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# International Encyclopedia of Agency and Distribution Agreements

*Editor*

Agustín Jausàs

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Commercial Transactions) of the Section on Business Law of  
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# CONTENTS

# List of Contributors

## Editor

Agustín Jausàs  
JAUSAS  
P° de Gracia, 103 - Planta 7<sup>a</sup>  
08008 Barcelona, Spain  
Tel. 34 934150088 / Fax. 34 934152051  
E-mail: dsola@jausaslegal.com

## Contributors

### ARGENTINA

Justo F. Norman, Maria Victoria Paz  
Maciel Norman & Asociados  
Cerrito 1136, 10th Floor  
C1004AAX – Buenos Aires, Argentina  
Tel. +54 11 4813-2044  
E-mail: vpaz@mna.com.ar

### AUSTRALIA

Frederick J. Chilton, Andrew Egri & Joseph O'Mara  
Emil Ford Lawyers  
Level 5, 580 George Street  
Sydney, NSW 2000, Australia  
Tel. 61 2 92679800 / Fax. 61 2 92832553  
E-mail: fred.chilton@emilford.com.au

### AUSTRIA

Rudolf Krilyszyn  
Rudolf Krilyszyn & Ass.  
Porzellangasse 39  
A-1090 Wien, Austria  
Tel. 43 1 3199470 / Fax. 43 1 3199470-70  
E-mail: rudolf@krilaw.at

## LIST OF CONTRIBUTORS

### BELGIUM

Yves Van Couter & Pieter De Smedt  
Loyens & Loeff Avocats  
Woluwe Atrium, Rue Neerveld 101-103  
1200 Brussels, Belgium  
Tel. 322 7 434343 / Fax. 322 7434310  
E-mail: yves.van.couter@loyensloeff.com

### BRAZIL

Maria Regina Mangabeira Albernaz Lynch  
Motta, Fernandes Rocha Advogados  
Al. Santos, 2335, 10° Andar, Cerqueira Cesar  
01419-002 Sao Paulo, SP – Brasil  
Tel. +55 (11) 3082-9398 / +55 (11) 2192-9300  
E-mail: reginalynch@mfra.com.br

### CANADA

Stephen Weinstein  
Weinstein & Associates, Montreal, Canada  
Updated by Neil Ezra Hazan  
Borden Ladner Gervais LLP  
1000, rue de la Gauchetiere Ouest,  
Suite/bureau 900  
Montreal, PQ H3B 5H4, Canada  
Tel. (514) 879 1212 / Fax. (514) 954 1905  
E-mail: nhazan@blg.com

### CHILE

Florencia Larrain V. Blanco y Cia.  
Nueva York, N° 9 – Piso 16  
Casilla 21123, Correo 21  
Santiago de Chile, Chile  
Tel. 56 2 6988450 / Fax. 56 2 6985630  
E-mail: mblanco@urod.cl



## LIST OF CONTRIBUTORS

### CHINA

Nathan Kaiser & Xu Tian  
EIGER  
Suite 1607-1609,  
I Mansion of the North  
106 Zhongjiang Road  
Shanghai 200062  
China  
Tel. (86) 21 3255 2208  
E-mail: nathan.kaiser@eigerlaw.com

### COLOMBIA

Carlos Umaña Trujillo & Álvaro Cala  
Brigard & Urrutia  
Calle 70 A No. 4-41  
Bogotá, Colombia  
Tel. (571) 3462011 / Fax. (571) 3100609  
E-mail: cumana@bu.com.co

### COSTA RICA

John Aguilar Quesada  
Aguilar Castillo Love  
Centro Corporativo Plaza Roble  
Edificio El Pórtico III Nivel,  
Escazú, San José, Costa Rica  
Tel. (506) 2225959 / Fax. (506) 2229653  
E-mail: jaq@aguilarcastillolove.com

### CZECH REPUBLIC

Vojtěch Tríska & Juraj Dulík  
Triska & Zak  
Mánesova 5  
CZ-120 00 Praha 2  
Czech Republic  
Tel. (420) 224234413 / Fax. (420) 222246065  
E-mail: miroslav.tichy@dlapiper.com

### DENMARK

Jørn Vestergaard-Jensen, Kristian Storgaard & Joris Pieter Andersen  
Kromann Reumert  
Radhuspladsen 3  
Postboks 18 – DK-8100 Århus C.  
Denmark  
Tel. 45 70 121211 / Fax. 45 70 121411  
E-mail: jvj@kromannreumert.com

## LIST OF CONTRIBUTORS

### DOMINICAN REPUBLIC

Georges Santoni Recio  
Russin Vecchi & Heredia Bonetti  
Calle Recodo N° 2 – 3rd floor  
Ensanche Bella Vista  
Santo Domingo, D.N., Dominican Republic  
Tel. (809) 535-9511 / Fax. (809) 535-6649  
E-mail: gsantoni@rvhb.com

### EGYPT

Amr Zaki Abdel Motaal  
Abdel Motaal, Moharram & Heiza Law Firm  
5, Al Zohour St., Mostaza Mahmoud Sq.,  
Mohandessin – Giza 12311, Egypt  
Tel. 20 2 3361601 / Fax. 20 2 3361602  
E-mail: abdelmotaal@ammh-lawfirm.com

### FINLAND

Tuija Viinakka  
Turku School of Economics  
Rehtorinpellonkatu, 3  
Fin-20100 Turku, Finland  
Tel. 358 21 6383311 / Fax. 358 21 6383302

Markus Handelin  
Jaanti, Becker, DeBeck, van Setten & Leissner  
Mikonkatu 4  
FI-00100 Helsinki, Finland  
Tel. 358 9 6869080 / Fax. 358 9 6869081

### FRANCE

Stéphanie Hurtut de Giovanni  
C'M'S' Bureau Francis Lefebvre  
1-3, villa Emile Bergerat  
92522 Neuilly-sur-Seine Cedex, France  
Tel. +33-1 47385500 / Fax. +33-1 47385555  
E-mail: stephanie.degiovanni@cms-bfl.com

## LIST OF CONTRIBUTORS

### GERMANY

Klaus Günther LLM & Silvanne Helle LLM  
Oppenhoff & Partner  
Konrad-Adenauer-Ufer 23  
50668 Köln, Germany  
Tel. 49 2212091-0 / Fax. 49 2212091-333  
E-mail: klaus.guenther@oppenhoff.eu

### GREECE

Spyros G. Alexandris LLM  
Bahas, Gramatidis & Partners  
26 Filellinon Street  
105 58 Athens, Greece  
Tel. (30) 210 3318170 / Fax. (30) 210 3318171  
E-mail: s.alexandris@bahagram.com

### GUATEMALA

Alfonso Carrillo M.  
Carrillo y Asociados  
Diagonal 6, 10-01 zona 10  
Centro Gerencial Las Margaritas Torre II Nivel 7  
Guatemala, C.A. 01010  
Tel. (502) 2421-5700 / Fax. (502) 2421-5724  
E-mail: alfonso.carrillo@carrillolaw.com

### HONDURAS

Rosalinda Cruz Sequeira, Roberto A. Williams Cruz & Gabriela Alejandra Padilla  
Casco Fortín Cruz & Asociados  
Edificio Torre Alianza I, Suite 701,  
Tegucigalpa, M.D.C., Honduras  
Tel. (504) 2271-0072/73  
E-mail: vanessav@cascolaw.com

### HUNGARY

Péter Komáromi & Mariann Miskovics  
Sándor Szegedi Szent-Ivány Komáromi Eversheds  
Pasaréti út 59  
H-1026 Budapest, Hungary  
Tel. (36-1) 3943121 / Fax. (36-1) 3924949  
E-mail: komaromi@eversheds.hu

## LIST OF CONTRIBUTORS

Edit Pintér  
Dr Pintér Edit Law Firm  
Csalogány u. 12. fszt. 10.  
H-1015 Budapest, Hungary  
Tel. (36-1) 7983836 / Fax. (36-1) 7981812  
E-mail: edit.pinter@icicom.hu

## ICELAND

Thordor S. Gunnarsson  
Arnason & Partners  
Hofdabakki, 9  
112 Reykjavik, Iceland  
Tel. 354 5871211 / Fax. 354 5671270

## INDIA

Rabindra Jhunjhunwala, Aakash Choubey & Radhika Agarwal  
Khaitan & Co.  
One Indiabulls Centre, 13th Floor, 841 Senapati Bapat Marg,  
Elphinstone Road, Mumbai 400 001, India  
Tel. (91 22) 66365000 / Fax. (91 22) 66365050  
E-mail: aakash.choubey@khaitanco.com

## IRELAND

Edwina Dunn  
Solicitor  
45 Glenageary Woods, Glenageary  
Co. Dublin, Ireland  
Tel. 353 1 2850894

## ISRAEL

Alon Kaplan and Gideon Koren  
1, King David Ave.,  
Tel Aviv 64953, Israel  
Tel. (972-3) 6954463 / Fax. (972-3) 6955575  
E-mail: alon@alonkaplan-law.com  
lyat@are-legal.com

ITALY

Monica Aparo and Daniela Ghitti  
Picchi & Associati Studio Legale  
Via G. Obezolan 1/A  
25128 Brescia, Italy  
Tel. (39) 030 37722044 / Fax. (39) 030 3752802  
E-mail: dghitti@lexolution.it

JAPAN

Yasuzo Takeno  
Hamada & Matsumoto  
Sankyu Building  
6-14, Kasumigaseki 3-chome  
Chiyoda-KU, Tokyo 100, Japan  
Tel. 81 3 35803377 / Fax. 81 3 35920912

KOREA

Soo Chang Kim  
Kim & Company  
23rd Floor Gateway Tower Bldg.  
12, Dongja-Dong, Yongsan-gu  
Seoul, 140-709, Korea  
Tel. 82 2 37825500 / Fax. 82 2 37825501  
E-mail: mail@kclaw.co.kr

KUWAIT & SAUDI ARABIA

Sara Carmeli, Jordi Farres Valcarce & Joe Berti  
Studio Legale Perone & Fiori Apolloni  
Via XIV Settembre, n. 71  
06122 Perugia (Italy)  
Tel. (039) 075 5726404 / Fax. (039) 075 5738511  
E-mail: saracarmeli@yahoo.com

LEBANON

Mohamed Y. Alem  
Alem & Associates  
126 Foch Street  
Beirut Central District  
Beirut 20126609 - Lebanon  
Tel. + 961 1 999717 / Fax. + 961 1 999607  
E-mail: mohamed.alem@alemlaw.com

## LIST OF CONTRIBUTORS

### MALTA

Arthur Galea Salomone  
Galea Salomone & Associates  
Europa Centre  
113 St. Francis Street  
Floriana VLT 08, Malta  
Tel. 356 21221107 / Fax. 356 21243280  
E-mail: ArthurGaleaSalomone@fincotrust.com

### MEXICO

Jorge Sánchez Davila,  
Rosario Huet-Covarrubias &  
José Luis Vega Garrido  
Goodrich, Riquelme y Asociados  
Paseo de la Reforma 265  
Mexico City 06500, Mexico  
Tel. 52 55 55110738 / Fax. 52 55 55251227  
E-mail: jsanchez@goodrichriquelme.com

### THE NETHERLANDS

E.W.J. Hannema  
Norton Rose LLP  
Rembrandt Tower, 24th Floor  
Amstelplein 1, 1096 HA Amsterdam  
P.O. Box 94142, 1090 GC Amsterdam  
The Netherlands  
Tel. 31 20 46 29 413  
E-mail: ep.hannema@nortonrose.com

### NIGERIA

Lawrence Fubara Anga  
AELEX  
7th Floor, Marble House  
1, Kingsway Road, Falomo  
Ikoyi, Lagos, Nigeria  
Tel. 234 1 4736296 / Fax. 234 1 2692072  
E-mail: lfanga@aelex.com

### NORWAY

Didier Rigault  
Inkognitogate 22 A  
No-0256 OSLO  
Tel. +47 91 60 16 45  
E-mail: dr@rigault.net

PAKISTAN

M. Farrukh Irfan Khan  
Irfan & Irfan  
West End Building  
61, The Mall  
Lahore-54000, Pakistan  
Tel. +92 42 7249638 / Fax. +92 42 7323501  
E-mail: utmp@paknet4.ptc.pk

PAPUA NEW GUINEA

Vincent Bull  
Allens  
Level 6, Mogoru Moto Building  
Champion Parade  
Port Moresby  
National Capital District  
Papua New Guinea  
Tel. +675 305 6000 / Fax. +675 321 7566  
E-mail: Vincent.Bull@allens.com.au

PARAGUAY

Esteban Burt  
Peroni Sosa Tellechea Burt & Narvaja  
Eulogio Estigarribia N° 4846 (Villa Morra)  
1892 Asunción, Paraguay  
Tel. +595-21 663536 / Fax. +595-21 600448  
E-mail: Esteban.burt@pstbn.com.py

PERU

Carlos Alayza Bettocchi  
Alayza Consultores  
Guillermo Marconi #451  
San Isidro, Lima, Perú  
Tel. +511 4720628 / Fax. +511 7070600  
E-mail: charlie@alayzalegal.com.pe

POLAND

Ewa Butkiewicz, Joanna Krakowiak & Sylwia Paszek  
WARDYŃSKI & PARTNERS  
WARSAW Head Office:  
Aleje Ujazdowskie 10  
00-478 Warsaw, Poland

## LIST OF CONTRIBUTORS

Tel. (48-22) 437 82 00, (48-22) 537 82 00 / Fax. (48-22) 437 82 01, (48-22) 537 82 01  
E-mail: warsaw@wardynski.com.pl  
Web: www.wardynski.com.pl

## PORTUGAL

António Serra Lopes, Francisco Barona &  
Ana Guedes Teixeira  
Serra Lopes, Cortes Martins & Associados – Sociedade de Advogados, RL  
Rua General Firmino Miguel, n° 3 torre 2 – 12 andar  
1600-100 Lisboa, Portugal  
Tel. 351 217234000 / Fax. 351 217234029  
E-mail: slcm@slcm.pt

## RUSSIA

Natalia G. Prisekina & Vilena S. Mandrika  
Russin & Vecchi L.L.C  
Ulitsa Sadovnicheskaya, 35-37  
Building 2, Suite 406  
Moscow 115035, Russia  
Tel. 7-495-783-0522  
Fax. 7-495-783-0523  
E-mail: russinvecchi@snc.ru, lawyersgroup@russinvecchi.ru

## SINGAPORE

Tham Kok Leong & Alexander Yap  
Allen & Gledhill LLP  
One Marina Boulevard No. 28-00  
Singapore 018989  
Tel. 65 68907526 / 65 68907627  
Fax. 65 63023046 / 65 63023049  
E-mail: tham.kokleong@allenandgledhill.com / alexander.yap@allenandgledhill.com

## SLOVAKIA

Jana Markechova  
Weiss-Tessbach  
Rotenturmstrasse 13  
A-1010 Wien, Austria  
Tel. 43 53316510 / Fax. 43 53315252



SOUTH AFRICA

Leora Blumberg  
Webber Wentzel Bowens  
60 Main Street  
Johannesburg, South Africa  
Tel. 27 11 8322636 / Fax. 27 11 8346701

Revised and updated by Byron Angelopulo  
Spoor & Fisher  
P.O. Box 454 Pretoria, South Africa  
Tel. 27 12 6631611 / Fax. 27 12 6631942

SPAIN

Héctor Jausàs  
Jausàs  
Pº de Gràcia, 103 – 7th floor  
08008 Barcelona, Spain  
Tel. +34 934150088 / Fax. + 34 934152051  
E-mail: hjausas@jausaslegal.com

SWEDEN

Mikael Karlsson & David Klose  
Moll Wendén Advokatbyrå, Malmö  
Stortorget 8  
SE-211 34 Malmö, Sweden  
Tel. + 46-40 6656511 / Fax. +46-40 971917  
E-mail: david.klose@mollwenden.se

SWITZERLAND

Bernhard F. Meyer & Martina Wirz  
MME – Meyer Müller Eckert Partner  
Kreuzstrasse 42  
CH – 8008 Zürich  
Tel. +41 44 2549966 / Fax. +41 44 2549960  
E-mail: nadine.reinfried@mmepartners.ch/nadine.reinfried@mmepartners.ch

## LIST OF CONTRIBUTORS

### TAIWAN

Nathan Kaiser & Show Chen  
EIGER  
12F, Bldg. A, 25-2 Ren Ai Rd, Sec. 4  
Taipei 10685  
Taiwan  
Tel. 886 926181004  
E-mail: nathan.kaiser@eigerlaw.com

### THAILAND

E.T. Hunt Talmage III  
Chandler & Thong-EK  
7th Fl., Bubhajit Bldg.  
20 North Sathorn Rod.  
Bangkok 10500, Thailand  
Tel. 66 2 2666483 / Fax. 66 2 2666483  
E-mail: talmage@ctlo.com

### TURKEY

Esin Çamlıbel & Noyan Turunç  
TURUNÇ  
Cumhuriyet Bulvari 140/1  
Alsancak 35210 Izmir, Turkey  
Tel. 90 232 4634907 / Fax. 90 232 4634909  
E-mail: ecamlibel@turunc.av.tr; nturunc@turunc.av.tr

### UNITED ARAB EMIRATES

Essam Al Tamimi  
Al Tamimi & Company  
Advocates & Legal Consultants,  
6th floor, Building 4 – The Gate Precinct – Int Financial Centre  
Dubai, United Arab Emirates  
Tel. +971 4 3641641 / Fax. +971 4 3641777  
E-mail: e.tamimi@tamimi.com

UNITED KINGDOM

Mark Williamson & John Milligan  
Clyde & Co  
The St. Botolph Building,  
138 Houndsditch  
London, EC3A 7AR, England  
Tel. + 44 207 876 5000 / Fax. + 44 207 876 5111  
E-mail: Mark.Williamson@clydeco.com

UNITED STATES

Mark F. Katz  
Katz & Associates  
1221 Broadway, 21st Floor,  
Oakland, CA 94612, U.S.A.  
Tel. 650 996 4792  
E-mail: mfk@markfkatzandassociates.com

URUGUAY

María Durán Ameixeiras, Federico Fischer Castells, Antonella Toma  
& Marina Jiménez de Aréchaga  
Hughes & Hughes  
25 de Mayo 455 – 2° piso  
11000 Montevideo – Uruguay  
Tel. 598 2 9160988 / Fax. 598 2 9161003  
E-mail: mduran@hughes.com.uy/ffischer@hughes.com.uy

VENEZUELA

Carlos Eduardo Acedo Sucre  
Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía.  
Edificio 'ABA' Calle Veracruz Las Mercedes  
Caracas 1060 – Apartado 3857  
Caracas 1010-A, Venezuela  
Tel. 58 212 9091600 / Fax. 58 212 9931237  
E-mail: ceacedo@menpa.com

VIETNAM

Phan Ho Thien Vu, Do Thanh Cong, & Ngo Viet Hoa  
Russin & Vecchi  
15/F, OSC-VTP Building  
8 Nguyen Hue Blvd, D1  
Ho Chi Minh City, Vietnam  
Tel. (84-8) 3824-3026 / Fax. (84-8) 3824-3113  
E-mail: dtcong@russinvecchi.com.vn

LIST OF CONTRIBUTORS

# **Dominican Republic**

**Georges Santoni Recio**  
*Russin Vecchi & Heredia Bonetti*

This chapter is up to date as of 15 September 2015

DOMINICAN REPUBLIC

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## 1. LEGAL FRAMEWORK

One of the various means of selling foreign goods or services in the Dominican Republic is by way of local agents or distributors, which act as local representatives of a foreign principal to promote the sale of the goods and services in question.

Selling through local agents or distributors has the advantage of establishing an effective sales apparatus at low cost. The downside, however, is the strong protection afforded to agents and distributors by the Dominican Law No. 173 of 6 April 1966, as amended (hereinafter 'Law No. 173' or simply 'the law'). As it will be further established, after an agent or distributor is appointed (what the law calls 'concessionaires'), the foreign supplier may have very little flexibility in terminating the agent or distributor, even in the face of marginal performance.

Law No. 173 is considered to be a 'public order law', that is, it supersedes contrary provisions in agreements between private parties.

As of the enactment of the Foreign Investment Law of 1995 (Law No. 16-95), which modified Article 12 of Law No. 173, foreign companies are free to act as distributors of goods and services in the Dominican Republic. The law struck down the former requirement of Law No. 173 that corporations engaged in the business of distribution in the Dominican Republic had to be incorporated in the Dominican Republic and have two-thirds Dominican ownership, as a result any Dominican company owned by forgeries or a locally registered foreign company may engage in distribution business in Dominican Republic.

### 1.1 Courts and Administrative Agencies

There are no special courts or tribunals for Law No. 173 cases. The ordinary trial courts have jurisdiction over disputes between foreign suppliers and their local concessionaires. Before a concessionaire can file a claim for termination without 'just cause', it first must attempt a conciliation procedure before the local Chamber of Commerce and Production. Only when such conciliation is unsuccessful, can the concessionaire file a claim with the competent trial court. In recent experience rarely the parties reach a successful conciliation with 99.5% of cases resulting in a lawsuit.

There are no governmental agencies or authorities that regulate the appointment, use, and termination of commercial intermediaries. A very important aspect of Law No. 173 is that the concessionaire must have registered the name of the foreign firm it represents and the terms of its agreement with the International Department of the Central Bank of the Dominican Republic. While non-registration generally bars a claim under Law No. 173, there have been a few cases where unregistered local companies have been able to successfully claim that circumstances outside their control prevented proper compliance with the registration requirement. Since agents and distributors sometimes fail to register their agreements with the Central Bank, it is useful for foreign suppliers to submit a formal request to the Central Bank seeking to determine if the requisite registration was made before considering the termination of its concessionaire.

## LEGAL FRAMEWORK

In general, although there is a limited amount of reported case law interpreting Law No. 173, the courts in the Dominican Republic tend to interpret Law No. 173 in favour of the local concessionaires.

### 1.2 Choice of Law/Choice of Forum Clauses

In principle, Dominican law would apply to an agreement with local concessionaires notwithstanding a choice of law clause in their agreement because of the ‘public order’ nature of Law No. 173. Similarly, a choice of forum provision in an agreement would, in principle, be rendered equally ineffective. The Dominican Supreme Court has interpreted Law No. 173 as precluding application of foreign law and jurisdiction. Hence, the choice of foreign law and submission to foreign courts or an arbitration panel will not prevent a Dominican court from applying Law No. 173. Nevertheless, it may be convenient for foreign manufacturers to include foreign law as governing so as to strengthen its position in the event that its agents or distributors should attempt to seek enforcement of a Dominican Republic judgment in a foreign court. The imposition of Dominican Republic Law, substantially altering mutually agreed-upon obligations of the parties in a situation where the parties previously have chosen a foreign law as governing, may be construed as repugnant to the public policy of the foreign court before which enforcement of the judgment is sought. Arbitration and other forms of alternative dispute resolution are not precluded under Law No. 173, but there is no guarantee that a Dominican court would respect such a choice. Limited cases from lower courts report the recognition of arbitration as valid in a distribution agreement nonetheless those cases must still resist the test of the Supreme Court in order to be considered a binding precedent in this subject. Furthermore, the recently enacted Law No. 554-14 on international private law provides that the courts of the Dominican Republic are competent in the matters, concerning patrimonial rights of contractual obligations that take place in the Dominican Republic.

The law does not require that concession agreements be entered into in Spanish. To register the agreement with the International Department of the Central Bank, however, a translation into Spanish by a certified court-appointed interpreter is required.

### 1.3 Law No. 173 and CAFTA-DR

As has been mentioned, Law No. 173 is a ‘public order’ law whose provisions may not be superseded by private contract. Nevertheless, with the taking of effect of the Dominican Republic – Central American Free Trade Agreement (CAFTA-DR) on 1 March 2007, the law is no longer considered to have a ‘public order’ nature with regards to agreements with United States companies, thus permitting the will of the contracting parties to prevail over the provisions of the law. According to Chapter 11, Annex 11.13, section B, of the CAFTA-DR, a contract between a United States company and a local concessionaire can be governed either by Law No. 173 or civil law, as the parties determine. If Law No. 173 is not specifically chosen, the relationship will be ruled by the freedom of contract principle and the Dominican Civil Code rules.

## 2. GENERAL CONCEPT: CONCESSIONAIRES

Law No. 173 makes no distinctions between agents or distributors. They are referred to as 'concessionaires'. It is very broad in its application. It protects, *inter alia*:

Physical or juridical persons engaged in the promotion or negotiation of the importation, distribution, sale or lease of products or services, or any type of trade or exploitation of foreign merchandise or products and the services related thereto . . . Whether act[ing] as agent, representative, importer, commission merchant, franchisee, or under any other designation.

Under this broad statutory language, both agents and distributors would be construed as subject to Law No. 173.

### 2.1 Definition

Agents are those who sell on account of others and generally are paid a commission on sales by the foreign supplier. Distributors buy and resell on their own account and the profit results from the differential, which is received directly from the final customer. There are not many practical variations to those generalized concepts in the Dominican Republic.

### 2.2 Registration Obligation

As indicated above, registration with the International Department of the Central Bank is a prerequisite for the concessionaire that wishes to file a claim for termination without 'just cause' against its foreign supplier. Failure to comply with this obligation should result in the concessionaire being barred from filing a claim under Law No. 173.

### 2.3 General Duties: Scope of Its Powers

The duties of the concessionaires are those set forth in the agreement with the foreign supplier. There is no specific legal principle that defines the duties of agents or concessionaires in the absence of contractual understandings. Under Dominican law, agents do not have implied authority to act for their foreign principals. The parties may establish the general duties and powers of agents in their agreements.

However, the general duty of the foreign principal is to accept orders from its local concessionaire. Failure to accept such orders may be construed to be a constructive termination of the agreement. Dominican law is not specific as to the powers of foreign principals over the local agents. As indicated above, the parties may stipulate in their agreement as to their respective powers and duties.

## 2.4 Exclusivity

Law No. 173 is silent on the question of whether a foreign supplier can have several non-exclusive concessionaires. In only one section of the Law, Article 5, is there a provision concerning exclusive contracts. That section has been interpreted to mean that the Law does not exclude the existence of non-exclusive agreements. As a practical matter, the International Department of the Central Bank registers exclusive as well as non-exclusive concession agreements. The parties therefore are free to negotiate on exclusivity. The Supreme Court has determined, however, that simple or reciprocal exclusivity is of the essence of a concession agreement and can only be limited by an express convention between the parties. It had also determined that a non-exclusive agreement may become exclusive through the course of dealings. In general, exclusivity is interpreted to mean that the foreign manufacturer or supplier is barred from appointing other concessionaires or from itself selling the products within the assigned territory. The appointment of non-exclusive concessionaires is one of the foreign suppliers' best options for limiting the protective effect of Law No. 173. If a concessionaire performs poorly, the foreign supplier would then be free to appoint a new non-exclusive concessionaire.

## 2.5 Term and Renewal

Agreements with regards to term or expiration clauses will be rendered ineffective on account of the public order nature of Law No. 173. Article 2 of Law No. 173 states as follows:

Notwithstanding that a contract contains a clause by which the parties reserve the rights of unilaterally terminating their commercial relations, the foreign . . . [principal] shall not terminate the relationship nor refuse to renew the contract upon its normal expiration, except for just cause.

While the term clause is ineffective under Dominican Law, its inclusion is nonetheless recommended. It sometimes happens that the concessionaire whose performance is marginal will allow an agreement to expire on the termination date without claiming compensation.

## 2.6 Termination

### 2.6.1 With Cause

Under Law No. 173, a distribution relationship can only be terminated by the licensor when 'just cause' can be shown. Law No. 173 defines 'just cause' as non-compliance with an essential obligation of the distribution agreement. The burden of proving 'just cause' falls to the licensor. The local agent or distributor is required to prove only that explicit or constructive termination occurred.

Hence, Law No. 173 may provide sanctions against termination of concessionaires even if the concessionaire violates the terms of the agreement, unless failure to comply with these provisions is interpreted by a Dominican court as breaches of essential obligations, constituting 'just cause' for a termination. The inclusion of quota or minimum sales, together with a stipulation that compliance with those provisions constitutes an essential element of the agreement, may result in a finding of 'just cause' by Dominican courts.

### 2.6.2 Without Cause

Contractual provisions whereby the principal is allowed to terminate the agreement without cause, such as upon a minimum notice, are ineffective under the provisions of Law No. 173.

### 2.6.3 Non-renewal

Pursuant to Article 2 of Law No. 173, non-renewal of distribution agreement is deemed equivalent to termination, and will hence carry all consequences of termination as will be set forth below.

### 2.6.4 Consequences of Termination

Article 3 of Law No. 173 sets forth, on the one hand, the circumstances when a concessionaire is entitled to indemnification upon termination and, on the other hand, the basis for calculating such indemnification. Such Article literally reads as follows:

ARTICLE 3. Every concessionaire shall have the right to sue the licensor in case of destitution, substitution or termination of the concession contract existing between them, or due to refusal to renew said contract, unilaterally or without just cause on the part of the Licensor, for the complete and just indemnification of the damages and losses caused by such reason, which amount shall be fixed based on the following factors:

- a- All losses sustained by the concessionaire due to the personal efforts he has put in for the exclusive benefit of the business he is deprived of, including expenses for payment of compensations established by the labour laws.
- b- The present value of the investment in the acquisition or lease of the premises and its fitness, of the equipment, installations, furniture and fixtures, in case these were only used for the business he is deprived of.
- c- (Amended by Law No. 263 dated 31 December 1971) The value of the promotions of the services offered as per the commercial prestige of the agent, of the merchandise and products, parts, spare parts, accessories and fixtures that he has in stock and from whose sale, lease or exploitation he shall cease to benefit from; this value shall be determined by the acquisition and transportation cost to his warehouse or office, plus taxes, duties, inland freight charges and any other charges caused by the delivery of the merchandise to his warehouse or office; and
- d- (Amended by Law No. 622 dated 28 December 1971) The amount of the gross profits obtained by the concessionaire from the sale of the merchandise, products or services during the last five years, or if the commercial relationship has been for

## GENERAL CONCEPT: CONCESSIONAIRES

less than five years, five times the average annual gross profits obtained during the last years, irrespective of what they amount to. In case the concessionaire had represented the Licensor for more than five years, the latter shall pay, in addition, the amount resulting from multiplying the number of years in excess of five years by one tenth the average of the gross profits obtained during the last five years of representation.

A concessionaire's contractual waiver of his statutory right to indemnification is ineffective on account of the 'public order' nature of Law No. 173.

However, Law No. 173 does not deal specifically with the issue of whether a terminated concessionaire has a right to continuing commissions with respect to orders solicited prior to termination. The parties may freely negotiate this issue in their agreement.

Lastly, to terminate the concessionaire's registration before the International Department of the Central Bank, the agreement between the concessionaire and the principal must have been terminated. Such termination can be done amicably through a termination agreement, where the foreign supplier generally pays the concessionaire a substantial amount to agree to termination, or through a definitive court order declaring the rescission of the agreement.

### **3. ADDITIONAL MATTERS**

#### **3.1 Tax Issues**

The appointment and use of a local concessionaire by a foreign principal will not subject the principal to local income taxation. A relationship with a local concessionaire could be regarded as an employee-employer relationship only if the legal characteristics of the employee-employer relationship are found, such as subordination of the employee to the employer, payment of salary (including a commission in some cases), etc. Other than those indicated above, there are no withholding or reporting requirements that would apply to commissions paid to the concessionaire.

#### **3.2 Intellectual Property Issues**

The protection of the principal or licensor for any patents, trademarks, trade names, and other intellectual property rights when selling through a concessionaire is only guaranteed by the registration of its rights to such intellectual property with the Ministry of Industry and Trade of the Dominican Republic via the local Industrial Property Office (ONAPI). There are no laws that specifically require the licensor to indemnify the concessionaire from infringement claims against the licensors' s products. Notwithstanding, violations of intellectual property rights dully protected are subject to sanctions, in accordance with Intellectual Property Law No. 20-00.

#### **3.3 Antitrust & Competition Law Issues**

There are no specific competition laws concerning agency arrangements. Notwithstanding, there is an Anti-trust Authority (Pro-Competencia) and an Anti-trust Law (Law No. 42-08). Pro-Competencia may, on an ex-officio basis or by request of a legitimate interested party, begin an investigation and procedure to determine whether a transaction is in accordance with the anti-trust regulations or not. In the event of wrongdoings, Pro-Competencia may issue fines of a range from 30 to 3,000 minimum wages in cases of antitrust violations. Law No. 42-08 was promulgated in the year 2008, and has not yet become in force pending the appointment of the executive director.

As a contract condition, the licensor may prohibit the concessionaire from soliciting orders outside the assigned territory or from representing products that compete with those of the principal.

#### **3.4 Consumer Protection**

Law No. 358-05, for Consumer Protection, is also considered a public order statute. Said law creates and establishes *Pro-Consumidor*, a governmental agency for the

## ADDITIONAL MATTERS

protection of consumers with ability to order products recalls, establish fines and destroy harmful products.

Law No. 358-05 establishes the mandatory recall of any products that are deemed to be harmful to consumers. The cost and sanctions associated to a product recall shall be the responsibility of the local supplier (in this case local distributor), nonetheless Law No. 358-05 has a long reach and in recalls based on harm to the public health, it may reach the manufacturer, as the courts have ruled before (First Instance District Court of the National District, date 15 August 2002).

Supplier and distributor may delineate in the agreement the party responsible for carrying out and absorbing the cost of a recall. A supplier may limit the warranty provided to its distributor in an agreement between the parties. Nonetheless per Law No. 358-05, local distributor must grant the end-user a warranty for the same length as provided in the country of origin of the products.

### **3.5 Data Protection**

Supplier and distributor may exchange information about customers and end-users, provided such data is not protected by the law. Personal and financial data are protected in the Dominican Republic by Law No. 172-13. Any information regarding racial or ethnic origin, religious, political and sexual preferences, union affiliation and health information, is protected and cannot be revealed or shared without the consent of the owner of such data.