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Author:

Donald C. Dowling

don.dowling@klgates.com

+1.212.536.3914

Multinational Employer Monthly focuses on international HR management and compliance topics essential to the global operational needs of multinational companies.

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How to Structure Overseas Independent Contractors

Independent contractor versus employee classification challenges come up increasingly as new work relationships emerge in the high-tech environment—particularly as the so-called "sharing economy" pushes more people into working for "on-demand companies" in nonemployee capacities.

Nonemployee services providers play an increasingly important role in international business. One common scenario is the multinational testing out a new overseas market without registering an in-country corporate presence or payroll and trying to engage in-country representatives not as payrolled employees, but as consultants, freelancers, entrepreneurs, agents, telecommuters, job-sharers, dispatch workers, remote workers, temporary workers or staff on "distributed international teams." In jurisdictions around the world, the default way to classify these nontraditional work relationships is by using some type of arrangement that, under law, amounts to an *independent contractor*.

But in most places, contractor classification can be legally risky. Contractor status is fragile and constantly under attack in courts and agencies from Europe to Latin America to Africa, Asia/Pacific and beyond. And contractor-versus-employee classification becomes especially complex in the cross-border context. A human resources professional once posted a query on an Internet HR bulletin board saying "*our company is looking to have independent contractors rather than employees work for us throughout Latin America. I wanted to know if the laws in those countries are just as strict as in the U.S.*" The short answer to that is simple: No—they are even stricter. Or, at least, rectifying independent contractor misclassification problems can be more complex and more expensive outside the employment-at-will United States. Even so, multinationals continue to sign up would-be independent contractors—even when the actual work relationship seems a lot like everyday employment.

Our discussion here addresses the cross-border classification conundrum of who is a genuine independent contractor versus who is a misclassified de facto employee by addressing five central questions: (1) What is at stake? (That is, what happens when a nominal contractor gets held a de facto employee, and how likely is a contractor misclassification claim?) (2) When is a contractor not a contractor? (3) How important is the text of the independent contractor agreement? (4) What strategies might insulate contractor classification? (5) What other legal issues do international independent contractors implicate?

1. What is at stake?

If a U.S. court or the U.S. IRS determines a misclassified American contractor had worked stateside as a de facto employee for a contracting principal, the principal could face liability in at least six categories:

1. Back tax withholdings
2. Back social security contributions
3. Back state unemployment compensation and workers' compensation insurance premiums
4. Back overtime (for nonexempt positions)
5. Back benefits (under the terms of certain employee benefit plans)
6. Interest and penalties

Outside the United States, though, a misclassified nominal independent contractor can trigger liability on these six grounds as well as on four other, potentially more expensive, grounds that tend not to be issues stateside:

7. Back vacation and back holidays under legal mandates
8. Back mandatory benefits (for example, profit sharing, thirteenth-month pay, mandatory bonus, payments to state housing funds)
9. Severance pay, notice pay and liability for unfair employment dismissal
10. "Misclassification fines"(for example, misclassification fines in Argentina and Peru, and fines under Spain's Law on Violations and Sanctions on Social Matters, which imposes fines plus a percentage of unpaid withholdings and an extra penalty for "very severe" violations)

These extra four grounds get expensive. Even so, a multinational signing up an independent contractor abroad may cross its fingers and hope the relationship never gets challenged. And yes, a given dubious contractor arrangement might escape notice, for a while. But when the relationship finally ends, as it inevitably must, the termination clause in the independent contractor agreement looks stingy compared to the severance pay that an otherwise similarly situated fired local employee could win under local employment law—pretermination notice; severance pay; wrongful dismissal damages; and accrued benefits including holidays, vacation and overtime. Typically the termination clause in the independent contractor agreement offers only the standard 30 or 60 days' pretermination notice, which is usually much less than severance pay under local law. This can push the nominal contractor to demand that a local labor court award him a fired employee's full severance entitlement. And foreign labor courts prove surprisingly sympathetic here. For reasons we will discuss, the obvious defense—the claimant's signature on his own contractor agreement concedes contractor status—usually goes nowhere.

Contractor misclassification claims under these theories are real, not theoretical. Outside the United States, contractor misclassification claims arise in various contexts—government audit, whistleblower denunciation, termination of contractor agreement. Tax and social security agencies around the world increasingly target contractor classification in their audits, using modern technologies to make these audits more frequent and effective.

Countless labor court, tax and government agency judgments in contractor misclassification claims from across first-world and third-world countries alike impose awards in hundreds of thousands, sometimes millions of dollars. One widely publicized (if outsize) example is a February 2010 decision of the UK First Tier Tribunal Tax Chamber that reclassified as de facto employees a group of services providers who had worked for the UK branch of an American multinational. The multinational defendant in that UK ruling (in a U.S. S.E.C. filing) quantified the cost of the forced reclassification at USD $37 million—which caused a 33-cent drop in the company's earnings per share. (*Cf*. "Update 1: 04 Charge on Adverse Tax Ruling," Reuters online, 2/16/10)

2. When is a contractor not a contractor?

The likelihood of exposure for contractor misclassification highlights the importance of the threshold question in international contractor classification analysis: When can a multinational legitimately engage an overseas services provider as an independent contractor or so-called consultant, freelancer or entrepreneur? That is, under applicable foreign law, what distinguishes a genuine independent contractor from a de facto employee? In short, when is a contractor not a contractor?

Obviously this central question turns on local law, the law of the place where the service provider works. Be sure to look to both local host-country law as well as any legal regime set out in a choice-of-law clause in the independent contractor agreement: Choice-of-foreign-law clauses in independent contractor agreements rarely divest the mandatory application of local host-country employee-classification laws if the nominal contractor later convinces a local judge he had worked as an employee and so is entitled to fundamental employee rights. Choice-of-foreign-law clauses, however, do pull the selected regime's laws into the analysis even though those provisions are usually powerless either to turn off host-country employee protections or to stop the mandatory application of a host jurisdiction's more protective employee classification rules. (*E.g., Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir. 2012), *later proceeding* 754 F.3d 1093 (9th Cir. 2014))

So how does local host-country law around the world distinguish genuine contractors from misclassified de facto employees? Most every jurisdiction's local law offers up a list of factors—in Australia and elsewhere called a "multifactorial test"—to distinguish genuine independent contractors from de facto employees. (*Cf. Tattsbet Ltd. v. Morrow*, 2015 FCAFC 62 (May 2015), ¶¶ 5, 53) These multifactorial tests differ from jurisdiction to jurisdiction—even within a single country, the lists of contractor-versus-employee factors can differ. For example, Belgium imposes a four-factor test under its 2006 Employment Relations law but a nine-factor test under a 2012 Act. Meanwhile, the U.S. IRS test imposes a 20-factor test, while the U.S. Fair Labor Standards Act imposes a six-part/multiple subpart "economic realities" test under a "suffer or permit standard," while law under different U.S. statutes and in various U.S. states imposes various "commonlaw" tests and factors. (*Compare* IRS Revenue Ruling 87-41 of June 8, 1987 (1987-1 C.B. 296, 1987-23 I.R.B. 7) *with* U.S. Dep't of Labor Wage and Hour Div. Administrator's Interpretation No. 2015-1 (July 15, 2015) *and Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992))

Speaking broadly, countries' lists of contractor-versus-employee factors end up looking surprisingly similar across jurisdictions. In fact, contractor classification might be the area of international employment law where we can most actually offer some useful generalizations about substantive legal rules across the jurisdictions of the world. The overarching legal issue behind all the various tests and factors is the core concept that, overseas, is called "subordination"—whether the contractor is dependent rather than autonomous. "A key feature of an independent contractor relationship is autonomy." (F. Manjoo, "When the Best Employees Are Actually on the Payroll," *New York Times*, June 25, 2015) Most every country would uphold the parties' designation of independent contractor status if the would-be contractor can truthfully answer "yes" to these 10 questions:

1. *Exclusivity and independence*: Can you, and do you, have other paying clients—and do you market your services to the public? (Exclusive independent contractors pose a special risk in jurisdictions like Myanmar, Nicaragua and Taiwan. Peru applies a rebuttable presumption that a full-time exclusive contractor is a de facto employee. In Germany, contractors should avoid becoming "economically dependent" on the principal.)

2. *Short-term*: Is your relationship explicitly temporary and short term? (In Sweden a contractor relationship of more than six to nine months risks challenge. In the Dominican Republic, serially renewed independent contractor agreements risk challenge.)

3. *Self-supervision*: Do you have the power to perform your tasks the way you want to—free from the principal instructing you on process, free from discipline, free from work rules, free from performance evaluations and free from other supervision and control?

4. *Self-scheduling*: Are you free to set your own schedule and work hours, with no attendance requirement?

5. *Self-starting*: Are you free to determine the order and sequence of your tasks, with no requirement to make regular progress reports to the principal?

6. *Supplies and tools*: Do you provide your own office and supplies, pay your own business expenses and hire your own assistants? (This factor is particularly important in jurisdictions including Canada and Romania.)

7. *Task pay*: Do you get paid only for work you actually do, like hourly pay or task pay, with no paid vacations or holidays? (In the Dominican Republic, for example, a contractor should never receive a salary.) Is your pay free from employee-benefit executive compensation elements like bonuses, health/life/disability insurance and equity awards?

8. *Business risk*: Do you take business risks and bear the ultimate risk of profit or loss? Do you bear the risk of casualty loss (property/personal injury) and do you buy insurance? (This "business risk" factor is vital in Quebec, and also in Puerto Rico, where it is called the "economic reality" test—as well as in Beijing, per an August 2009 Beijing declaration on contractor classification.)

9. *Tax/social security*: Do you make tax/social security payments and withholdings like a business? (This is a vital issue in jurisdictions including Ghana, India, Liberia, Sri Lanka and South Africa.)

10. *Business cards/letterhead/email/title*: Do your business cards and letterhead clarify your independence from the principal, and do you use a title unrelated to the company? Are you kept off the principal's organization charts and internal structure documents? Does your email address make clear you are not part of the principal's organization?

These 10 questions flushing out contractor dependence or "subordination" tend to predominate, but three other questions also frequently factor into classification analysis:

11. *Restrictive covenants*: Are you free from non-compete, non-solicitation and other post-termination restrictions?

12. *Training*: Do you refrain from attending the principal's training sessions as a student?

13. *Organization structure*: Does your operation stay separate from the principal's organization structure and work procedures? (In Peru, a contractor should not be "integrated" into the principal's production or work "process.")

A nominal contractor who truthfully answers "yes" to all 13 questions likely meets the classification standards of most countries. Otherwise, though, the parties' contractor classification gets weaker for each question that gets answered "no." Court opinions tend not to say so explicitly, but as a practical matter the classification challenge is toughest where a contractor answers "no" to the first two questions—where the contractor is full time and long term. Classifying contractors rarely raises much risk where they are part time and short term.

For a "reality check" in assessing whether you might legitimately engage some overseas services provider as an independent contractor, ask: *If structuring this position as an independent contractor is such a great idea, then why not go ahead and engage all this person's U.S. counterparts as independent contractors, too?* If a contractor relationship would fail the "smell test" stateside, expect it also to flunk the smell test abroad. That is, while the various contractor classification "factorial tests" differ across jurisdictions, if classification would be suspect in the United States,

that fact raises a red flag that the classification may well also be suspect overseas.

3. How important is the text of the independent contractor agreement?

By definition, an independent contractor is party to a contract with a principal. There is a persistent myth of the bulletproof independent contractor agreement—the perfectly drafted contractor form that contains all the local jurisdiction's "legally blessed" boilerplate provisions shielding the parties' designation as an independent contractor. Unfortunately there is no bulletproof contractor agreement for the simple reason that the legal analysis as to contractor classification goes beyond the text of the independent contractor agreement itself. The text of the independent contractor agreement is sometimes such an insignificant factor that it makes little difference in classification analysis. Few legal systems defer to parties' own classification (in their contract) as "contractor" and "principal." Most countries' laws elevate substance over form to scrutinize the parties' actual relationship. This reduces the contractor agreement document to a mere starting point in contractor classification analysis.

In the words of one UK supreme court case, the operative legal issue is whether the clauses in an independent contractor agreement that purport to classify a services provider as a nonemployee contractor amount to a "sham" in light of "all the circumstances of the case, of which the written agreement is only a part." (*Autoclenz Ltd. v. Belcher*, [2011] UKSC 41 at ¶¶ 26, 34) A South African case says an independent contractor agreement can be a "subterfuge," and so classification analysis must focus instead on the "decisive importance" of the "actual relationship between the parties." (*Motor Industry Barg. Council v. Mac-Rites Panel Beaters and Spray Painters (Pty) Ltd.*, 22 Indus. L.J. Juta 1077 (2001)) A Canadian case says "the subjective intent of the parties" as expressed in the text of their independent contractor agreement "cannot trump the reality of the relationship as ascertained through objective facts." (*Connor Homes v. Canada National Revenue*, 2013 FCA 85 (Can. LII) (2013)) Perhaps the most concise way a court has articulated this virtually universal principle appears in the English employment tribunal decision *Ministry of Defence Dental Services v. Kettle*, which says, simply, that independent contractor classification analysis forces us to look "*outside the four corners*" of the parties' agreement. (EAT 0308/06 (2007))

At best, the contract document is only a starting point, not an ending point, of independent contractor classification analysis. Where the text of a sloppily drafted independent contractor agreement betrays a misclassification, then yes, a nominal contractor should and will get held a de facto employee. But where a well-drafted independent contractor contract makes the parties' independent contractor relationship look airtight, the analysis simply shifts to the facts of the parties' actual relationship.

That having been said, though, three contractor classification issues play into the drafting of an overseas independent contractor agreement: *special jurisdictions, contractual backstops* and "*business-to-business" contracts*. Take these three issues into account when drafting an overseas independent contractor agreement—they can make a huge difference in buttressing contractor classification.

- **Special jurisdictions**: While courts the world over will look beyond the four corners of an independent contractor agreement to assess the legitimacy of contractor status, a handful of countries give extra weight to certain special contract provisions, which therefore, in those particular jurisdictions, become vital to include when drafting an independent contractor agreement (as long as they are accurate). For example, in India an independent contractor agreement should recite that the contractor has a "permanent tax account number" and withholds and pays his own taxes. In Israel an independent contractor agreement should recite that the contractor has registered as a self-employed "consultant." In Russia an independent contractor agreement should recite that the services provider has registered

as an "individual entrepreneur." An independent contractor agreement in Indonesia or Turkey should expressly invoke the Indonesian Civil Code or the Turkish Code of Obligations as operative law, rather than those countries' labor codes. In Haiti, independent contractor classification gets more defensible if the contract recites the contractor's *patente* (taxpayer) number and declares that the contractor's invoices will be subject to TCA (VAT), which the contractor agrees to remit to Haiti's *Direction General des Impots*.

In addition, courts in some other jurisdictions—examples include Cambodia, El Salvador, Malaysia, Senegal, Thailand—ostensibly use the traditional analysis looking outside the four corners of the independent contractor agreement, but judges in these countries may prove somewhat more deferential to parties' own classification as "contractor." Australian courts will treat a clear contractual "acknowledgement" of contractor classification as one important factor buttressing contractor classification, as long as that acknowledgment "reflect[s] the real intentions of the putative employee." (*Tattsbet* (2015), *supra*, at ¶¶ 65, 66) In these countries, where the text of an independent contractor agreement unequivocally has the services provider represent and warrant that he is self-employed, the parties' contractor classification might actually withstand scrutiny. So vet an overseas independent contractor agreement with local counsel to capture any special local clauses and to take advantage of contractor status in jurisdictions that may be friendlier to parties' clear selection of contractor status.

- **Contractual backstops**: While not strictly related to classification, there are some contractual backstops that, when included in an independent contractor agreement, might act as disincentives keeping the contractor from later claiming to have been hired as a de facto employee. Consider using, in the independent contractor agreement, contractual indemnities, set-asides, hold-harmless provisions and remedies that kick in if the contractor later gets held the principal's employee. In Israel, include an "apportionment" clause to be able to recalculate paid contractor fees (after any misclassification determination) as salary and benefits. Check local-law enforceability. Consider collectability.

- **Business-to-business contracts**: We have been discussing independent contractors whom principals engage as individuals. But a contractor who incorporates and then does business through his closely held corporate entity gives the principal an extra layer of protection, if the principal contracts only with the contractor's corporation. In jurisdictions like Quebec, contractor incorporation is vital—contracting with an *unincorporated* individual makes contractor classification particularly vulnerable. And so the corporate veil can really help insulate contractor classification.

  This business-to-business independent contractor structure (the incorporation strategy) offers other advantages, as well. For example, Dutch Labor Relations Decree of 1945, as amended in 2013, still requires permission from a court or a Dutch agency to dismiss an employee, including a misclassified individual contractor. But terminating a relationship with a contractor corporation should sidestep Dutch employment termination rules. In much of Canada, contractor incorporation raises the chances a court will, at most, deem the contractor to be just a so-called "dependent contractor" rather than a full-fledged de facto employee—dismissal liability may be about the same either way, but at least a principal can avoid other employment liabilities, such as those related to payroll. (*E.g., Keenan v. Carnac Kitchens*, 2015 ONSC 1055 (Ontario Sup. Ct. of Justice 2015); *Khan v. All-Can Express Ltd.*, 2014 BCSC 1429 (Brit. Columbia

Sup. Ct. 2014; *Drew Oliphant Prof. Corp v. Harrison*, 2011 ABQB 216 (Queen's Bench Alberta 2011); Quebec Labor Standards Act)

4. What strategies might insulate contractor classification?

It is easy to engage an overseas independent contractor for a discrete task—no one questions a short independent contractor engagement of a lawyer, accountant, plumber, roofer or guest speaker at a corporate retreat. Contractor classification problems arise internationally when would-be contractors become long term and full time—like where a multinational signs up a foreign sales agent to work exclusively, or where a nonprofit engages a grant-writer under a three-year consulting contract. To avoid misclassification in risky situations, after accounting for the three contract-drafting issues just discussed (special jurisdictions, contractual backstops, "business-to-business" contracts), consider three other vital strategies:

- **Draft an agreement that establishes real independence**: We have seen that the text of an independent contractor agreement, by itself, will not immunize parties' contractor classification. But an independent contractor agreement still needs to lay the groundwork for genuine independence, because legal systems will hold a contractor agreement that betrays dependence ("subordination") to be a sham. When drafting any independent contractor agreement, loosen the reins. Avoid the temptation to have it both ways, controlling an independent contractor like a "subordinate."

  In the contractor agreement, reject non-compete clauses, scheduled work hours, performance evaluations and any other provisions that seem too much like employment. Let contractors structure the job however they want. Keep the contractor out of equity plans. Avoid paying insurance, bonuses, vacations or holidays (contractors like these extras, so be firm in saying "no"). Of course, the principal might simply increase the contractor fee enough so that the contractor drops demands for noncash benefits.

- **Structure the day-to-day work relationship to establish real independence**: After signing the contract, in day-to-day practice respect the contractor's structural independence as the contract spells it out. Keep contractors off organization charts. Let them compete. Refuse to give a title, an office, company business cards or a company email address (unless the business cards and email address prominently include the word "contractor"). Avoid scheduling a contractor's work hours. Avoid performance evaluations. Do not invite the contractor to training sessions or office parties. In short, do not have it both ways: The contractor is not an employee, so do not treat him like one.

- **Stand down and hire the person as an employee or leased employee/secondee**: Where contractor classification will be hard to defend, consider standing down and hiring the services provider as an employee. Doing this will cause administrative headaches, yes—but those headaches should hurt a lot less than the pain a misclassified foreign contractor inflicts after being held a de facto employee.

  But what about a multinational principal not yet registered in-country and unable to issue a local payroll? In that situation, consider engaging the services provider as a *leased employee* or secondee. That is, get some other local business (affiliate, business partner or manpower/staffing agency) to hire the services provider as an employee onto its own local payroll. Then get this nominal employer company to "second" the person's services in a business-to-business contract with you, the multinational principal, in a contract to which the services provider is not a party.

  This "leased employee" (secondment) structure does not resolve "permanent

establishment" problems (discussed below). And it raises the specter of co-/dual-/joint-employment (discussed below). But this structure does eliminate the threat of de facto employee reclassification, because this structure intrinsically (from the beginning) classifies the services provider as an employee. In *James v. Greenwich Council*, an English court upheld this approach, holding the principal, a business customer of a temp or manpower agency, not to be the employer of a temp employee who was a leased employee/secondee and so not a misclassified independent contractor. (UK EWCA Civ 35 2008)

5. What other legal issues do international independent contractors implicate?

Everything we have discussed up to now addressed the threshold legal issue of contractor classification. In engaging independent contractors outside the United States, also account for these additional, separate issues that often come into play, beyond classification:

- **Embedded subcontractors and co-/dual-/joint-employment**: Independent contractors sometimes engage their own employees or subcontractors who are often invisible to a U.S. principal, which has privity of contract only with the foreign contractor and no direct relationship or privity of contract with his subordinates. The fact that a contractor has his own employees or subcontractors buttresses the argument that contractor classification is legitimate. But these "embedded subcontractors" pose a risk—they themselves might claim to be the principal's misclassified de facto employees. Search out contractors' embedded employees and subcontractors. Develop a proactive strategy to contain exposure, like hiring embedded subcontractors directly, or having contractors with staff incorporate and indemnify the principal for employment claims of their staff. A related issue is a claim of co-/dual-/joint-employment: Sometimes the individual employees of a legitimate contractor business argue that the principal simultaneously employed them, along with the contractor—after all, they spent all their work time working for the principal. Again, the principal will be best positioned if the contractor business is truly independent, and has a contractual duty to indemnify for these claims. (*E.g., Balwant Rai Saluja & Anr v. Air India Ltd.*, Sup. Ct. India Civ. App. ## 10264-10266 (Aug. 2014) (setting out standards for co-/dual-/joint-employment findings in the contractor context in India)) Structure the contractor relationship so the contractor's staff reports to the contractor rather than to the principal, and get an indemnification for these claims. Also, verify that the contractor makes good on its employment liabilities to its staff.

- **Contractor pay reporting**: In the United States, principals must notify the IRS of payments they make to domestic U.S. independent contractors, using the 1099 form. Few other countries require reporting contractor pay to tax agencies, but be sure to check and comply with any equivalent overseas reporting mandates.

  And of course be sure each independent contractor represents and warrants in the contractor agreement that he will make all applicable tax and social security reports and filings under local laws that reach self-employed contractors. Then follow up to ensure the contractor complies, for example by requiring the contractor to submit proof of tax compliance.

- **Permanent establishment**: We have been addressing contractor issues under employment law. In addition, engaging a contractor overseas triggers the completely separate *corporate and tax law* issue of "permanent establishment." In the independent contractor context, the permanent establishment issue arises when a multinational has no formal corporate presence

in a foreign country (no registered branch, subsidiary or representative office, not licensed to do business locally) but ends up being held to be transacting business in-country through the acts of an in-country agent, its independent contractor. Once an independent contractor's activities in a country on behalf of a principal trigger that jurisdiction's definition of "doing business" locally, the (overseas) principal organization is deemed to have a local permanent establishment or de facto corporate presence that requires corporate registration and filing corporate tax returns. That is, a (foreign) principal held to be doing business in a new country through its in-country contractor or agent will have a legal obligation to register with the local corporate registry (the local equivalent of a U.S. state secretary of state's office) to get a local taxpayer identification number, perhaps to get local nonprofit status (if the organization is a nonprofit), and to file local corporate tax returns and pay local corporate taxes. Indeed, tax lawyers talk about permanent establishment as an issue of *corporate tax* compliance.

Because permanent establishment is a corporate law and tax law issue unrelated to employee classification, a multinational operating in some jurisdiction mostly or exclusively through an independent contractor might be deemed to have a local permanent establishment even if the contractor is legitimately classified. However, an unregistered multinational found to be the de facto employer of local misclassified contractors will almost certainly be held to have an in-country permanent establishment, because in most places, employing full-time locals triggers the corporate-law definition of doing business.

Hence the question: *Where an organization's only activities in a given country are through its in-country independent contractor, when do the contractor's activities trigger that jurisdiction's local law definition of doing business on behalf of the principal*? The answer depends on the jurisdiction's own particular definition of "doing business." In Qatar, for example, the "doing business" test is whether the principal "engages in commerce"—a concept Qatari law does not define clearly. Singapore's statute is more precise: "Carrying on a business" in Singapore means "administering, managing or otherwise dealing with [local property] as an agent,...legal representative or trustee"; in Singapore, "effecting] any [one single] sale through an independent contractor" does not itself trigger "carrying on" a local business, but a series of sales or other acts of a contractor might. Syria holds an entity to be doing business locally under five concrete tests: the organization employs someone; rents or buys real estate; opens a bank account; lists in a telephone directory; or takes out a post office box. Mexico's "doing business" standard turns largely on whether the overseas principal has issued local powers of attorney or has a fixed place of business—which might be an independent contractor's Mexican home office.

- **Special local independent contractor designations, registration mandates and sales agent regulations**: More and more countries impose laws that create special contractor categories or registration requirements. Check for these, understand how they work, and structure contractor relationships to account for them. For example:

  - ✓ *Canada*: In Canada, contractors who render services more or less like employees can be held to be "dependent contractors," and a principal dismissing a "dependent contractor" can be held to owe more or less the same dismissal notice or pay in lieu as a similarly situated employee. (*See Keenan* (Ontario, *supra*); *Khan* (Brit. Columbia, *supra*); *Drew Oliphant Prof. Corp* (Alberta, *supra*); Quebec Labor Standards Act)

- ✓ *China*: China imposes special regulations for so-called "dispatch workers" that might include certain independent contractors.
- ✓ *Colombia*: In Columbia, improperly classified independent contractors can be deemed "independent workers" with specific ramifications under Colombian Decree 1406/1999.
- ✓ *France*: France has special designations called *portage salarial* and *auto-entrepreneur* for self-employed freelancers who are autonomous in many ways—but each of whose "employers" (principals) may have to make payroll withholdings, contributions and deductions similar to those of a regular employer.
- ✓ *Spain*: Since 2007, Spain has categorized independent contractors who devote 75% of their full-time efforts to a single client as "economically dependent autonomous workers." Principals of these contractors must offer 18 days of annual time off and must pay severance pay for any pre-term, no-cause termination.

A related issue is complying with local regulations on *sales* agents. Independent contractor arrangements with sales contractors need to account for local laws that impose protections (such as regarding compensation and termination) on sales agencies and, less commonly, on distributorships. In the European Union these laws fall under the often-overlooked Directive 86/653, "transposed" (adopted) into local member state laws like the UK Commercial Agents (Council Directive) Regulations 1993. Costa Rica's Law for the Protection of Representatives of Foreign Firms can have a similar effect, as can Puerto Rico's sales representative law and the strict laws in Argentina that regulate sales staff.

The Dutch Obligation to Register Intermediaries Act (in effect since July 2012) requires certain non-Dutch companies to register with the government if they use contractors in the Netherlands.

- **Illegal subcontracting**: Laws in Brazil, Colombia, Croatia, Mexico, Vietnam and elsewhere actually ban "subcontracting" core tasks central to a business. In Malawi, subcontracting core business activities becomes a factor in assessing the legitimacy of independent contractor status—a properly classified Malawi contractor can only provide services ancillary, not "integral," to the principal's main or core business. Be sure any independent contractor arrangement in a jurisdiction with laws like these complies with local subcontracting mandates.
- **Midterm conversions and "up or out" rules**: Nipping the misclassified independent contractor problem in the bud at the time of initial engagement is a best practice. But sometimes multinationals waking up to this compliance threat find themselves already deep into relationships with dubiously classified foreign "contractors." Unless a classification claim is pending, it is not too late to comply. Liability here grows as misclassifications linger.

  Consider a *global conversion project*—hiring misclassified contractors as employees and paying consideration for releases of accrued liabilities. Do this while relationships with foreign contractors remain friendly: Deferring reclassification until contractor termination or an audit only increases exposure.

  Going forward, consider adopting the emerging best practice of implementing an in-house global "up or out" rule that caps worldwide relationships with independent contractors at a set period, ideally six months to two years.

After that period, require hiring each contractor directly, or require engaging each contractor as a leased employee—or else require severing the contractor relationship entirely.

* * *

The overseas independent contractor classification conundrum bedevils even major multinationals. At the beginning of a relationship, engaging an independent contractor overseas (rather than hiring a foreign services provider as an employee) may seem to offer attractive advantages. But dubiously classified foreign contractor arrangements open up a Pandora's box of legal problems. Challenges are frequent. Liabilities can run surprisingly high. And where a multinational principal is not registered to do business in the overseas jurisdiction, the challenges extend beyond classification under employment law and trigger the corporate and tax problem of permanent establishment. So figure out when, under local foreign law, a nominal independent contractor is likely to get classified a "subordinated" (dependent) de facto employee (or, in special jurisdictions like Canada and Colombia, some unique local breed of services provider like a "dependent contractor" or "independent worker"). Where necessary, hire the services provider up front as an actual employee, or at least reduce classification risk somewhat by either engaging him as a leased employee (secondee on someone else's payroll) or as a "business-to-business" contractor through his own closely held corporation.