

# **Vermont Council on World Affairs**

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## **International Contracts (Including Distributorship and Agency Agreements)**

### **The Basics**

The drafting of effective Sales Contracts, Distribution Agreements, and Agency Agreements, always requires careful attention to the facts of the particular seller-buyer, seller-distributor, or seller-agent relationship. This certainly true in the *domestic* context, and it is particularly true in the *international* context, where certain elements of the relationship are unique to...and/or command greater attention in...the international context. Some of the contract terms which deserve heightened attention in the international context include:

- Choice of law;
- Choice of forum;
- Choice of currency;
- Choice of language;
- INCOTERMS; and
- Alternative dispute resolution.

Consider using Letters of Intent as a pre-cursor to the binding contract itself.

Use the United States Department of Commerce for export support:

- They can research prospective distributors and agents; and
- And they can conduct credit checks on prospective purchasers.

Use "Customs import specialists" for importing.

Use the Small Business Administration for loans and guarantees.

Ask VEDA about OPIC and ExIm options.

Use knowledgeable freight forwarders for "logistics" (but watch costs...thin margins).

Use bankers who knows "letters of credit" and "documentary trade transaction" first hand.

Always ask, "How am I going to get paid?"

Don't risk more than you can afford lose:

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Because enforcement is hard and expensive domestically; and  
And because enforcement is even harder and more expensive internationally.  
So...structure your deals so that *both* parties *want* them to succeed,  
And so that the value proposition is in the success of the relationship *long term*.  
Manage risk with intentionality.

## **The Human Factors**

Long-term business relationships are more the norm overseas:

They take time to develop;

Having a well-chosen local partner overseas is indispensable; and

Regularly review the agreement,

As the relationship must be balanced and mutually beneficial.

Study and follow the local custom and practice.

Use cutting edge technology, such as Google Hangouts.

Insist on the highest ethical standards:

Yours and the ethical standards of your overseas partners; and

Understand and abide by the Foreign Corrupt Practices Act.

## **Protecting Intellectual Property Rights Internationally**

Identify your protectable intellectual property, and the international sources of their protection:

Patents (Paris Convention; WIPO; Patent Cooperation Treaty (PCT));

Trademarks/Trade Names (Paris Convention, WIPO and Madrid Agreement);

Copyrights (Berne Convention); and

Trade Secrets.

How are these rights currently protected under US law?

Are your IP rights are currently being violated, and if so, how?

Have a clear, comprehensive, and product/service-specific Non-Disclosure Agreement (NDA):

It may have limited practical enforceability; but

It memorializes and solemnizes the parties' intentions.

Target countries/sectors have very different risk profiles.

So...choose your target markets strategically:

Favor countries that have a relatively high level of protection and respect for IP;

Luckily, those are generally the larger markets with more affluent consumers; and

The EU is the obvious example:

Selling pharmaceutical technology to Switzerland is relatively safe; but

Selling music to Russia is relatively dangerous.

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**Mark Oettinger** has practiced law in Burlington and Montpelier since 1980. He was a partner at Bloomberg, Oettinger & O'Hara until 1995, and then a partner at Lisman & Webster until 2006. From 2006 until 2013, Mark he served as General Counsel to the Vermont Agency of Education. He then returned to private practice in Burlington, where he is a partner at Montroll, Backus & Oettinger, 135 College Street. Mark taught Business Law as an adjunct professor at Champlain College from 1985-2000, and has taught public and private international law at Vermont Law School as an adjunct professor since 1999. Mark's website, [www.markoettinger.com](http://www.markoettinger.com), and the Montroll, Backus & Oettinger website, [www.mblawoffice.com](http://www.mblawoffice.com), have numerous helpful links and publications. Mark is the Vermont representative of the Export Legal Assistance Network (ELAN), and is the founder and chair of the Vermont Bar Association's International Law & Practice Section. Mark is also a member of the Board of Directors of the Vermont Council on World Affairs.

## CHECKLIST FOR INTERNATIONAL DISTRIBUTION AGREEMENT

- ☐ Legal identity of the parties (due diligence)
- ☐ Appointment of distributor: exclusive or non-exclusive
- ☐ Territory: define geographical area precisely
- ☐ Products or services: identify specifically
- ☐ Improvements/additions to products or services
- ☐ Term of agreement (renewal option)
- ☐ Confidentiality
- ☐ Non-compete (during/after – limited time period)
- ☐ Relationship between parties: independent contractor
- ☐ Distributor's obligations: advertising, minimum purchases, sales increases, orders, service to customers, inventory, office maintenance, attend product training, permits and licenses, compliance with local laws and regulations, insurance, access to premises, accounting and reports, other
- ☐ Supplier's obligations: product literature, advertising, free training seminars, sample products, sales leads in territory, sales support, quality controls, returned defective products, visits to distributor's offices, other
- ☐ Purchase price (discounts)
- ☐ Method of payment and currency
- ☐ Shipping and delivery: Incoterms® 2010 (inspection, title, risk of loss, insurance, variants)
- ☐ Product warranty (full/limited) and disclaimers
- ☐ Other terms and conditions of sale
- ☐ Competing products: permitted or prohibited
- ☐ Limited license: trademarks and copyrights (other intellectual property)

- ☐ Force majeure (allocate risk for an extraordinary circumstance beyond the control of the parties, such as a war, strike, riot, crime, or "act of God")
- ☐ Compliance: export controls, import regulations, Foreign Corrupt Practices Act (FCPA), other
- ☐ Limitation of liability: what to include, be specific
- ☐ Indemnification: be clear as to intent and scope
- ☐ Early termination: for cause/with notice
- ☐ Effect of termination
- ☐ Choice of law: select the law that will govern disputes
- ☐ Dispute resolution: mediation, arbitration, court
- ☐ General provisions: severability, entire agreement, modification and waivers, non-assignment, other

**Each agreement must be custom tailored – no one-size-fits-all**

**Watch out for mandatory laws of foreign country**

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**Disclaimer:** For the drafting of international distribution agreements you should seek competent advice from a licensed attorney who has experience in such matters. This Checklist does not constitute legal advice and it does not take into account the specific circumstances of your situation.

**About the Export Legal Assistance Network (ELAN):** With a presence in 70 U.S. cities and with the participation of more than 250 attorneys, the Export Legal Assistance Network (ELAN) program is a nationwide group of attorneys in private law firms that volunteer to provide an initial legal consultation free of charge to companies just beginning to export. Under ELAN, knowledgeable lawyers help new export companies learn the legal aspects of international trade, issues relating to export licensing, tariffs, protection of intellectual property rights and much more. For additional information, visit [www.exportlegal.org](http://www.exportlegal.org).