duty entry.[24] TAA #35

Value of a chip that is a component part of a stereo receiver, and consequently an assist, is the cost of the chip's acquisition even if that cost includes research and development for the chip done in the United States. TAA #55

Value of raw material assist sold to manufacturer at depreciated value is equal to difference between original purchase price and depreciated sale price. TAA #24

Neither principal nor escaped interest of interest-free loan is an assist. TAA #17

Non-production use equipment (air conditioners, telephones, emergency generators, etc.) are not assists. TAA #18

Optional testing paid for by importer not an assist, but dutiable if seller is paid for it. TAA #11

Services-costs not within definition of assists may still be a part of COMPUTED VALUE as material/fabrication/general expense if GAAP of country of manufacturer so dictates. TAA #9

Accounting services carried on U.S. books are not part of general expenses or of cost of fabrication under computed value. TAA #44

Method of payment of salaries of U.S. employees working abroad through related foreign producer in foreign currency does not alter fact such services are not assists. TAA #46

OTHER

Facts involving violation of foreign laws will not be subject of rulings. TAA #26

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[24]Original equipment automobile parts from Canada are entitled to entry free of duty. Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016.

Termination of Sales Agents and Distributors in France

A foreign manufacturer who wishes to market his products in France has an option between creating a French subsidiary or branch or appointing one or more independent sales agents or distributors.[1]

[1]The further option of contracting with a *Voyageur-Représentant Placier* (VRP) (literally, travelling salesman) is also available to a French manufacturer but should not be entertained in the case of a foreign manufacturer.

The role of a sales agent, whether an individual or a company, is to solicit business for the foreign manufacturer in a given territory and to transmit orders to the manufacturer for the latter's acceptance and processing. The agent receives for his services a remuneration usually expressed as a percentage of the total sales made by the manufacturer in his territory. Since sales are made directly by the manufacturer to the customers, title to the goods does not pass through the agent, who therefore is not normally involved in clearing the products through French customs nor in shipping them to customers.[2]

The distributor is an independent contractor who buys and resells for his own account and is normally free to fix his own resale prices. The distributor must generally pay the manufacturer regardless of whether or not he has been paid by his own customers. He is responsible for clearing the products through French customs and for having them delivered at the customer's place of business. The distributor thus acts on his own behalf and assumes the risk of possible insolvency of the customers, which is not the case for the agent.[3]

In practice, however, the contrast between an agent and a distributor is often not so marked.[4] This is the case, for example, where the manufacturer participates in or follows closely the activities of the distributor, or where, for a variety of reasons, the distributor's gross profit upon his resale of the goods is not more than the commission which a sales agent would normally receive on such a sale.[5] This is also the case where the distributor is granted payment terms by the manufacturer which exceed those the distributor normally grants to his own customers.

The manufacturer's decision to utilize the distributor or sales agent route to market his products in France will be dictated by a variety of economic, financial and commercial factors. However, there are also certain legal considerations to bear in mind. For example, while in the agency situation the manufacturer retains an absolute control of the price at which his products will be sold in France, the distributor is free to fix his own resale prices (although maximum—as opposed to minimum—resale prices can be fixed

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The basic function of a VRP is to solicit clients and conclude sales contracts for the firm which he represents. The VRP also has a number of other features of a sales agent, including the right to an indemnity upon termination. However, the VRP, who must be an individual, necessarily has the legal status of an employee of the principal and therefore is not "an agent of an independent status." Accordingly, a foreign manufacturer having one or more VRPs in France would be exposed to the risk of the VRPs being treated as a permanent establishment of the foreign manufacturer in France pursuant to article 4(4) of the France-U.S. Tax Treaty of July 28, 1967. For a general discussion of VRPs, *see* Encyclopédie Dalloz, Commercial, V° Représentant de Commerce.

[2]Encyclopédia Dalloz, Commercial, V° Agent Commercial n° 1-2; Dictionnaire Permanent de droit des affaires, V° Agent Commercial n° 2.

[3]*See* Cass. Soc. October 21, 1970 (J.C.P. (C.I.) 1971. 10131, note Level); *See also* Encyclopédie Dalloz, Commercial, V° Concession Exclusive et V° Agent Commercial n° 55-57; Dictionnaire Permanent de droit des affaires, V° Agent Commercial n° 6.

[4]*See, e.g.*, Cass. Com. May 13, 1970 (D. 1970.701).

[5]*See infra* ¶ 13 of text.

by contract between the manufacturer and the distributor).[6] In addition, the French regulations barring refusals to sell would be applicable to the distributor but would not normally apply to a foreign manufacturer. Furthermore, while the distributor would be subject to whatever price control regulations may be applicable to imported goods, a foreign manufacturer selling through a sales agent would not be legally affected by such regulations.[7]

On the other hand, the rights of a sales agent upon termination of the agency agreement by the manufacturer are undoubtedly more far-reaching than those of a distributor. The purpose of the following analysis is to discuss those respective rights, since they may, in some instances, be the determinative factors in deciding whether to use the distributorship or the sales agency route.

I. Sales Agents

1. Sales agents, whether individuals or companies, are entitled to protection upon termination by virtue of a statute of December 23, 1958 (the "1958 Statute") which provides in part that "contracts entered into between sales agents and their principals are made in the common interest of the parties. Their termination by the principal, if not justified by some fault on the part of the agent, entitles the latter notwithstanding any contractual provision to the contrary, to an indemnity as compensation for his damages."[8]

2. The 1958 Statute does not offer any definition of the "fault" the absence of which entitles the agent to an indemnity. It is generally considered, however, that such fault may exist on the part of the sales agent not only for breaches of his contractual obligations, but also for mistakes that a qualified and diligent professional should have avoided. Thus, the courts have held that a "fault" depriving the agent of any termination indemnity was characterized where the agent had encroached maliciously on the territory of other agents; where he made injurious comments concerning the principal or sold competing products or had been negligent in his solicitation of customers.[9]

By contrast, the courts have held that the fact that sales for a given year were less than those of the previous year "without being ridiculously low" was not sufficient to deprive the agent of a termination indemnity. Also, in a 1982 decision involving a case where mandatory sales goals had been provided, the French Supreme Court upheld the decision of a court of

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[6]Circular of March 31, 1970 (*Circulaire Fontanet*) title I, chapter I, § B (J.O. April 2, 1960).

[7]French criminal law is of extraterritorial application only in very limited cases which do not encompass possible violations of French economic regulations committed abroad by a foreigner. C. PR. PEN. Art. 689-1; *See* Encyclopédie Dalloz, Droit Pénal, V° Compétence Internationale, Nr. 117-25.

[8]Decree Nr. 58-1345 of December 23, 1958 (J.O. Dec. 28, 1958, p. 11945; D. 1959.132); translation of article 3 is by the author and is not official.

[9]Cass. Com. November 29, 1971 (Bull. Civ. IV-287); Paris, October 23, 1964 (D.1965. Somm. p. 36); *See also* Encyclopédie Dalloz, Commercial, V° Agent Commercial NR 132-33.

appeals which had refused to permit termination of the sales agency agreement for failure to comply with the sales goals, on the ground that such failure did not result from a lack of activity on the part of the agent but from the fact the products were becoming less popular with the potential customers.[10]

Furthermore, even where a fault can be attributed to a sales agent, the courts may ascertain whether the agent's fault itself resulted from a fault of the principal. In the latter case, the principal remains responsible for the termination and is required to pay the termination indemnity. Thus, it has been held that the late sending of examples, or the nonpayment of commissions by the principal justified the agent's default under the contract and that the principal was therefore liable for a termination indemnity.[11]

3. Where it is payable, the measure of this indemnity is said to be the damage actually suffered by the agent by reason of the termination. In practice, however, the indemnity is often determined arbitrarily by the courts on the basis of an annual commission arrived at by averaging the commissions of the preceding two years of activity,[12] though there are cases where the amount of the indemnity awarded was either greater[13] or less.[14] A court is likely to take into account as well factors other than the amount of past commissions, such as the extent to which the agent has increased the principal's business;[15] the amount of money which the agent has invested;[16] the extent of the agent's specialized qualifications; the portion of the agent's time which has been devoted to the principal's business; the cost to the agent of the termination of employment and other contracts resulting from the termination of the sales agency relationship.[17]

In addition to the "normal" indemnity contemplated by the 1958 Statute, an agent may also be entitled to supplementary compensation if the termination is regarded as "abusive." This concept is applied where the agent can show that there was an element of malice or unfairness in the termination.

Such compensation would be awardable, for example, in a case where the principal terminated the agency agreement in such a manner or in such circumstances as to cast doubt on the agent's reputation or to cause unnec-

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[10]*Id.*, Nr. 134; Cass. Com. Feb. 9, 1982 (unreported decision, *See* Lamy Commercial 1983 Nr. 2147).

[11]*Id.*

[12]Trib. Com. Paris January 3, 1973 (D. 1973. Somm. p. 137); Paris, April 20, 1972 (D. 1973. Somm. p. 105); Riom, October 8, 1976 (J.C.P. 1978. 18941) Amiens, June 14, 1978 (G.P. 1978.2. Somm. p. 469).

[13]Cass. Com. October 14, 1974 (G.P. 1974.2. Somm. p. 285).

[14]*See* Colmar May 28, 1976 (Table GAZETTE DU PALAIS-DALLOZ 1974-1977 Tome I, p. 72).

[15]Cass. Com. May 20, 1969 (D.S. 1969.642, note J.L.)

[16]Cass. Com. December 1, 1981 (J.C.P. 1982.IV. p. 71).

[17]*See* Paris, February 13, 1964 (G.P. 1964.1.333); Versailles, December 1, 1981 (J.C.P. IV.1982 p. 208).

essary hardship to him.[18] The period of notice given to the agent may also be taken into account, and the indemnity may be increased by the commissions which he might have earned during a "reasonable" period of notice, if the notice actually given was unreasonably short, irrespective of the period of notice contemplated by the agency agreement.[19]

4. The 1958 Statute makes it clear that this right to an indemnity exists notwithstanding any contractual provision to the contrary and the courts have, in a number of cases where both the principal and the agent were French, confirmed that this right to an indemnity cannot be waived by contract.[20]

Where an international contract is concerned,[21] however, the question arises of whether the 1958 Statute can be defeated by a choice of law clause, whether or not coupled with a choice of forum or arbitration clause.

In the first place, where a French court has jurisdiction over a dispute between a French agent and a foreign principal (which would be the case under article 14 of the French Civil Code in the absence of a choice of forum clause,[22] it is virtually certain that it would apply the 1958 Statute as a matter of public policy notwithstanding any provision in the contract naming as governing law the laws of a country or state which gives agents no protection upon termination.

By contrast, where the foreign forum under a choice of forum clause is located in one of the countries which are parties to the September 27, 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commerical Matters (the Brussels Convention),[23] it seems clear that a French judge would be bound to decline jurisdiction over a dispute between a French agent and a foreign principal having his main place of business in one of the countries which are parties to the Brussels Convention.[24] Under article 17 of the Brussels Convention, "if the parties, one or more of whom is domiciled in a contracting state, have agreed that a court or courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdic-

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[18] *See* Nimes, April 25, 1974, REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 1974, p. 579, note Hémard.

[19] Lyon, October 17, 1974, REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 1974, p. 169, note Hémard.

[20] *See, e.g.*, Cass. Com. January 7, 1980 (D. 1980, IR. 218).

[21] For a definition and discussion of an international contract, *see* note Mestre under Cass. Civ. October 7, 1980, REV. CRIT. D.I.P. 1981, p. 313.

[22] Article 14 of the French Civil Code reads as follows in English translation: "a foreigner, even if not residing in France, may be cited before French courts for the execution of obligations by him contracted in France with a Frenchman; he may be brought before the courts of France for obligations by him contracted in foreign countries towards Frenchmen." Article 14 can be waived by contract, either expressly or by way of a choice of forum clause. *See* H. Batiffol and P. Lagarde, DROIT INTERNATIONAL PRIV, vol. 2, 1976 ed., N. 685-89.

[23] COMMON MKT. REP. (CCH) ¶ 6003.

[24] As at April 1, 1983, the member countries are: Belgium, France, Italy, Luxembourg, Netherlands, West Germany.

tion. . . ." It would then be up to such foreign court to apply whatever law governs the contract.

The situation is not as clear in the case of a principal having his main place of business in a country, such as the United States, which is not a party to the Brussels Convention and which gives agents no statutory rights upon termination. There does not appear to be any reported case directly on the subject, but French courts have declined jurisdiction in cases where an international sales agency agreement contained an arbitration clause[25] and this fact, combined with the fact that choice of forum clauses between "merchants" are generally enforceable under French law except in limited cases,[26] makes it rather likely, at least where the agent is a company,[27] that the courts would also decline jurisdiction where an international sales agency contract contained a choice of forum clause.

There remains, however, a possibility that arbitrators or foreign courts may find it proper to give some effect to the mandatory provisions of the 1958 Statute. This possibility—which is admittedly today a rather remote one where there is an express choice of law clause—will become a factor to be reckoned with when and if the Hague Convention of March 14, 1978 on the Law Applicable to Agency[28] or the Rome Convention of June 19, 1980 on the Law Applicable to Contractual Obligations[29] ever becomes applicable.[30]

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[25]Paris, June 19, 1970 (REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ (Rev. crit. D.I.P.) 1971.692, note Level) Cass. Civ. October 7, 1980 (REV. CRIT. D.I.P. 1981, p. 313 note Mestre). *See also L'arbitrage international dans le nouveau code de procédure civile* (REV. CRIT. D.I.P. 1981, p. 616).

[26]*See* H. Battifol and P. Lagarde, op. cit. N° 685.

[27]While choice of forum clauses are generally valid in commercial matters between "merchants," a number of French courts including the French Supreme Court (Cass. Com. October 29, 1979, G.P. 1980. 87, note Dupichot) have held that the agency relationship is "civil" by nature and that disputes between agents and their principals must accordingly be brought before "civil" as opposed to "commercial" courts. For the same reason an arbitration clause would probably be held invalid in a purely internal sales agency contract where the agent is an individual. However, where the agent is a company, and especially where the contract is international, it is likely that the choice of forum clauses would be recognized by French courts.

[28]REV. CRIT. D.I.P. 1977, p. 639. As of April 1, 1983 only France and Portugal had signed the Hague Convention, which is not yet effective.

[29]Text of the convention in English (COMMON MKT. REP. (CCH), ¶ 6311). As at April 1, 1983 the Convention of Rome had been signed by: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, the United Kingdom and West Germany. This convention is not yet effective but has already been ratified by France.

[30]The Hague Convention of March 14, 1978 provides that "the internal law chosen by the principal and the agent . . . shall apply in particular to . . . clientele allowances . . . the categories of damage for which compensation may be recovered . . . whether or not it is the law of a contracting state" (articles 4, 5 and 8) but article 16 provides that "in the application of this convention, effect may be given to the mandatory rules of any state with which the situation has a significant connection, if and in so far as, under the law of that state, those rules must be applied whatever the law specified by its choice of law rules." This principle, which has also been implemented in the Rome Convention of June 19, 1980, will make it possible for a foreign judge to apply the 1958 Statute as far as the right to an indemnity is concerned, notwithstanding any provision in the contract naming a less favorable law as governing law.

5. In any event, whether or not a choice of law clause is coupled with a choice of forum or arbitration clause, it is important to note that French courts would retain jurisdiction if the agent applied for interim or conservatory measures of protection. The agent might therefore conceivably obtain a French court's permission to attach monies owed to the principal by his French customers, pending the outcome of the dispute before the foreign court[31] or the arbitrators.[32]

6. Another important issue is whether the mere expiration of a fixed-term agency agreement or the failure to renew a contract may be construed as a "termination" under the language of the 1958 Statute, entitling the agent to an indemnity.

The French Supreme Court held in an April 24, 1974 decision that a fixed-term sales agency agreement which was automatically renewable every two years unless terminated by a party, remained a fixed-term contract even though there was no contractual limitation of the number of possible renewals.[33] However, since the date of such decision, a number of lower courts, including the commercial court of Paris,[34] have continued to rule differently where the contract was for a short fixed-term period, had an automatic renewal clause and did not limit the number of possible automatic renewals, and certain critics of the French Supreme Court decision have even predicted that the 1974 precedent would be overruled in the future.[35] The fact is, however, that the French Supreme Court has since, on at least three occasions, reaffirmed the principles laid down in 1974.[36]

7. Finally, an increasing number of court decisions have held that a sales agent (individual or company) must be duly registered as such with a French commercial court as required by article 4 of the 1958 Statute in order to qualify for the protection of the 1958 Statute.[37] A contract providing that the agent will not be entitled to any indemnity upon termination

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[31]Encyclopédie Dalloz, Procédure, V° Référé Commercial Nr. 47-53; see article 24 of the Brussels Convention which reads as follows:

> Application may be made to the courts of Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter" (COMMON MKT. REP. (CCH) ¶ 6028).

[32]Article 13-5 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, provides that "the parties may, in case of urgency, whether prior to or during the proceedings before the arbitrator, apply to any competent judicial authority for interim measures of protection, without thereby contravening the arbitration clause binding them. Any such application, and any measures taken by the judicial authority shall be brought without delay to the notice of the Court of Arbitration or, when necessary, of the arbitrator."

[33]Cass. Com. April 27, 1974 (D. 1975. 764, note Delaporte).

[34]Trib. Com. Paris May 17, 1976, cited by Jean Jacques Hanine under Cass. Com. March 7, 1977 (J.C.P. 1979. 19072). *See* Boulanger, *Le Précédent Judiciaire dans le droit privé français contemporain*, in LA REVUE DU BARREAU DE LA PROVINCE DE QUEBEC, 1961, p. 65 *et seq*.

[35]Note J.J. Hanine in note 34 *supra*.

[36]Cass. Com. October 5, 1976 (D. 1976.IR. 337); Cass. Com. March 7, 1977 (*see supra* note 34); Cass. Com. January 22, 1980 (D. 1980.IR. 257).

[37]Cass. Com. January 19, 1976 (J.C.P. 1977.II.18630, note Hanine); Cass. Com. October 18, 1976 (G.P. 1976.2.299).

might therefore possibly be enforceable if the agent were not duly registered with a commercial court at the time his contract is terminated by the principal.

However, even if an agent were not so registered when he entered into the agency agreement and he so represented in the contract, he could probably under certain circumstances register after the signing of the sales agency contract, thus defeating any representation or undertaking not to register which he might have made in the sales agency contract.[38]

II. Distributors

8. Distributors have no statutory termination rights under French law and French courts have held that the termination of a distributorship agreement entered into for an indefinite period of time (or of a distributorship agreement entered into for a fixed term, but renewable indefinitely) does not give rise in principle to any indemnity,[39] provided that reasonable notice of termination is given and provided that the termination is not "abusive,"[40] i.e., the maliciousness or unfairness cannot be shown.[41]

9. It is therefore very important that formal notice of termination by registered mail be given by the manufacturer so as to avoid any ambiguity or any claim that the notice has not been received. It is also very important that the notice period be "reasonable," irrespective of the period of notice contemplated by the distributorship agreement. Based on a review of French case law, it would appear that a three-month notice of termination would be a minimum[42] and that a manufacturer would be virtually certain of meeting successfully the reasonableness test if a six-month notice of termination were given to the distributor.[43] It is also crucial that the manufacturer avoid any breach of the contract until the expiration of the notice period: he should thus definitely refrain from making direct sales in the distributor's territory, he should continue to accept the distributor's orders on the same terms which prevailed prior to the sending of the notice of

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Until the enactment of a regulation dated August 22, 1968, (J.O. September 17, 1968), a company could not, as a practical matter, register as a sales agent. For this reason, the courts were often lenient and, including where individuals were concerned, have held that the failure to register did not necessarily deprive the agent of the protection of the 1958 Statute. Since the enactment of the regulation of August 22, 1968 which spells out the registration formalities, French courts have been strict as to the consequences to be attached to the failure to register.

[38]Nancy, November 4, 1975 (J.C.P. 1976.18363).

[39]Cass. Com. October 16, 1967 (D. 1968.193); Cass. Com. March 9, 1970 (REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 1971, p. 160 Nr. 8).

[40]Cass. Com. January 26, 1976, BULL. CIV. IV-29; *See also* Lamy Commercial 1983 Nr. 2542.

[41]Cass. Com. January 8, 1968 (D. 1968.495); Paris, June 16, 1960 (REVUE TRIMESTRIELLE DE DROIT COMMERCIAL, note Hèmard); Paris, October 13, 1967 (G.P. 1968.1.36); *See also* Lamy Commercial 1983 Nr. 2606. *See also infra* ¶ 13 of text.

[42]Cass. Com. March 9, 1976 (D. 1976.388); Cass. Com. July 7, 1980 (J.C.P. 1980.IV.360).

[43]Cass. Com. January 3, 1980 (D.1980.IR.309).

termination and he should preferably not advertise the fact that the distributor has been terminated and that his notice is about to expire.

It is also advisable—though not mandatory—that a reason be given for the termination so as to avoid a claim that the termination is malicious.[44] It is clear in such respect that a distributor who is terminated because of poor sales performance or of late payments on his part after several warnings[45] will not be in as favorable a situation to claim damages as a distributor who is suddenly terminated even though he substantially increased the sales of the manufacturer's products and always met his payment obligations.[46]

It is also important that the manufacturer, if he is then to establish a sales subsidiary or branch in France to market his products directly, refrain from hiring away former employees of the distributor, without the latter's written consent, since this could prompt a claim for damages on the distributor's part for unfair competition.[47]

10. In any event, experience has shown that distributors often seek to obtain damages upon termination of their contract by the distributor, even where precautions have been taken by the manufacturer to avoid a claim that the termination is abusive.

Thus, upon receipt of the registered notice of termination, a distributor might decide, in order to improve his bargaining position, to withhold payment of outstanding amounts due to the manufacturer or to place substantial orders with the manufacturer and then withhold payment of the corresponding invoices. Appropriate action (other than flat refusals to sell which could generate a further claim for damages) should therefore be taken by the manufacturer, to ensure that the amount of the distributor's debts to him at any given time be kept at some reasonable level.[48]

11. The question of whether, in the absence of a contractual provision to the contrary, a manufacturer is required to repurchase the distributor's inventory of the manufacturer's products, has not been definitively settled by French courts, and there are conflicting decisions in this respect.[49] There are also conflicting decisions on the question of whether such products should be repurchased at the price at which they were initially purchased by the distributor, or at that price plus an interest factor, or at the market value (which may be considerably higher or lower) at the time of termination.[50]

12. It appears from the above discussion that it is preferable that a written contract be signed by the distributor before he begins any sales activities

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[44]*See supra* note 41.

[45]Trib. Com. Paris September 17, 1982, Eurotron v. Data Instrument and S.S.C. (unpublished).

[46]Cass. Com. March 31, 1978 (G.P. 1978. Somm. 291).

[47]*But see* ¶ 14 of the text.

[48]Cass. Com. July 21, 1975 (D. 1975.IR.206).

[49]Encyclopédie Dalloz, Commercial, V° Concession Exclusive Nr. 216-23; Lamy Commercial 1983, Nr. 2573-82.

[50]Paris, October 14, 1981, Intersil v. Techni-Import Professionnel (unpublished).

concerning the manufacturer's products. From the manufacturer's point of view, such contract should contain clauses as to the exclusivity or nonexclusivity of the distributorship; the duration of the notice period; the maximum quantity of products which may be ordered by the distributor after notice of termination is given to him (the contract might for example provide that the distributor shall not during the six-month notice period have the right to purchase more than 150 percent of the volume of products purchased during the six-month period immediately preceding the sending of the notice of termination); and as to the manufacturer's possible obligation to repurchase the inventory, and at what price, etc.

The manufacturer may also consider providing in the contract that his own law (if it is even more favorable to the manufacturer than French law) shall be governing and that his own courts shall have exclusive jurisdiction over any dispute arising under the contract, or that any such disputes shall be settled by arbitration. Such clauses would certainly be enforceable in France in the case of a distributor, without the difficulties—flowing from the public policy provisions of the 1958 Statute—discussed above in the case of sales agency agreements. However, as in the case of sales agency agreements, French courts would always retain the right to intervene for urgent or conservatory measures.[51]

13. Exclusive distributors have, however, on some occasions succeeded in obtaining an indemnity in the event of termination by the manufacturer, on the theory of *mandat d'intérêt commun*," i.e., an agency agreement in the common interest of the parties. Thus, in a celebrated 1973 case, the Court of Appeals of Amiens[52] observed, among other things that all the distributor's business in a particular field consisted of the resale of products provided by the manufacturer; that the supplier set the quantities of products to be sold by the distributor and the resale price thereof; and that the distributor's profit margin was limited to 12 percent and represented in fact a commission. The court held that this rendered the distributor directly dependent on the supplier and that the agreement was a *mandat d'intérêt commun* or agency agreement in the common interest of the parties and therefore ruled that the distributor should be awarded an indemnity for loss of its clientele, but the fact that an eighteen-year relationship had been terminated on very short notice (seven weeks) was also a key factor in its decision.

The manufacturer's appeal was dismissed by the French Supreme Court on March 9, 1976,[53] essentially on the ground that the termination of this eighteen-year relationship upon a short notice period had been effected in such a manner as to render it abusive. The Supreme Court, however, did not read the decision of the Court of Appeals of Amiens as having been based on the *mandat d'intérêt commun* or agency theory. The Supreme

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[51] *See* ¶ 5 of text and notes 31 and 32 *supra*.
[52] Amiens, December 13, 1973 (D. 1975.452).
[53] Cass. Com. March 9, 1976 (D. 1976.383).

Court went on to criticize the court of appeals for having actually held that a distributorship agreement for an unlimited duration could not be terminated at will by a supplier. In another decision also rendered on March 9, 1976,[54] the Supreme Court upheld a decision of the Court of Appeals of Paris which had held that, "in the absence of an agreement to the contrary, (the supplier) was entitled to terminate the distributorship agreement made for an unlimited duration and was not therefore liable for the payment of any indemnity whatsoever, since the (distributor) did not offer evidence of the abusive character of the termination."

The principle that the supplier is entitled to terminate a distributorship agreement without incurring liability has thus been reaffirmed. The lesson, however, is that the more independent the distributor is, i.e., the less closely the manufacturer participates in or follows the activities of the distributor, the greater the chances that this principle will be applied.

14. If upon termination of the distributor, the manufacturer decides to set up his own sales subsidiary in France or appoints a new distributor, his sales subsidiary or the new distributor may unexpectedly have to face a potentially serious problem which results from a recent decision involving article L. 122-12 of the French labor code. Article L. 122-12 reads as follows:

> If there occurs a change in the legal status of the employer, including by inheritance, sale, merger, transformation of the business, incorporation of a business, all the employment contracts in force on the day of the change shall remain in force between the new employer and the personnel of the business.[55]

This section of the law was specifically applied to a distributorship situation by the French Supreme Court on February 19, 1981,[56] and again on November 9, 1982.[57] In the 1981 case, a company which became the distributor in France of a brand of whiskey had refused to maintain in its employment a representative employed by the previous distributor. In opposing the request of the employee for damages, the company pointed out that the distributorship transferred covered only one of twenty brands distributed by the previous distributor and that there had not been a real transfer of activity. The French Supreme Court rejected this argument. According to the court, article L. 122-12 must apply in all cases where the branch of activity taken over by a new owner constituted in itself, by its importance, an enterprise, even though it had only been one of the activities of the prior owner. However, in one of its most important findings, the court stated that the trademark transferred attracted an important clientele "for the development of which (the employee) and other representatives had been *exclusively* employed by the prior distributor."

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[54]Cass. Com. March 9, 1976 (D. 1976.IR.150).

[55]This translation is by the author and is not official.

[56]Cass. Soc. February 19, 1981 (Bull. Civ.V.144).

[57]Cass. Soc., November 9, 1982 (cited in BULLETIN RAPIDE DU DROIT DES AFFAIRES, February 28, 1983, p. 22).