



Legal Aspects of Selling Goods Overseas

by Mark D. Oettinger, Esq.

The subject of agency and distribution agreements is a vast one, and no article of this length can hope to do the topic justice. More importantly, international trade is very fact-specific, and as such, even a comprehensive article on the general subject should not be used as the sole basis upon which to design an agency or distributor agreement.

Each document must be hand-tailored to the needs of the specific case. Generic forms are available, as are checklists. These are helpful, but one must be careful not to complacently rely on pre-prepared forms. The would-be exporter should circulate draft agreements through all departments whose activities touch on exporting, so that input from all impacted areas of the company can be considered. Finally, qualified legal assistance should be obtained.

There are several ways by which manufacturers sell goods overseas. The two most common are through agents and distributors. An agent is typically commission-based, and does not take title to the products. The agent functions essentially as a broker. Under this type of relationship, the manufacturer sets prices and terms. The agent may or may not have the actual authority to enter into contracts on behalf of the principal.

A distributor, on the other hand, actually buys the goods from the manufacturer, thereby taking title, and usually has full discretion in fixing the prices and terms to its customers. Superficially, the manufacturer has fewer headaches when selling to a distributor.

Even so, the manufacturer still has a strongly vested interest in the good will which is associated with its product line. As such, it is critical for the manufacturer and the sales conduit (whether an agent or a distributor) to work together closely, in a manner which benefits the entire chain of distribution.

Regardless of whether the arrangement is in the nature of an agency or a distributorship, it should be in writing. Although each arrangement is specific to its own facts, the following issues should be addressed in the majority of agreements.

1. The identities of the parties. This may seem obvious, but a number of practical considerations flow from this principle. Are you dealing with a legal entity or an individual? Legal entities can declare bankruptcy. So can individuals, but it is less easy. Consider obtaining personal guarantees when the main contract is with a legal entity. Also, be sure to specify the address to which notices are to be sent. Place the burden on the other party to let you know if and when the legal notice address changes. In this way, notice which is provided will be considered sufficient even if the agent/distributor has, unbeknownst to you, moved to a different location.

2. The duration of the agreement. When does it begin, and how long does it last? This is an issue of some delicacy, since many countries understandably limit the ability of the principal to terminate the agency/distributor agreement. Such restrictions are designed to guard against the unscrupulous manufacturer who allows an agent/distributor to develop a market, only to snatch it away. This is one of the several areas in which consultation with a properly qualified international trade lawyer is critical, since the rules regarding agents and distributors differ dramatically from country to country. The local lawyer is likely to recommend the obtaining of an opinion from an appropriately qualified lawyer in the country of the agent/distributor, since their rules are often different from ours, and of course, subject to change. One approach for designing the length of the agreement is to condition its renewal on the agent/distributor's sale of a certain volume of the manufacturer's merchandise.

Continued next page



3. The territory over which the agent/distributor will have rights and responsibilities. Some countries have special rules of public policy which govern and restrict the granting of exclusive agencies. Furthermore, house accounts can generally be protected, although their practical effect on the motivation of the agent must be considered. This is another area in which legal counsel with knowledge of the rules and conditions of the local market is indispensable.

4. The products to which the agency is to extend. If the principal wishes to exclude certain lines or particular products, that should be made clear.

5. The method for establishing pricing. Prices should be quoted in US dollars in order to avoid unforeseen losses due to currency fluctuations. Given the agent's understandable need for reasonable lead times on price changes, the principal should guarantee prices for an agreed period, for example ninety days.

6. Agents should generally be prohibited from carrying competing products.

7. Although it is convenient to allow the agent to sign contracts on behalf of the principal, it is also dangerous. The prudent course is to condition contract creation on written confirmation from the principal. One must be careful, however, that sometimes "apparent authority" can empower the agent to bind the principal even in the absence of actual authority, for example, where the principal has cloaked the agent in such a manner that a reasonable customer would infer authority from the circumstances.

8. Payment terms should be clearly agreed and understood. In the international arena, letters of credits are widely (although not universally) accepted. They are probably the best combination of practicality and safety. They do have a transactional cost, however, and with long-term properly-qualified customers, open accounts may be an option.

9. In order to ensure timely availability, you should have the agent stock a reasonable volume of inventory. For products which require after-market service, the agent should also be required to stock a reasonable inventory of spare parts.

10. Criteria should be set for minimum orders. The agent may request the right to return slow-moving items to the principal. Risk of loss, and types and levels of insurance, should be resolved.

11. If the product will require warranty servicing, allocation of that responsibility must occur.

12. What are the responsibilities of each party with respect to advertising and promotion? Who translates, prepares and distributes product literature? Technical specifications in product literature may need to be converted into the metric system, and the underlying standards themselves will often differ. For example, the US bed frame manufacturer must consider that many European countries have different standards for mattress sizes. Responsibility must also be assigned for ensuring that the product meets destination-market requirements, including safety standards, quality certifications and the like.

U.S. Small Business Administration International Trade Program

The Export Legal ELAN Assistance Network

Mark Oettinger, of Lisman & Lisman, has been named Vermont Regional Coordinator for the Export Legal Assistance Network.

The ELAN program is provided through a cooperative agreement among the U.S. Small Business Administration, the U.S. Department of Commerce, and the Federal Bar Association. Under the ELAN program, international trade lawyers provide free initial consultations to businesses interested in starting or expanding export operations.

For more information contact Mark Oettinger 802-864-5756 or visit ELAN's web site at www.fita.org/elan.

Continued next page



13. The principal would like to have access to the agent's customer database. There are several legitimate justifications for this, including marketing. Even so, the agent will be reluctant to disclose this information for fear that it will be used against the agent.

14. The agreement should include a "force majeure clause", whereby non-performance is excused when it is due to factors which are beyond the control of the parties.

15. For economic and foreign policy reasons, US exporters are restricted from selling to certain countries, and from exporting certain types of products generally. These are areas which should be explored early when you are proposing to trade in a new country or with a new product line.

16. The agreement should contain a hold harmless agreement in which the agent agrees to defend, indemnify and hold you harmless for any of its unauthorized conduct relative to the principal/agent relationship.

17. The agreement should have an alternative dispute resolution provision. I recommend that resolution of disagreements first be attempted through direct discussion between the parties. Failing that, depending on the size and type of the

disagreement, mediation might be attempted. If the disagreement persists, submit the matter to arbitration under a pre-agreed set of standard rules. Designate the geographic location where arbitration will occur (ideally, your home state), and specify which body of substantive law will apply (ideally, that of your home state and of the United States in general). Arbitration is faster, cheaper and more private. Authorize the arbitrator to assess the cost of the arbitration (including reasonable attorney's fees) as is deemed fair; this is a strong disincentive to disagreeing about anything but the most good-faith of disputes.

18. Designate English as the language for all of the parties' official dealings.

No article of this length can provide you with a reliable blueprint for creating a perfect agent/distributor agreement. Each set of facts is unique. In many cases, the international trader may need to consult with properly qualified legal counsel.

One way to find such individuals is through the Export Legal Assistance Network (ELAN), a program which is provided through a cooperative agreement among the U.S. Department of Commerce, the U.S. Small Business Administration, and the Federal Bar Association.

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© **Mark Oettinger** is a business, international and trial lawyer with the law firm of *Lisman & Lisman*, in Burlington, Vermont. He is Chair of the International Law Committee of the Vermont Bar Association, and Chairman of the Vermont Karelia Sister State Committee. He teaches US and international business law at the college and law school levels, and has taught law school in Russia as a Fulbright Scholar. He is Vermont regional coordinator for the Export Legal Assistance Network.