A][1].

82. U.C.C. § 2-607(1).

83. *Id.* § 2-607(2). However, the buyer can return the goods after acceptance only if the buyer accepted the goods on the reasonable assumption that the non-conformity would be seasonably cured. Acceptance does not preclude any other code provided remedy. *Id.* However, now the buyer must prove that a non-conformity "substantially impairs" the value of the goods to the buyer. *Id.* § 2-608(1).

84. *See id.* § 2-606(1)(a).

85. *See id.* § 2-606(1)(b). However, this acceptance does not occur unless the buyer has an opportunity to inspect the goods.

86. *See id.* § 2-606(1)(c).

87. *See id.* § 2-316.

88. *See id.* §§ 2-314, 2-315.

ness in Section 2-315.[89]

The U.C.C. also prescribes the buyer's remedies where the goods do not conform to the contract. Depending on the seriousness of the seller's breach, the buyer may, in addition to other remedies, take one of a number of actions: 1) return the goods and refund the price;[90] 2) recover the extra cost of procuring replacement goods or "cover";[91] 3) reduce the purchase price by damages;[92] or 4) obtain specific performance in the proper circumstances, for example, where the goods are unique.[93]

The U.C.C.'s general remedies may be helpful to both the buyer and the seller in certain situations. These remedies, however, may not be appropriate in a specific transaction between the buyer and the seller. Thus, the drafter of a sales contract should be alert to the specific remedial provisions desirable in the particular transaction, taking into account each party's goals and desires.

### D. *Political/Commercial Risks*

#### 1. Foreign Exchange Risk

Another major issue for an international sales contract is the currency for payment. Given the volatility of many Latin American currencies and regimes governing the monetary systems, the U.S. businessperson usually prefers U.S. dollars as the currency for payment. Because the U.S. seller has to pay labor and material costs in U.S. currency, the seller will not want a return from the sale reduced by payment in a devaluing currency. A second risk which the seller may face is the Latin American government's imposition of foreign exchange controls. Such controls may be in the form of restrictions on convertibility or restrictions on repatriation.[94]

If a seller in the United States does not have the leverage to ensure payment in U.S. dollars, the seller should attempt to nego-

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89. *See id.* § 2-316(2); *but cf. id.* § 2-316(3).

90. *See id.* § 2-711.

91. *See id.* § 2-712. The buyer may recover from the seller the difference between the cost of cover and the contract price together with any incidental or consequential damages as provided in U.C.C. Section 2-715, less any expenses buyer saved as a consequence of seller's breach. *See id.* § 2-712(2).

92. *See id.* § 2-716(1),(2).

93. *See id.* §§ 2-711, 2-718.

94. For example, an exporter may be unable to convert the foreign payment into its own currency because of restrictions on such conversion in the foreign country.

tiate to reduce its exposure to such foreign exchange risks. Major techniques of protecting against exchange rate fluctuation and government action shift the risk to the buyer, a third party or both.

A U.S. seller may protect itself from the risk of government imposed currency restrictions by specifying in the contract that the place of payment shall be the United States or a monetarily stable third country. Regardless of what the currency of payment is, the U.S. exporter will not be exposed to the risk of restrictions on repatriating the funds by the Latin American customer.

If the U.S. exporter agrees to accept payment in the buyer's currency, the contract should include provisions to protect the value of the contract from currency devaluation. First, the exporter could ensure a guaranteed price measured in U.S. dollars by invoicing the importer in the foreign currency at a U.S. dollar equivalent established in the invoice. While payment would be made in the buyer's currency, if a devaluation of the foreign currency occurred, the price in foreign currency would be raised in order to offset the amount of devaluation. Second, the exporter could factor the foreign exchange risk into the price for the goods. Third, the exporter could shield part of the purchase price from devaluation by requiring pre-payment of a percentage of the purchase price. Fourth, the exporter could require the importer in advance in a third country to establish an escrow account in a specified currency from which payments could be made under the contract. Such a provision is more advantageous to the importer than an advance because the importer earns interest on funds in the escrow account. Finally, if the importer is a government, then the exporter may be able to exact a clause in which the foreign government warrants not to impose any foreign exchange controls affecting the contract.

The second major technique in protecting against exchange rate fluctuation and government action is to shift the risk to third parties. Most techniques for shifting risk to third parties are usually not contained in the main sales contract (*e.g.*, hedging in financial markets, private currency swaps, and insurance against inconvertibility of foreign exchange). However, if the export contract is of national significance to a Latin American importer, then a central bank or other agency might offer the U.S. exporter guarantees of protection against the foreign exchange risk.

2. Government Approvals

Many sales transactions in Latin America require the approval of, or are subject to, some government intervention. For example, there may be requirements for the registration of the contract or for export and import permission. Some countries have extensive import control regimes. In addition, specific annual quotas are often imposed for the importation of certain products in many countries. Generally, such government approvals should be drafted as conditions precedent to the completion of the transaction rather than conditions subsequent.

3. Unusual Risks

The contract should allocate responsibility for risks which are unforeseeable or, at least, unlikely. A major contractual provision for eventualities of a more general nature, such as war, riots, insurrection, embargo, and export or import prohibition is the *force majeure* clause. In sales transactions with Latin American parties, a U.S. businessperson may also wish to include a special risk clause which would specifically provide for events which the parties believe might occur. For instance, a stabilization clause might protect the parties against changes in governments and their policies.

Essentially, the *force majeure* clause suspends performance of the contract without penalty for the non-performing party, usually only for the period of disruption. A properly drafted clause should include three provisions: 1) notice by the non-performing party; 2) suspension of obligations for a certain number of days and, at the seller's option, termination of the contract after this period if the disruption continues; and 3) consequences of termination.

In the event that the parties do not expressly address these uncertainties in the contract, the law governing the contract will usually fill in the gap. If the law of a U.S. state governs, the test of commercial impracticability adopted by U.C.C. Section 2-615 could determine whether performance will be excused. It should be noted that this section excuses only the seller from non-performance. However, case law may imply a similar excuse for the buyer.[95]

95. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 261-271 (1979).

## VI. The United Nations Convention on Contracts for the International Sale of Goods

The Sales Convention[96] governs the formation of standard international sales contracts and delineates the rights and obligations of the buyer and the seller arising from the contract.[97] U.S. and Latin American parties engaged in negotiating a sales transaction may find the Sales Convention especially suitable because it codifies private international law by drawing from both the common and civil law traditions.[98]

The Sales Convention came into effect in the United States and in other contracting countries on January 1, 1988. As of the date of this article, nineteen countries have acceded to the Sales Convention,[99] and it is expected that several major trading nations will follow. A primary objective of the Sales Convention is to avoid problems arising when the contract does not provide for the applicable law. The Sales Convention avoids the uncertainty associated with conflict of laws rules and the high costs and unpredictability of dealing with disputes under a wide variety of foreign legal systems. In essence, the Sales Convention permits a buyer and a seller from two separate ratifying nations to conduct their transaction under the law of the Sales Convention as opposed to the laws of a particular country.

The benefits of the Sales Convention are numerous. First, it operates as a checklist of international contractual issues that ought to be covered in contracts. Second, the Sales Convention permits the parties to avoid difficult conflict of laws questions which may arise under a contract between parties of two different legal systems. Third, the Sales Convention offers parties to a potential sales contract an acceptable compromise when negotiating

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96. *See* Sales Convention, *supra* note 11. For critical analyses of the Sales Convention, see Farnsworth, *The Vienna Convention: An International Law for the Sale of Goods*, in PRIVATE INVESTORS ABROAD - PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1983, at 121 (1983); Rosett, *Critical Reflections on the United Nations Conventions on the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984).

97. *See* Sales Convention, *supra* note 11, art. 4.

98. Griffin & Calabrese, *The New Rules for International Contracts*, 74 A.B.A. J. 62, 64 (1988). Indeed, unless the parties specifically opt out of the Sales Convention, the provisions of the Sales Convention may apply.

99. *Id.* at 62. The countries are Argentina, Australia, Austria, Egypt, Finland, France, Hungary, Italy, Lesotho, Mexico, Peoples Republic of China, Sweden, Syria, United States, Yugoslavia, and Zambia. It came into force in Norway in August 1989 and Denmark and the German Democratic Republic in early 1990.

which country's laws will apply. Finally, the Sales Convention cannot derogate from the parties' own wishes set out in the contract. Nevertheless, where the negotiated contract fails to deal with a particular issue, the Sales Convention will fill the gap and respond to situations which the parties did not anticipate.

### *A. Application of the Sales Convention*

The Sales Convention applies to contracts of sale between parties whose places of business are in different contracting states,[100] unless the parties specifically "opt out" of the Sales Convention in the contract. It also applies when the rules of private international law lead to the application of the law of a contracting state.[101] However, because the United States has declared that the latter application will not bind it in sales contracts with U.S. parties, the Sales Convention will only be applicable when both parties are from contracting states. Where the place of business of the other party to the contract is in a non-contracting state and where the choice of law rules indicate the application of United States law, then Article 2 of the U.C.C., rather than the Sales Convention, would apply unless the parties expressly agreed otherwise.

The Sales Convention would not apply where the contracting parties are:

1) a U.S. entity and a U.S. subsidiary of a foreign entity since both parties' places of business are in the same country;

2) foreign subsidiaries of U.S. companies and persons whose place of business is in same foreign country;

3) a person whose place of business is in the United States and a person whose place of business is in a country which is not a party to the Sales Convention; or

4) where one party is a foreign branch office of a U.S. entity, the Sales Convention's applicability will depend on which place of business has the closest relationship to the contract and performance.

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100. *See* Sales Convention, *supra* note 11, art. 1(1)(a).

101. *Id.* art. 1(1)(b). For example, when the choice of law provision of a sales contract results in application of the law of a contracting country, the Sales Convention will apply. However, this provision is not applicable to U.S. parties to a sales contract because the United States' ratification of the Sales Convention contained a reservation that the United States will not be bound by this provision.

The Sales Convention does not apply to consumer transactions,[102] securities and other negotiable instruments, goods sold by auction, electricity or ships.[103] In addition, it does not apply to contracts where the preponderant part of the obligation of the seller consists of services[104] or to the liability of the seller for death or personal injury caused by the goods to any person.[105]

### B. *Effect of the Sales Convention on the Sales Contract*

The parties may directly or indirectly exclude, vary or limit the applicability of the Sales Convention.[106] As noted previously, a provision of a sales contract that is inconsistent with the Sales Convention will override the Sales Convention. Such derogation does not require any reference to the Sales Convention. The parties retain the flexibility to tailor the provisions of the sales contract to meet their particular needs or concerns when the Sales Convention would not best serve their interests. Furthermore, established trade practices between the parties and trade usage have the same derogating effect as the parties' contract.[107] One should note, however, that a provision stating that the sales contract shall be governed by the law of a U.S. state may be ambiguous. Therefore, where the intention is that the law of one of the states of the United States should govern, the sales contract should unambiguously state that only the domestic law will govern and not the Sales Convention.

### C. *U.C.C. Versus the Sales Convention*

Although this article does not undertake a detailed examination of the Sales Convention's provisions,[108] drafters of sales contracts between United States and Latin American parties should

102. Unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for personal, family or household use, the Sales Convention does not apply to sales of goods bought for personal, family or household use. *Id.* art. 2(a).

103. *Id.* art. 2. Argentina ratified the Sales Convention, but because of a translation error, Article 2 of the Sales Convention *does* apply to these types of transactions.

104. *Id.* art. 3(2).

105. *Id.* art. 5.

106. *Id.* art. 6.

107. *Id.* art. 9(2).

108. For a detailed analysis of the Sales Convention, see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982).

be aware that several provisions of the Sales Convention differ from the U.C.C.

First, U.C.C. Section 2-201, the "Statute of Frauds" provision, provides that a contract for the sale of goods is not enforceable unless it is in writing.[109] Article 11 of the Sales Convention rejects such formal requirements. This article does not subject a sales contract to any requirement as to form and may be proved by any means, including witnesses.[110] The contracting state may require, however, that sales contracts be evidenced in writing pursuant to Article 96 of the Sales Convention[111] when it has made a declaration under Article 96, that Article 11 does not apply where any of the parties to the sales contract has its place of business in the contracting state.[112] In the event Article 96 has not been invoked and the parties do want their contract to be in writing, it is prudent for them to state explicitly this intent in the contract.

Second, the Sales Convention establishes guidelines for interpretation of sales contracts. Even though a sales contract may be in writing, "due consideration" must be given to the parties' intent, their past course of dealing, trade usages, and subsequent conduct.[113] Such provisions are consistent with modern commercial practice in light of the speed and informality characterizing many international sales transactions.

Third, under the U.C.C. an acceptance of an offer is effective when sent.[114] In contrast, Article 24 of the Sales Convention provides that offers and other indications of intention are effective upon receipt by the person to whom they are addressed.[115]

Fourth, the treatment of irrevocability of offers in the U.C.C. differs from its counterpart provision in the Sales Convention. Section 2-205 of the U.C.C. provides that a written offer which states

109. *See* U.C.C. § 2-201.
110. Sales Convention, *supra* note 11, art. 11.
111. *Id.* art. 96.
112. *Id.* art. 12. The parties may not derogate from the effect of this article.
113. *Id.* art. 8. *Cf.* U.C.C. §§ 1-201(3), 1-205, 2-208.
114. U.C.C. § 2-207(1).
115. Indeed, Article 24 expressly states:

> For purposes of this Part of the Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Sales Convention, *supra* note 11, art. 24.

that it will be held open is not revocable for the time stated or, if no time is stated, a reasonable time not exceeding three months.[116] Under the Sales Convention, an offer may be revoked any time before a contract is concluded if the revocation is received prior to acceptance,[117] except "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable"[118] or "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."[119] Accordingly, when acting for a seller, one may want to opt out of Article 16 to avoid the test of reasonableness if the client wants the ability to revoke an offer. Correspondingly, when acting for the buyer, one might not recommend opting out of Article 16 so that an offer is not revocable at all, thus also avoiding the reasonableness test.

Another approach of the U.C.C. which differs from the Sales Convention approach concerns the "battle of forms" issue. The Sales Convention declares that a reply to an offer containing different terms does not constitute an acceptance where the differing terms "materially" alter the terms of the offer.[120] The list of examples of material alterations set out in the Sales Convention (*e.g.*, price, payments, quality and quantity of the goods, place and time of delivery, extent of liability or settlement of disputes)[121] clarify the fact that most alterations are material. In contrast, under U.C.C. Section 2-207, even a material alteration may not prevent the alleged acceptance from creating a contract.[122]

Furthermore, the buyer's rights to recover for defective goods appear to be more limited under the Sales Convention than under the U.C.C. The Sales Convention denies the buyer a remedy if the buyer does not give notice to the seller of the non-conformity within a reasonable time after the buyer discovered it or ought to have discovered it.[123] While this provision is similar to U.C.C. Sec-

116. U.C.C. § 2-205.

117. Sales Convention, *supra* note 11, art. 16(1).

118. *Id.* art. 16(2)(a).

119. *Id.* art. 16(2)(b).

120. *Id.* art. 19(2). Unless, of course, the offeror, without undue delay, objects orally to the discrepancy or dispatches notice to such an effect. If the offeror fails to object, the terms of the contract consist of the offer's terms and any modification contained in the acceptance. *Id.*

121. *Id.* art. 19(3).

122. U.C.C. § 2-207(1). However, if the parties are "merchants" under the U.C.C., additional terms contained in the acceptance do not form part of the contract if they materially alter it. *Id.* §§ 2-207(2)(b), 2-104(1).

123. Sales Convention, *supra* note 11, art. 39(1).

tion 2-607(3)(a), the Sales Convention sets an outside limit of two years from the date on which the goods were actually "handed over" to the buyer, unless this time limit is inconsistent with a period of guarantee in the contract.[124] Thus, a "reasonable" time period is defined to be two years under the Sales Convention.

In contrast to the restricted rights of the buyer to recover for defective goods, the buyer's right of set-off is expanded under the Sales Convention. Under the U.C.C., the buyer has the right to deduct from any part of the purchase price still due under the contract any damages incurred as a result of the seller's breach.[125] This right is limited, however, to situations where the buyer has not yet paid the full purchase price.[126] In contrast, the Sales Convention gives the buyer a right of set-off which effectively permits the buyer to recover damages even where the contract price has already been paid.[127]

## VII. Conclusion

As this survey has shown, U.S. exporters of goods may penetrate foreign markets in varying degrees through a simple sale of goods to a foreign buyer or through an agency or a distributorship arrangement. In determining which method to choose, an exporter will have to consider numerous issues, including the legal ramifications of each option. In so doing, the exporter must bear in mind that each Latin American country has its own peculiar legal regime for the regulation of international commercial transactions. Thus, appropriate foreign counsel becomes increasingly crucial in international sales transactions generally and, more particularly, in Latin American sales transactions where such counsel may bridge the gap between the distinctive legal systems of the Latin American civil law countries and the common law United States. At the same time, this article seeks to do more than merely encourage U.S. lawyers to rely on foreign counsel. By flagging key provisions in the foreign intermediary contracts and sales contracts, drafters of such contracts hopefully will be able to achieve the parties' aims

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124. *Id.* art. 39(2).

125. U.C.C. § 2-717.

126. *Cf. id.* § 2-714(1) giving buyer the right to recover damages for any non-conformity of tender resulting from seller's breach after buyer has accepted the goods.

127. Sales Convention, *supra* note 11, art. 50.

and avoid problems which arise when the performance of the contract does not unfold as the parties intended.