

1985

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Recommended Citation

Georg Vorbrugg & Dirk H. Mahler, *Agency and Distributorship Agreements under German Law*, 19 INT'L L. 607 (1985)

<https://scholar.smu.edu/til/vol19/iss2/10>

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Agency and Distributorship Agreements Under German Law

I. Introduction

The American manufacturer desiring to market its products in Germany has several courses open to it. The U.S. firm could establish a branch or wholly-owned subsidiary in Germany or enter into a licensing or joint-venture agreement with a company doing business in Germany. If it wants a less significant presence, however, it is left with the alternative of having a foreign sales representative market and sell its products. This article will address some of the issues that arise under German law in connection with the creation and termination of a relationship with a foreign sales representative in Germany.¹ As a result, the discussion in most of the article assumes that the contractual relationship between the U.S. principal and the German representative is subject to German law, but the final sections of the article discuss the use of contractual choice-of-law clauses and some recent international developments that might affect the relationship between a U.S. supplier and a German representative.

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Both authors wish to thank Beatrice A. Rothweiler, Attorney-at-Law, Minneapolis, Minnesota, for her assistance in the preparation of this article.

1. See generally Mueller-Freienfels, *Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty*, 13 AM. J. COMP. L. 193 (1964); Hay/Mueller-Freienfels, *Agency in the Conflicts of Laws and the 1978 Hague Convention*, 27 AM. J. COMP. L. 1, 4-8 (1979). Sales, *Termination of Sales Agents and Distributors in France*, 17 INT'L LAWYER 741 (1983); Simons, *Termination of Sales Agents and Distributors in Belgium*, 17 INT'L LAWYER 752 (1983).

II. The Three Basic Types of Representation

Apart from licensing and joint venture agreements, the relationship between a German representative and a U.S. supplier can take one of three basic forms: (i) commercial agent, (ii) distributor, or (iii) commission merchant.

A. COMMERCIAL AGENT

At the end of the last century, the drafters of the German Commercial and Civil Codes, strongly believing in comprehensive, nearly perfect legal frameworks, provided for a complex system of agency law. As a significant step, a separate definition of a "Handelsvertreter" (commercial agent) was included in the Commercial Code (Handelsgesetzbuch, "HGB").² Almost sixty years later, in 1953, the rather rough framework of commercial agency law was spelled out more precisely by adding new provisions addressing the particular rights and duties between commercial agents and their principals, including the right to a commission, the termination of the agency relationship, and the right to special compensation upon termination.³

The Commercial Code defines the commercial agent as "one who, as an independent person engaged in business, is regularly entrusted to negotiate business for another entrepreneur or to conclude business in the latter's name. A person is independent if he is essentially free to arrange his activity and determine his hours of work."⁴ It is important to point out the distinction between an independent agent and an employee. "Any person who, without being independent . . . , is regularly entrusted to solicit business for an entrepreneur or conclude business in his name is deemed an employee."⁵ An entirely different set of rules would govern the relationship between a U.S. supplier and a representative who is an employee. Whether someone is independent turns on the factual circumstances of each case; merely having an agreement declare independence or non-employee status does not suffice. Thus, the U.S. principal should ensure that the German representative is granted enough flexibility to be regarded as "independent" under the law.⁶

2. The German Commercial Code of 1897 included for the first time provisions with respect to commercial agents. Other European countries followed: Sweden (1914), Norway (1916), Denmark (1917), Austria (1921), The Netherlands (1926), Italy (1942), Switzerland (1949). See generally Baumbach/Duden/Hopt, *HANDELSGESETZBUCH (HGB)* 26th ed., Sec.84 at 1)B. (1985).

3. 21st Amendment to the Commercial Code (HGB), August 6, 1953, BGBI. I 771.

4. Sec.84 Subsec.1 HGB.

5. Sec.84 Subsec.2 HGB.

6. See Federal Labor Court (Bundesarbeitsgericht, "BAG") VersR 1966, 382 and Baumbach/Duden/Hopt, HGB, Sec.84 at 5)B. Accordingly, the particular circumstances in the individual case are decisive.

The distinction between an agent and an employee is also important for tax purposes. The U.S.-German tax treaty exempts industrial or commercial profits of a U.S. enterprise from German tax unless the enterprise is engaged in trade or business through a permanent establishment located in Germany.⁷ Article II of the Treaty states that an enterprise is not deemed to have a permanent establishment merely because it is engaged in trade or business in the other state through a broker, general commission agent, or any other agent of an independent status.⁸

1. *Rights and Duties in General*

The principal and the commercial agent have certain rights and duties specified in the Commercial Code. The commercial agent solicits or concludes business and safeguards the interest of the principal (Sec.86 Subsec.1 HGB). These duties prohibit the agent from promoting competitive products of other suppliers, unless the contract provides otherwise.⁹ Restrictive covenants, such as contractual provisions that require the agent to market products of only one manufacturer, must be followed in good faith. For instance, if the owner of a gas station agrees with a particular oil company to sell that company's products only, the obligation would also require the gas station owner to sell only the oil company's products in the owner's affiliated repair shop.¹⁰

The agent also must give all necessary information to the supplier, i.e., he has to inform him immediately of every solicitation and conclusion of business (Sec.86 Subsec.2 HGB). Generally, the agent must exercise his duties with the care of a prudent merchant (Sec.86 Subsec.3 HGB).

The principal, on the other hand, has the duty to provide the agent with all materials necessary for the performance of his duties, such as samples, drawings, price lists, advertising material, and terms and conditions of business (Sec.86a Subsec.1 HGB). In other words, the principal has to support the agent's business. This includes the duty of loyalty.¹¹ The principal must also provide the commercial agent with requisite information about the acceptance or refusal of a transaction brought about by the agent or concluded without the agent's authority (Sec.86a Subsec.2 HGB).

7. Convention Between the United States and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income (July 22, 1954), 5 U.S.T. 2768, T.I.A.S. No. 3133, at Art. III(1).

8. *Id.* Art. II(1)(c)(ee).

9. See Federal Supreme Court (Bundesgerichtshof, "BGH") BB 1958, 425; 1963, 448; VersR 1964, 331.

10. BAUMBACH/DUDEN/HOPT, HGB, Sec.86, at 2)B.

11. *Id.*, Sec.86a, at 1)B.

2. *Commission*

According to the law, “the commercial agent has a right to commission for all business concluded during the term of the contractual relationship, which is to be attributed to his activity or has been concluded with third parties who he had acquired as customers for similar business.” (Sec.87 Subsec.1 HGB). As a general matter, the key term is “attributed,” but in some cases, an agent may have the right to a commission without having conducted any attributable activity. If, for instance, an agent is assigned an exclusive sales area or a defined group of customers, he has the right to claim commissions for all contracts concluded with persons within the scope of the area or with the designated customers, even though he did not actually participate in the transaction (Sec.87 Subsec.2 HGB). A U.S. company that assigns an exclusive sales territory to one agent and later makes a direct sale to a customer in the territory must pay the appropriate commission to the agent, although the agent might have done nothing to conclude the contract. This concept, which might appear unusual to American lawyers, is limited only by fraud: an agent who intentionally refuses to cooperate with the principal under the assumption that he will receive the commission anyway will not be protected under the law.

The contract between the parties can modify this statutory provision and limit the commission to business attributable to him. Conversely, the contract may prohibit direct contracts between the supplier and customers in the assigned sales area.¹² In addition to the right to a commission, the commercial agent has a right to compensation for collecting amounts owed by customers, provided that no agreement to the contrary exists between the agent and the principal (Sec.87 Subsec.4 HGB).

The commission is due upon the completion of the supplier’s performance of the transaction (Sec.87a Subsec.1 HGB). The parties may determine the amount of the commission, but if the agreement does not specify, the principal must pay the “reasonable value of such services” (Sec.87b Subsec.1 HGB). Unless otherwise provided by contract, the principal has to account for commissions on a monthly basis (Sec.87c Subsec.1 HGB). The period may be extended to three months.

German law states that the commercial agent may demand information from the business records of the supplier concerning the agent’s claim for commission (Sec.87c Subsec.2 HGB). If the records are denied or reasonable doubt exists as to the accuracy or completeness of the account, the commercial agent may demand that the supplier permit him, an auditor, or certified accountant to inspect the books (Sec.87c Subsec.4 HGB). These powers and rights of the commercial agent cannot be altered by contract (Sec.87 Subsec.5 HGB).

12. *Id.*, Sec.87, at 3)D.

B. DISTRIBUTORS

The contractual distributor or dealer (*Eigenhaendler*, *Vertragshaendler*) is defined as someone who, usually on the basis of a long term contract with a manufacturer, buys goods from the manufacturer and resells them in his own name. The primary difference between a commercial agent and a distributor is that the distributor sells at his own risk.

Neither the Commercial Code nor the Civil Code contains provisions specifying the rights and duties of a distributor. In the absence of specific provisions in the individual contract between the distributor and the manufacturer, certain rights and duties have been imposed by courts, referring either to the Civil Code and its contract provisions or to the Commercial Code and the provisions designed for commercial agents. Whether the provisions of the Civil Code or the Commercial Code ought to apply depends upon the circumstances of each case.¹³

When the relationship between the manufacturer and the distributor is so close that the distributor begins to resemble a commercial agent, courts often apply the agent provisions of the Commercial Code. Depending upon the terms of the individual agreement, the distributor may be bound to one manufacturer and be subject to various other conditions (active sales promotion, minimum stock, reporting duties)¹⁴ that, as a practical matter, integrate the distributor into the sales organization of the manufacturer. This structure is typical in the German auto industry. Those distributors having such a close relationship to their suppliers deserve, and receive, basically the same protection that the Commercial Code grants the commercial agent.¹⁵

C. COMMISSION MERCHANT

A third form for a representative is the commission merchant (*Kommissionaer*). German law defines a commission merchant as one who professionally engages in the business of buying and selling goods or securities in

13. Civil Code and Commercial Code provisions do not exclude each other. As a matter of fact, Civil Code provisions (in particular the law of services, Secs. 613 et seq., normally applies to the commercial agent). On the contrary, if the relationship is so loose that none of the provisions on commercial agency would apply to the distributor, then he would virtually be left with the law governing commercial sales as regulated by both the Civil *and* the Commercial Code.

14. In contrast to the situation under an agency arrangement, the supplier must not interfere with the distributor's freedom to calculate his own retail price. Any restrictions on the distributor's pricing policy would violate Sec. 15 of the German Law Against Restraints on Competition (GWB), which basically prohibits price arrangements. Only in the case of branded goods and if certain other conditions are met, the supplier may "recommend" retail prices (Sec. 38a GWB).

15. See *infra* notes 28-42 and accompanying text.

his own name for the account of another (the principal) (Sec.383 HGB). Thus this concept of an undisclosed principal is almost identical to the commission merchant or factor under American law. A court in Tennessee has defined the commission merchant as

one who receives goods, chattels, or merchandise for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner, or derived from the sale of the goods. One whose business is to receive and sell goods for a commission, being entrusted with the possession of the goods to be sold, and usually selling in his own name.¹⁶

Two areas in which principals typically wish to remain undisclosed, and therefore in which commission merchants often are involved, are the trading of artistic works and (in Germany in particular) the trading of securities by banks.¹⁷ Though a thorough analysis of the German law on commission merchants is beyond the scope of this article, one important feature is that, in the absence of a contractual prohibition, the commission merchant may engage in self-dealing (Sec.400 Subsec.1 HGB).

III. Termination

This section discusses the acts and circumstances sufficient to terminate the contractual relationship between a commercial agent and the supplier and between a distributor and supplier. It does not address what steps are required to notify third parties of the termination of the agent's authority.¹⁸ The methods of termination are usually divided into termination by act of the parties and termination by operation of law.

A. TERMINATION BY ACT OF THE PARTIES

Termination by act of the parties includes termination according to the provisions of the agreement and termination by the act of one or both of the parties.

1. *Termination by Expiration or Mutual Agreement*

If the contract between the supplier and the commercial agent so provides, the relationship may be terminated upon the expiration of a definite period of time. However, most agency or distributorship agreements are unlimited in time. Moreover, like any contract, the relationship may be terminated by mutual agreement.

16. *Hughes v. Young*, 17 Tenn. App. 24, 65 S.W.2d 858, 864.

17. See German Securities Depository Act, Feb. 4, 1937, RGBl.I 171, Secs. 18 et seq.; and the General Terms and Conditions of Commercial Banks.

18. As to the issue of external power, see in: Conard/Knauss/Siegel, note on *Powers of Position in Foreign Law*, ENTERPRISE ORGANIZATION, 271 et seq. (3d ed.).

2. Termination by the Act of One Party

German law allows one party to an agency or distributorship contract to terminate the agreement by giving notice to the other party (Sec.89 HGB). The Commercial Code and the Civil Code contain detailed provisions governing the termination by notice. The minimum notice period required by statute before termination of an agency agreement is based upon the duration of the contract at the time of the termination. During the first three years of a commercial agent's contract, termination notice must be received at least six weeks before the end of a quarter, and termination then takes effect at the beginning of the next quarter. The agreement may provide for other notice requirements, but no notice period may be shorter than one month (Sec.89 Subsec.3 HGB). A contract that has been in effect for three years or more may be terminated only by complying with a three month notice period before the end of a quarter.

The statute does not specify a method for providing notice, but most agreements usually provide for written notice or registered mail.¹⁹ Notice must actually be received by the party or by an authorized representative, but the party must take reasonable precautions to receive mail during periods of absence. The notice period starts running on the day after notice has been received, unless the day of receipt is a legal holiday, a Saturday, or a Sunday. The party who wants to terminate the contract has the burden of proof that the notice has been duly received.

Example: P wants to terminate an agency relationship (no definite termination period) with commercial agent C after two years. Today is Saturday, November 10, 1984. P has to make sure that C receives the notice by November 19, 1984 (midnight of 19th to 20th), so that the six week notice period starts on November 20, 1984, thereby terminating the contract at the end of December 31, 1984. If November 19, 1984 were a holiday, Saturday, or Sunday (this year it is in fact a Tuesday), the notice period would not start until Thursday (since Wednesday November 21, 1984 happens to be a legal holiday in Germany). Therefore the six-week period would not end until after the beginning of the next quarter (January 2, 1985), and, as a result, the contract would not terminate until March 31, 1985.

The German concept of unilateral termination differs substantially from the approach under U.S. law. U.S. law basically distinguishes between the power to terminate and the right to terminate. Disputes about the right to terminate are solved through the concept of "wrongful termination" (liability for damages for breach of contract). In contrast, German law constrains the unilateral power to terminate. Thus, if a party declares termination of

19. See STUMPF, DER VERTRAGSHAENDLERVERTRAG, 108 (2d ed. 1979).

the agency relationship but does not comply with the notice periods described above, the parties are still required to fulfill all their obligations under the initial contract until the notice period has expired. This distinction helps to explain why German law recognizes the exceptional termination.

3. *The Exceptional Termination*

The exceptional termination (“*ausserordentliche Kuendigung*”) is a rightful termination notwithstanding compliance with the notice requirements. Sec.89a HGB states:

- (1) The contractual relationship can be terminated without notice by either party on significant grounds. This right cannot be excluded or limited.
- (2) Where termination results from conduct of the other party, this party is obligated to compensate for damages resulting from the termination of the contractual relationship.

The phrase “significant grounds” requires a severe rather than a technical breach of contract. “Significant grounds” that are considered sufficient to terminate a contract without giving notice do not necessarily require intentional breach of contract.²⁰ The circumstances and the particular facts of the individual case determine whether it would be unreasonable to obligate the parties to continue performance of the contract. The following list illustrates what kind of circumstances are usually considered “significant” under German law: gross unreliability of the agent; unauthorized competition (contractual or statutory) with respect to the principal’s business; failure to adequately protect and serve the principal’s interests; gross misbehavior by the staff of the agent; continuous neglect of the agent’s duty; nonobservance of the principal’s instructions so far as they are prescribed in the underlying agreement; accepting additional agency contracts without prior permission (if such is required in the contract); a large decline in sales (if caused by negligent conduct of the agent);²¹ cessation of the principal’s business; or violation of trade secrets.²² Similarly, reasons for which the agent is entitled to terminate include: the principal’s unauthorized aggravation or interference with the agent’s enterprise; violation of the principal’s duty to treat all agents equally; denial of access to documents necessary to perform authorized acts; death of the principal;²³ repeated delay with respect to accounting and paying for commission;²⁴ or enticing customers to deal directly with the principal.²⁵

20. BGH DB 1972, 2045.

21. OLG Nuernberg BB 1963, 447.

22. See generally, EBERSTEIN, *DER HANDELSVERTRETERVERTRAG*, 69–70 (5th ed. 1978); and Stumpf, *supra* note 19, at 113–14.

23. See *infra*, III.2.a.

24. Baumbach/Duden/Hopt, HGB, Sec.89a at 2)E.

25. BGH MDR 1959, 911.

B. TERMINATION BY OPERATION OF LAW

1. *Death*

Death of the commercial agent terminates the relationship by operation of law (Sec.673 German Civil Code, "BGB"). Unlike U.S. law, however, death or insanity of the supplier does not automatically terminate the agency. According to Sec.672 BGB, the agency relationship, unless otherwise agreed, will be deemed effective until the successor of the supplier gives different instructions.

2. *Bankruptcy*

Bankruptcy of the principal terminates the agency relationship by operation of law (Sec.23 Konkursordnung, "KO", German Bankruptcy Code), although the agent is required to continue performing when failure to do so might result in substantial damage to the assets of the principal (Sec.23 KO, Sec.672 S.2 BGB). Bankruptcy of the commercial agent—again, unlike U.S. law—does not terminate the agency relationship automatically, but constitutes a significant reason for the principal to terminate the contract unilaterally under Sec.89a HGB. If the principal does not choose to terminate the relationship, the trustee in bankruptcy may do so on behalf of the agent (Sec.17 KO, Secs.627, 649 BGB).

C. SPECIAL RULES FOR DISTRIBUTORSHIPS

Generally speaking, distributorship agreements are subject to similar rules. Depending on the individual conditions of the distributorship agreement, courts either tend to treat a distributor like a commercial agent (applying by analogy the provisions described above) or to distinguish the facts, in particular with respect to the distributor's position as an independent dealer. Because distributorship agreements are not directly subject to the provisions designed for commercial agents, the parties have more flexibility in agreeing upon a minimum notice period for unilateral termination. However, if the parties to a distributorship agreement do not explicitly agree upon certain notice requirements, courts—in the absence of evidence of a different intent—are likely to impose the notice periods applicable to commercial agents. As for exceptional termination, the following are examples of "significant reasons" which may justify termination by the manufacturer: failing profitability; poor financial record of the distributor; violation of designated sales territory; severe hostility between the parties; and significant adverse changes in the management or partnership of the distributor.²⁶ "Significant reasons" justifying termination by the distributor

26. See STUMPF, *supra* note 19, at 112-13.

include: reduction of the distributor's sales district; false and misleading instructions from the manufacturer; violation of the distributor's exclusive distribution rights; changes in the line of products by the manufacturer without consideration of the distributor's interest; and, in circumvention of the distributor's rights, delivery of goods directly to customers of the distributor.²⁷

IV. Claims for Compensation

A. COMMERCIAL AGENT

One of the most important consequences of the termination of a contractual relationship with a commercial agent is that under certain circumstances the agent may have a special compensatory claim ("Ausgleichsanspruch").

The Commercial Code States:

- (1) The commercial agent may, after termination of the contractual relationship, demand from the entrepreneur reasonable compensation if and in so far as
 1. the entrepreneur obtained substantial benefits, after expiration of the contractual period, from the business relations with new customers solicited by the commercial agent;
 2. the commercial agent lost, by reason of termination of the contractual relationship, rights to commission relating to concluded business or business to be concluded in the future with those customers he had solicited, which he would have had the contractual relationship continued; and
 3. the payment of compensation is equitable, in consideration of all circumstances.

The commercial agent's having so significantly expanded business with a customer that this commercially corresponds to the solicitation of a new customer, shall be considered as the solicitation of a new customer.

- (2) Compensation may amount to no more than the average of the annual commission or other annual compensation over the last five years of the activity of the commercial agent; in the event that the contractual relationship has been shorter than five years, the average during the period of activity is applicable.
- (3) The right does not exist if the commercial agent has terminated the contractual relationship, unless conduct of the entrepreneur provided reasonable grounds therefor or the commercial agent cannot be reasonably expected to continue his activity because of age or illness. In addition, there is no right of compensation if the entrepreneur terminated the contractual relationship for cause based on the fault of the commercial agent.

- (4) The right to compensation cannot be excluded in advance. It must be claimed within three months following termination of the contractual relationship.

HGB Sec.89b.

[Subsection (5) contains special provisions for insurance agents.]

The underlying theory of this provision is that the agent's services are not fully compensated by commissions received during the contractual rela-

27. *Id.*, at 114-15.

tionship. The fact that the agent has acquired new customers who, after termination, will most likely remain customers of the principal justifies the payment of additional compensation to the agent.²⁸

Any form of termination (including mutually agreed termination²⁹ and death of the agent³⁰) gives rise to a valid claim for compensation, unless equity requires another result (e.g., suicide)³¹ or unless one of the exceptions described in Subsec.3 applies. Even events that could be regarded as a partial termination, such as a substantial reduction of the business of the commercial agent (e.g., by cutting the sales territory in half) might be subject to the compensation provisions in the Code.³²

Notwithstanding the Code's declaration that the parties cannot exclude the right to compensation in advance, there are two situations in which the parties can exclude the right. First, the parties have authority to agree to eliminate the claim for compensation when there is a mutual agreement about the termination of the contractual relationship.³³ Second, the Code states, in Sec.92c Subsec.1 HGB, that where the commercial agent does not have a domestic office, all provisions concerning commercial agents (including Sec.89b HGB) can be altered by agreement. This provision is designed for factual situations in which a German manufacturer appoints a commercial agent whose place of business is abroad.³⁴

Subsection 1.1 of Section 89b HGB has been the subject of substantial interpretation. The reference to "business relations with new customers solicited by the commercial agent" has been construed broadly, encompassing prior nonexisting business, the reacquisition of former customers, substantial enlargement of accounts, or the provision of additional services to customers. The reference to "benefits" obtained by the principal also has been construed broadly. It includes "good will" and any prospect that the principal will obtain either longterm business relationships with customers or additional purchase orders from customers initially acquired by the commercial agent.³⁵ It also includes the amounts that the principal saves by virtue of not having to pay the agent's expenses to attract customers. The principal is deemed to have obtained benefits even if he breaks off relations with customers acquired by the agent or fails to maintain business relationships with those customers.³⁶ Benefits are not deemed to occur, how-

28. See KUESTNER, HANDBUCH DES GESAMTEN AUSSENDIENSTES, Vol. II, at n.9 (4th ed. 1978); EBERSTEIN, *supra* note 22, at p. 69.

29. OLG Nuernberg BB 1959, 318.

30. BGHZ 24, 215, 224; 41, 129.

31. BGH BB 1973, 815.

32. Baumbach/Duden/Hopt, HGB, Sec.89b at 2)A.

33. BGH BB 1969, 107.

34. As to the applicable conflicts of law rules, *see infra* notes 43-51 and accompanying text.

35. BGH BB 1970, 102.

36. See EBERSTEIN, *supra* note 22, at 82.

ever, if the principal loses customers who were acquired after termination of the contract. Similarly, if as a consequence of the termination, the agent saves 50 percent of his costs, no compensation has to be paid.³⁷

The amount of compensation is usually defined as the value of the principal's benefit, the value of the agent's losses, or an award which is considered fair—whichever is lowest. The computation must include consideration of agreed expenses as well as any commission, regardless of whether the commission derived from business with customers acquired by the agent or pre-existing customers. The statutory ceiling (the average of the annual commission over the last five years or less if the contractual relationship has been shorter) has become the usual yardstick for measuring compensation.³⁸

B. DISTRIBUTOR

In certain circumstances, distributors may claim compensation after termination of the distributorship agreement. The claim arises, by analogous application of the provisions concerning commercial agents, when:

(1) the contractual relationship between the distributor and the manufacturer is similar to an agent-principal relationship. This means that the distributor must have obligations similar to those imposed upon the commercial agent under Sec. 86 HGB and that the distributor must be integrated into the sales organization of the manufacturer. Elements that indicate such integration are: exclusive sales territory, the distributor's obligation to promote the distribution of the contract products, the distributor's duty under the agreement to cooperate with the manufacturer's field service, or a prohibition that the distributor may not act as another manufacturer's distributor.³⁹

(2) The contract must explicitly state that the distributor is required to give the manufacturer, either during the existing relationship or upon termination, a list of its customers.⁴⁰ It will not suffice that the customers pass over to the manufacturer merely because of the overwhelming appeal of the brandname of the product ("Sogwirkung der Marke"), e.g., "Coca Cola." This restriction is still very much disputed in the legal literature.⁴¹

If a distributor has a claim, the amount of compensation is determined according to the rules that apply to commercial agents.⁴²

37. EBERSTEIN, *id.*, at 85.

38. EBERSTEIN, *id.*, at 88.

39. See BGH DB 1977, 860; 1980, 344; 1982, 2293; BB 1984, 167.

40. *Id.*

41. *Cf.*, K. Schmidt, *HANDELSRECHT*, 513 (1980); Baumbach/Duden/Hopt, *HGB*, Sec. 84 at 2)A.(2); Veltins, *NJW*, 1984, 2063; v. Westphalen, *DB Beilage* 24, 1984; [critical to BGH requirement]; Bechtold, *NJW* 1983, 1393; Bamberger, *NJW* 1985, 33 [support BGH position]. If, as it is typical in the automobile industry, the customers pass over due to both a contractual provision and the "Sogwirkung," the former distributor has a claim, the amount of which may be reduced significantly. BGH DB 1983, 2412.

42. Stumpf, *supra* note 19, at note 125.

V. Conflicts of Law

In the absence of an express or implied choice of law by the parties, the contract between principal and commercial agent is (under German conflicts of law rules) governed by the “hypothetical intention of the parties” as to the applicable law.⁴³ German law holds that, in these circumstances, the parties intend to adopt the law of the contract’s “center of gravity” (Schwerpunkt). According to the case law⁴⁴ and the majority view in the legal literature,⁴⁵ the center of gravity of a contract—absent special circumstances—is the agent’s place of business.⁴⁶ The rule is similar in other countries.⁴⁷

The operation of the rule and the courts’ deference to choice of law provisions is illustrated by a decision of the Federal Supreme Court.⁴⁸ The decision involved a Dutch manufacturer and an agent (“general representative”) for the Federal Republic of Germany. The agent had signed a contract providing: “For all litigation in relation to this contract the appropriate court in Eindhoven is selected. All legal relations arising from the contract are determined for the present and in the future according to Netherlands law.” Later, both parties terminated this contract. The agent brought suit against the manufacturer in the district court at Frankfurt/Main and claimed compensation under Sec.89b HGB. The district court, the court of appeals, and the Supreme Court dismissed the complaint:

The Supreme Court rejected plaintiff’s argument that the choice of law clause was ineffective because it would lead to an evasion of the mandatory provision of Sec. 89b HGB:

That the Netherlands rules on commercial agents violate public policy because they do not recognize compensation claims, is not assumed even by the appeal. That would indeed be erroneous; for a claim to compensation by a commercial agent was just as foreign to German law up to 1953. The Netherlands law as to commercial agents does not conflict “with the purpose of a German law” in the sense of Art.30 EGBGB.⁴⁹ This provision is to be narrowly construed. It is not to be applied every time the foreign legal system departs from mandatory German

43. Hay/Mueller-Freienfels, *supra* note 1, at 14.

44. BGHZ 53, 332, 337; BGH IPRspr. 1962/63, No. 41; BGH IPRspr. 1960/61, No. 39b (dictum); BGH AWD 1973, 167, with annotation by V. Hoffmann, IPRspr., 1972, No. 144.

45. Reithmann, INTERNATIONALES VERTRAGSRECHT (No. 426), 329 (2d ed. 1972); Stumpf/ Detzger/Immesberger, INTERNATIONALES HANDELSVERTRETERRECHT, part 1, 14 et seq. (5th ed. 1977).

46. See Hay/Mueller-Freienfels, *supra* note 1, at 14–15 with further references.

47. See *id.*, at 15 n.70.

48. BGH NJW 1961, 1061 = AWD 1961, 103; a translated version of the decision is partly reprinted in H. Steiner and D. Vagts, TRANSNATIONAL LEGAL PROBLEMS, 1200 (2d ed. 1976). See also Kleiner, IPRspr, 1960/61 No. 39.

49. Sec.30 of the Introduction to the German Civil Code (Einfuehrungsgesetz zum BGB, “EGBGB”) states: “The application of a foreign law is not permitted if the application would be contra bonos mores or contrary to the object of a German law.”

legal rules. The mandatory German rule must rather be of such fundamental and far-reaching meaning that it intends to exclude contrary foreign legal solutions. Art.30 intervenes, then, if the difference of public policy or social views between the foreign law agreed upon and the German legal system are so substantial that by the application of the foreign law the very bases of the German state or social life would be attacked. These prerequisites are not present in the case of § 89b. The agreement as to Netherlands law and jurisdiction cannot in this case be denied effectiveness on the basis that defendant had thereby intended evasion of the mandatory prescription of Commercial Code Sec. 89b.⁵⁰

Although the contract would have been subject to German law in the absence of a choice-of-law clause, the Court said that the defendant as a Dutch corporation with its principal place of business in the Netherlands had a justifiable reason for choosing Netherlands law.⁵¹ The willingness of German courts to enforce choice-of-law provisions when there is a reasonable connection between the chosen law and the parties is of considerable practical importance to U.S. companies. Presumably, German courts will normally uphold a U.S. choice-of-law clause in an agreement between a U.S. supplier and a German distributor.

VI. Recent International Developments

The review of German rules shows that there are substantial differences between the way German and U.S. law treats the relationship between a commercial agent or distributor and a supplier. However, there have been several efforts on the international level to achieve more uniformity in the law of agency. Although neither Germany nor the United States has yet subscribed to the proposed rules, the informed practitioner should be aware of them.

In 1978 the Hague Convention on the Law Applicable to Agency was signed.⁵² Neither the U.S. nor Germany has ratified the Convention.⁵³ In 1983, twenty-two states signed another Convention, the Convention on

50. Steiner and Vagts, *supra* note 48, at 1200–1202. Another decision of the Federal Supreme Court addressing the choice-of-law issue involved commercial brokerage. A German enterprise entered into a contract with an Italian broker who attracted Italian clients for the German company and thereafter claimed commissions were due. The crucial issue in the case was which law—Italian or German—applied to the case for commissions. If Italian law was applicable, the claim was barred by the statute of limitations. The court stated the usual rule that the center of gravity is the agent's place of business when he acts only within one country. In contrast to commercial agents, however, brokers do not act continuously for the principal and do not have an obligation to act at all. The broker's place of business is therefore one factor, but not the chief element, in the determination of the center of gravity. Ultimately, the court did not consider the fact of the broker's Italian establishment to be decisive but rather applied German principles of contract law. BGH RIW/AWD 1977, 294.

51. See for more discussion of this case, Steiner and Vagts, *id.*, at 1205 et seq.

52. The English text is reproduced in 26 AM. J. COMP. L. 438 (1978); see also Pfeifer, *The Hague Convention on the Law Applicable to Agency*, 26 AM. J. COMP. L. 434 (1978); Hay/Mueller-Freienfels, *Agency in the Conflict of Laws on the 1978 Hague Convention*, 27 AM. J. COMP. L. 1 (1979).

53. See for Germany, Martiny, MÜNCHENER KOMMENTAR, VOR ART. 12 EGBGB note 216.

Agency in International Sale of Goods (Unidroit Convention).⁵⁴ The Convention remained open for signature until December 31, 1984, but neither Germany nor the United States has ratified this Convention yet. This convention is particularly designed to reconcile the differences between common law and civil law systems with respect to the law of agency.

The United States is considering the ratification of one other relevant international convention. The UN Convention on Contracts for the International Sale of Goods was signed by sixty-two states on April 11, 1980.⁵⁵ Several states have already ratified the Convention, and the U.S. is expected to ratify it soon. The State Department endorsed the ratification of the Convention subject to the addition of a reservation that the U.S. will consider the Convention binding only when seller and buyer have their places of business in different contracting countries.⁵⁶ The Convention has been submitted to the Senate for its "advice and consent" before the President may ratify the treaty. A ratification of the Sales Convention should improve the prospects of having the same states participate in the supplementary Convention on Agency in International Sale of Goods, a step that would have desirable effects for the internationalization of commercial relationships.

54. The English text is reproduced in 22 I.L.M. 249 (1983).

55. The English text is reproduced in 19 I.L.M. 671 (1980). See also President Reagan's Letter of Transmittal, reproduced in 22 I.L.M. 1368 (1984), and the Hearing before the Committee on Foreign Relations of the U.S. Senate, S. Hrg. 98-837 (April 4, 1984). According to the German Ministry of Justice, Germany has not yet even signed this Convention. For initiatives on the EEC level for a directive on commercial agents, see Simons, *supra* note 1, at 755 n.11.

56. See Note, *Unification and Certainty: The U.N. Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984 (1984).

