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VI. Representatives, distributors, franchises

A. Representatives

A foreign vendor can sell goods or services in Mexico directly through its own employees. Additionally, vendors may sell merchandise through representatives or intermediaries (who may be commission agents), through distributors, or through franchisees.

When dealing through a commission agent, the vendor should be careful in ensuring that the agent is classified as an independent contractor, and not as an employee.

Such precaution is necessary because an employee could claim a labor relationship for services in Mexico exists under Mexican law, independent of the nationality or residence of the employer, and thereby be entitled to the employee benefits. Furthermore, it is important to keep in mind that the Labor Law states that any person conducting sales, subject to direct supervision, is considered an employee of the person for whom he conducts the sale.

Mexican law does not regulate the amount to be paid as commission.

For tax purposes the agent's commission will be considered as his normal income. The sale by the non-resident vendor could be subject to Mexican taxes.

B. Distributors

Distributors are independent vendors who purchase and resell products for their own account.

Distributors, unlike commission agents, derive their income from the difference between the wholesale price at which they purchase, and the retail price at which they sell. On the other hand, a commission agent's income is based on the commission received, which is usually a fixed percentage of sales. The risks of loss are suffered by the distributor upon accepting the purchase of products. Commission agents do not suffer risks of loss of products, as they act only as intermediaries.

C. Franchisees

Mexican law broadly defines franchises as an agreement whereby technical knowledge is transferred, or technical assistance is granted, to produce, sell goods or render services in a uniform manner, and with the same commercial, administrative and operative methods set by the owner of the trademark, with the purpose of maintaining the quality, prestige and image of the products or services therein distinguished. Franchises involve the granting of a license to use a trademark.

Since a franchise agreement implies the licensing of a trademark, a franchise has to be recorded before the Mexican Institute of Industrial Property to gain protection of the trademarks against third parties. Unless otherwise agreed, the franchisee will then be authorized to exercise all legal actions necessary to impede the illegal use of the trademark, as if he were its owner.

The parties to a franchise agreement enjoy full contractual freedom. Their respective obligations include, among others, the granting of a trademark license and technical assistance, protection of confidential information, compliance with quality and operational standards, payment of royalties, and access to the franchisor's operating system.

Franchise agreements are not subject to government approval. In accordance with the Intellectual Property Law, franchisors must deliver to potential franchisees the technical, economic and financial information regarding the franchise and its system, prior to execution of the franchise agreement.

D. Relevant considerations

Representatives, distributors, and franchisees are subject to Competition Law. It is important to avoid agreements that unfairly eliminate competitors from the market.

Either party, in accordance with the terms of the agreement, may terminate any and all agreements governing the above relationships. Mexican law does not contain specific provisions for the payment of damages or remuneration upon termination of the agreement, except as provided by the agreement

The vendor may prefer other ways to either enter the Mexican market or expand market penetration. For example, the vendor can create a subsidiary or open a branch in Mexico, instead of, or in addition to, having a representative, distributor, or franchisee. Rules are different in each case and offer the foreigner different advantages.