INSIDE THE MINDS

Understanding International Commercial Contracts

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International Distribution Contracts

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Introduction

International distribution contracts highlight many considerations present to one degree or another in all types of international commercial contracts. Probably the most common method used by manufacturers and suppliers to sell their products internationally is to utilize distributors and/or sales agents. This chapter tends to assume that the products originate in the United States and are being sold outside the United States, but the analysis is still quite similar when the situation is reversed and the products originate outside the United States for distribution within the United States—or, for that matter, when a US company is distributing in the United States through another US company. While there are many considerations universal to all distribution relationships and contracts, this chapter will attempt to profile considerations that are either unique to international distribution or that have different, more pronounced, or nuanced effects in the international distribution context.

First, let us clarify some terminology. Where a sales agent is involved, the agent seeks to develop sales for the US company and receives a commission on those sales. With a true distributor, the distributor purchases product from the US company and then re-sells that product for a profit, sometimes selling to sub-distributors—often referred to as dealers—who then re-sell to the ultimate users. Both of these approaches fit under the general umbrella of "distribution." This chapter focuses primarily on true distributors and distribution relationships (i.e., buy and re-sell relationships), but most of the discussion applies generally to sales agents and sales agent arrangements as well.

Planning

In most cases, the attorney is brought in when the distributor has already been identified and the client wants a contract drawn up. It is not uncommon for the attorney to find out that the client is already selling to the distributor on a routine basis at this point. As with many areas of commercial practice, the contract is thought of as one of the final details. Unfortunately, when this happens, the client has already and probably unknowingly assumed some risks that, if understood, they would have wanted to avoid, address, or plan for in some fashion.

Real value can be provided—and some eventual problems can be avoided—by understanding some of the risks associated with engaging

international distributors. There are several potential ways problems can arise before the process ever gets to the contract itself.

The first element of a successful international distribution contract is careful business and legal due diligence. There is no shortage of potential distributors out there that will overstate their experience and abilities and make many promises about what they can do for the US company in their market. Many of them are quick to sign up to a distribution contract, but turn out to not be a good fit, and the potential market languishes as a result.

Business Due Diligence

Except where a brand is well-known in the new market, the distributor is often the primary representative through which the product becomes known—or remains unknown—in the new market. Thus, it is important to assess the ability of the distributor to support sales of the product(s) and consider whether the goals of the US company and the distributor are aligned. As part of its due diligence, the US company will want to learn about and verify the following with respect to the potential distributor.

Reputation and Experience

Review these both generally and within the particular sectors most important for the products to be distributed. How many other foreign companies utilize the distributor's services? Are they available to consult with about their experiences with the distributor?

Financial Ability

Credit analysis is typically a part of conducting due diligence on a distributor, but this review should go beyond investigating the ability to pay for product orders. It is important to assess whether the distributor has the financial ability to invest in promotional efforts and maintain the type of presence in the market expected. Also, does the distributor look viable for the long term?

Existing Product Line

Try to gauge the importance of the US company's product(s) to the overall business of the distributor and whether the distributor's other products

complement or compete with them. Also, it is important to understand what kind of financial arrangements exist for the other products carried by the distributor. Economic incentives might exist to cause the distributor to give priority to other product lines, turning what would otherwise be a complementary product into a competing product.

Existing Customer Base or Network of Sub-Distributors

Are the distributor's existing relationships with customers and sub-distributors or dealers right for the US company's product? Does this base already have built-in demand for the product or do they need to be converted into customers?

Locations

Does the distributor have adequate presence in key parts of the sales territory?

Sales Team

The depth, size, experience, and compensation of the sales team are all factors to consider. Again, depending on how the sales team is incentivized, there could be economic incentives that cause members of the sales team to give priority to other product lines.

Product Strategy

What is the distributor's plan for marketing the US company's products? Has the distributor previously sold similar products or foreign products in the past, and what were the results of those prior efforts?

Market Intelligence

What information can the distributor share on relevant markets for the product?

After-Sale Support

If needed, what is the ability of the distributor and its sub-distributors to adequately service products (personnel, facilities, equipment, logistics, etc.)?

Foreign Corrupt Practices Act

The US Foreign Corrupt Practices Act (FCPA)[1] is another area to consider. Simply stated, under the FCPA, a US company can be subjected to penalties if its distributor violates the FCPA by bribing a government official. Fines can reach $2 million per violation and there is the potential for personal fines and even imprisonment for culpable individuals. FCPA-focused due diligence can be important, both to avoid potentially problematic distributors and also to demonstrate the US company's efforts at FCPA compliance in the event activities of a distributor give rise to an FCPA investigation by the US Department of Justice or US Securities and Exchange Commission (SEC). Here, the level of concern, and thus diligence, varies with the level of perceived corruption in the country where the distributor will operate. For any country, it is a best practice to go to www.transparency.org and check that country's score on the most recent Transparency International Corruption Perception Index. If the country is at 5.0 or below, then it is time to think seriously about the level of FCPA diligence warranted. Determining how much FCPA diligence to do is based on a sliding scale, with more done in areas perceived as having higher corruption and diligence further escalating depending on what is found. There is no one-size-fits-all and it is a sensitive area; however, the good distributors are well-versed in the FCPA and understand that a US company needs to check things out.

Areas of inquiry in FCPA due diligence for a potential distributor include the distributor's:

- Understanding of, and past and present compliance with, the FCPA and local anti-bribery laws;
- Ownership and potential connections between owners/principals and government officials and entities;
- Prior accusations and convictions;
- Internal controls and "code of conduct" compliance; and
- Methods of receiving and making payments and type of payments involved.

The foregoing is not an exclusive list. Each situation is different and depends on a variety of factors. FCPA due diligence can be conducted via written due

[1] 15 U.S.C. § 78dd-1.

diligence inquiries, interviews, or some combination thereof. Publicly available information should also be reviewed and third-party investigator firms can also be utilized depending on the circumstances. It is important to develop and maintain written records of initial FCPA due diligence efforts as well as efforts to monitor ongoing FCPA compliance by foreign distributors.

Frankly, FCPA-related diligence is still an area that gets short shrift when companies are starting to look at international distribution. Business personnel are not often sensitized to the matter and may feel like they have gone too far down the path with a potential distributor to start asking about these things at the contract drafting stage—also known as "when the lawyer is brought in." The US company is much better protected by consulting legal counsel or other FCPA advisors earlier in the process when it comes to planning international distribution contracts.

Budgeting and Timing Expectations

Let me stop here for a moment and make a point about managing business expectations in connection with international distribution contracts. Simply put: International stuff costs more and takes longer. I realize that news is exactly the opposite of what any business client *wants* to hear, but I think everyone is better off understanding this point at an early stage in the process rather than mid-way through, when the bills are exceeding budget and target dates are already in the rearview mirror. The due diligence aspects alone are simply more cumbersome and lengthy than in US domestic transactions. The deal pace is also often slower in foreign transactions. Also, local counsel will need to be involved, so there is at least one extra layer of legal review for international distribution contracts. If business clients understand this on the front end, they can better plan and decide when and how to jump into international distribution. I hate to see clients start down this road, spend a significant amount of money to do things right, and then make unfortunate compromises on the contract toward the end because the expenses take them by surprise. Cutting off the last few thousand dollars of work can eliminate a disproportionate portion of the value and protections bought with the initial work.

After diligence is addressed, there are still some additional areas outside the contract of which to be mindful in preparing to develop the international distribution contract. These primarily relate to local law considerations.

Local Law Considerations

Many jurisdictions outside the United States have adopted laws protective of local distributors that apply broadly to all types of distributors.[2] This makes it critical to consult with local counsel familiar with the intricacies and nuances of local law when preparing contracts with foreign distributors or involving foreign territories. Without local counsel guidance, a US company may rely on contractual provisions that are, in fact, overridden by provisions of local law or may be unaware of important statutory rules that can have significant impact on the rights of distributors and the true potential costs associated with those relationships.

In some jurisdictions, the relevant statute may expressly cover only sales agents. However, there is frequently case law that will apply the same statutory protections to distributors if certain criteria are met. For planning purposes, I consider it prudent to assume that protections for sales agents will be applied in the distributor context and vice versa.

Local Competition Laws

Antitrust or competition laws outside the United States may affect the validity of some otherwise commercially accepted provisions in an international distribution contract. For example, the Vertical Agreements Block Exemption (VABE) in the European Union competition rules prohibits retail price maintenance and identifies other provisions that must not be included in a distribution contract, inserting itself into what would typically be "freedom of contract" issues in the United States.[3] For example, it is common to restrict a US distributor to a defined territory for all purposes; however, under the VABE, territorial restraints on distributors are weakened. A

[2] To be clear, many US states have similar laws. These state laws vary in substance and with respect to the types of distributors to whom they apply. Some states provide detailed mandatory or default rules that govern rights of distributors or how a distributor may be terminated, while other states leave most aspects of the relationship to be defined by contract and general state law contract principles. State statutory distributor protections are sometimes applied across the board to all types of distributors, but in other instances only to specific industries, such as motor vehicles, alcoholic beverages, or farm equipment.

[3] While the VABE is the example cited above, it is not the only source of competition law considerations. In some Latin American countries, competition laws may affect to what extent exclusivity may be granted as well as the enforceability of noncompetition provisions or minimum purchase requirements.

distributor can be kept out of another distributor's exclusive territory, but not kept out of areas where there is not yet an exclusive distributor—and trying to label other areas as "reserved to the US company" is not always going to be effective. Also, "passive sales" by the distributor cannot be restricted to certain territories. In general terms, "passive sales" are essentially sales generated by general advertising or promotion in media or on the Internet that reach customers in other distributors' exclusive territories, but are at the same time a reasonable way to reach customers in non-exclusive territories or in the distributor's own territory.

As another example, it is somewhat typical in the United States to require a distributor to purchase product direct from the US company and to refrain from carrying competing products during the life of the distribution arrangement, and sometimes even for a noncompetition period beyond the life of the distribution contract. Per the VABE, these types of requirements are functionally capped at five years in the European Union. Under the VABE, non-competition restrictions and minimum purchase requirements that require more than 80 percent of a distributor's total purchases of the contract products to be purchased from the foreign manufacturer, supplier, or its designee are not valid after five years. This five-year period does not reset upon automatic renewals of the distribution contract—essentially requiring the US company and distributor to enter into a new contract every five years to maintain important non-competition or minimum purchase requirements. Further, even if the contract term is fewer than five years, if it automatically renews, then it is viewed as a contract of indefinite duration and the five-year cap applies. Obviously, it can be a real surprise to learn after the fact that the non-compete provision—that was such a contentious and hard-fought component of the negotiations—does not apply anymore and cannot be revived without entering into new negotiations for a new contract.

Local Relationship Laws

Another non-intuitive item that impacts an international distribution contract is the local "relationship" laws of the distributor's territory. This is another instance in which what one would commonly expect to be enforceable contract terms are overridden or nullified by local distributor-protective laws. These laws tend to focus on when, how, and at what cost a distributor may be terminated. It is not difficult to imagine the wrong that these laws try to

prevent. These laws seek to prevent a foreign manufacturer or supplier from hiring a local distributor to build a customer base and then cutting the distributor out and selling direct. Commonly, a local statute will provide that a distributor cannot be terminated—no matter what the contract says—unless there is "just cause." "Just cause" will be statutorily defined and it will be narrow. Thus, the provision in the international distribution contract that says the term will expire in two years is inoperative. The distributorship continues indefinitely until "just cause" exists to terminate the distributor. Further, the statutes will often provide for mandatory payments to a distributor when a termination occurs without "just cause"—even at the end of a set contract term. The more severe versions require a payment based on the distributor's gross profit in a prior period. For example, a payment might equal the average annual gross profit of the distributor from the distribution arrangement over the past three to five years. These termination payment provisions generally cannot be waived in advance of termination and apply regardless of contract terms to the contrary.

There is also a chance that local law may give a distributor exclusivity for their territory unless the contract expressly states otherwise. Whether a distributor is granted an exclusive territory where it operates as the sole distributor is a significant point for both the US company and the distributor. In some countries, exclusivity is presumed absent a clear contractual agreement to the contrary. Thus, it can be important to classify by written agreement the rights of the distributor as exclusive or non-exclusive before the distribution relationship begins. Once rights to an exclusive territory activate, the bargaining power of the parties shifts and can affect various aspects of the distributor relationship and contract. Default exclusivity has historically been a common feature of statutes in Latin America, however, the presumption has been reversed in countries that have joined the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)—for distribution relationships begun after that country's effective joining of CAFTA-DR. Even in countries that do not have an exclusivity presumption, unless the US company intends to grant exclusivity, it is important to avoid statements in correspondence or discussions with a distributor or potential distributor that give the impression that a distributor will be treated as an exclusive distributor. These statements can be considered evidence that a distribution contract is exclusive, notwithstanding other contract language to the contrary.

If the sales territory's laws include this "default exclusivity" feature alongside the termination restrictions discussed above previously, it can create an especially potent mix in favor of the distributor.

In some cases, the contract can mitigate or alter some of these rights, but many times they will override the contract. As is probably obvious at this point, entering into a distribution arrangement without a full picture of the underlying statutory rules can lead to a different relationship than the one the US company expected. It can be especially problematic to start selling to the distributor before there is a full understanding of the local laws and a written contract in place. If the jurisdiction grants exclusivity unless otherwise provided, then it is a serious shift in negotiating power to start selling in advance of having a signed non-exclusive contract.

The International Distribution Contract

The Process

Even despite all of the potential statutory overrides to the contract terms presented by local law, it is still preferable to have a written, signed international distribution contract. Distributors often take the opposite view and try to avoid signing the contract. This, in itself, can be a frustration in the process and is a practical point for which to be prepared. The US company will work hard to get the contract refined and streamlined so that it covers the issues reasonably but is not overly long or oppressive to the distributor. Then, no matter how well this balance has been struck, the distributor will try to avoid signing and tell the US company that the agreement is too long and wordy and they do not understand the need for it. They do in fact understand the need for it, but have adopted a view that having no contract is better than having any contract that the US company wants to be signed. Add to this that the primary client negotiator is often a sales or marketing person who needs to have a good relationship with the distributor going forward and the stage is set for the distributor—who in many cases is already distributing product—to put off signing the contract indefinitely. Here, I have found it is important to coach those on the front lines dealing with the distributor about what to expect, how to answer some of the positions and tough questions of the distributor, and how best to keep gentle pressure on to get the contract fully wrapped up.

There are obviously firmer approaches that can be taken, but those should be carefully considered only after a distributor really refuses to get on board with the contract.

I have often found distributors will indicate they are okay with the idea of a contract and commit to review it. Then, they do not raise the topic ever again and put the business client in the position of pushing the issue. When initially giving distributors the contract for review, I suggest scheduling a follow-up meeting at that time. This will help keep the matter moving along and help avoid them just putting it off as long as they can without the relationship contact at the US company needing to continually raise the issue over and over again.

Local Counsel Review

Although it was mentioned earlier, I do want to repeat and emphasize that, in connection with preparing an international distribution contract, local counsel review is needed. Counsel can put together a great form that tries to anticipate what is known about the various potential local law risks, but it cannot be assured that things have been properly covered—or covered as best as possible—without local attorney review.

Contract Provisions

Like any international commercial contract, there are a number of provisions that need to be included and thought through in the international distribution contract. Several of the key ones follow.

Party Identification

Typically, the distributor is not an individual, but rather a legal entity. It is important to verify the exact legal name of that entity and understand how that type of entity can become legally bound to the international distribution contract. US-style signature blocks and assumptions about signing authority do not always translate well to foreign entities. While these are obviously important points in the United States as well, the chances for misidentifying or facing questions about the binding effect of the agreement increase when contracting with foreign entities.

Relationship Definition

As with any distribution relationship, it is important to define the parameters of the rights of the distributor clearly. US companies should try, where possible, to clearly define the exact products or product lines for which distribution rights are being granted—as opposed to granting distribution rights for "all products". New products may be developed in the future, and the US company may wish to use other distribution options for those new products. It is also important to address the effect of isolated sales to the distributor of products for which the distributor does not have ongoing distribution rights—such as providing that all such sales are on a non-exclusive basis. If these isolated sales are not addressed, a distributor may try to establish that an undefined distributorship, governed solely by local law, has been created for those products. Exclusive rights are significant and, from the US company's perspective, should be narrowly and specifically defined by product(s), customer(s), and/or geography. If a distributor has exclusive rights with respect to a product, customer, or territory, exceptions to that exclusivity should be defined. For instance, the US company may need exceptions for direct sales by the US company or perhaps for a pre-existing distributor with an overlapping territory. In these cases, the US company may agree to pay an override payment to the exclusive distributor for those types of sales. It is important to clearly define the sales that trigger any such override payments and how they are calculated.

Commercial Terms

In some cases, international distribution contracts focus on termination and relationship issues to such an extent that basic commercial terms are not given the focus they deserve. While most of the issues related to commercial terms in the international context are not substantially different from those in the domestic context, it is prudent to address important points in sufficient detail, because application of default Universal Commercial Code (UCC) rules is not assured even when the contract states that it is governed by the laws of a US state, and thus the UCC. Sales agent agreements involve fewer commercial terms than distribution agreements simply because the sales agent at no point takes title to the products. Some areas of note with respect to commercial terms include the terms and conditions of sale, service responsibilities and warranties, and trade names and trademarks.

Terms and Conditions of Sale. Application or exclusion of the standard terms and conditions of sale of each party should be specifically addressed. Certain of these terms and conditions may require review or restatement in the contract because they rely on UCC terminology that might be understood or interpreted less clearly in a dispute with a foreign party. Specific provisions on pricing, payment methods, required inventory levels, risk of loss, freight, insurance, and taxes may also be useful. Depending on the governing law of the contract, International Commercial Terms (INCOTERMS) might be used to define risk of loss concepts rather than UCC terminology.

Service Responsibilities and Warranties. Depending on the nature of the product, it may be important to spell out the parties' respective service responsibilities for products sold in the territory of the distributor. If the local distributor is to be the primary warranty service provider, it is advisable to define the warranty service obligations as well as the tools, facilities, and personnel that should be utilized in servicing the products. The warranty for the products—and all of its qualifications, reservations, or limitations—should be clearly defined or referenced.

Trade Names and Trademarks. As with any US distributor, it is important to clarify which names, marks, and copyrighted materials of the US company will be available for use by the distributor, parameters for that use, and obligations to cease use at the end of the distribution relationship. Website addresses are of particular note in the international context. Distributors may wish to establish websites that include the name of the US company. Consideration should be given to the practical ways for the US company to maintain ultimate control over any website URL including its name, while also, to the extent desired, permitting the distributor to administer the site in a manner that enhances sales for both parties.

Legal Compliance/FCPA

Representations and warranties concerning past compliance, and covenants assuring future compliance, with the FCPA and local anti-bribery laws are important with respect to many foreign jurisdictions. Depending on a country's commonly perceived corruption level, these provisions can become quite detailed and provide for annual or periodic compliance certifications, compliance failure notifications by the distributor, and rights of the US company to audit compliance and report information to the US government.

Termination Provisions

As noted previously, local law may restrict or override contractual provisions allowing termination of a distribution relationship absent "just cause"—as defined in that local jurisdiction; however, it is still prudent to set forth a non-exclusive list of circumstances that the parties agree should be considered "just cause" for termination of their contract. Where permitted by competition laws, reasonable minimum sale requirements can often support a "just cause" basis for termination if they are not met. It is also recommended in many cases to set a definite term after which the contract will automatically expire. In some jurisdictions, a "reasonable" notice in advance of termination may be required and override the notice provision in the contract. If there is an established view of how long is required for a "reasonable" notice in the applicable jurisdiction, it may be advisable to adopt that period in the contract.

Governing Law

While many countries will generally recognize parties' right to select the law that governs their relationship, it is safe to assume that there will always be exceptions in each country where local law applies and overrides the parties' selected governing law for public policy reasons. It is further prudent to assume that any termination restrictions and/or termination payment requirements under local law will be considered unwaivable and applicable to the parties, regardless of the governing law stated in the contract. As such, in all instances, it is advisable to identify the areas in which local law is likely to be applied regardless of the governing law provision included in the contract. Also, in many cases the parties will find that the governing law they have chosen—especially if a US state's law is the governing law—will, despite no desire to do so by the parties, apply the United Nations Convention on Contracts for the International Sale of Goods unless specifically excluded.

Dispute Resolution

In most cases, arbitration is a preferred venue for resolving disputes between parties from different countries. The contract parties should review whether the applicable foreign jurisdiction is a party to the New York Convention of 1958 or another treaty that provides for the enforcement of arbitration awards from foreign jurisdictions. While US

companies prefer to set arbitration locations close to home in the United States, consideration should be given to arbitration locales that make reasonable sense for both parties. If an arbitration provision is reasonable and is not perceived as being an unfair strategic advantage to one party, a local court is more likely to enforce the provision.

Dealing with Local Law Distributor Protections

Now, trying to pull it all together, is there anything that can be done in the international distribution contract to address the local law issues discussed previously? This is not the most satisfactory answer, but it is the best I have: Essentially, you get educated on the local law rules and you take your best whack and try to layer in protections for an eventual dispute.

Here is my approach: Knowing what I know about how these local law protections typically work, I develop a form of agreement that tries to limit their negative impact on the US company's position as best I can. Then, once the client and I are happy with the draft contract, we send it on to local counsel and they generally make some good suggestions, fix some compliance points, and then point out several provisions that are unenforceable under local law. Sometimes I modify those unenforceable provisions and sometimes I do not. Taking the termination payment idea for a moment, my form of agreement will state that, on termination, neither party owes any indemnity or other termination payment to the other. Local counsel will tell me that is unenforceable, but I may leave it in. The distributor will know the provision is unenforceable and try to strike it, but I will do my best to keep it in. If there is a later dispute and local law nullifies it, fine; there is nothing I can do about that. However, if that provision is in the document and the law changes or there are particular equities that favor my client in a dispute, then that provision may be useful to point to in a negotiation with the distributor. The distributor does not want to find out that it is enforceable any more than I want to find out that it is not. The question is: "What situation are you drafting for?" Are you drafting for litigation and judges or for attorneys who must decide whether to advise your potential opponent to initiate litigation?

In addition to serving an important business function and setting expectations for both sides, minimum sales requirements are also a good

protection for a US company. Failure by a distributor to meet minimum sales requirements is often considered grounds for a "just cause" termination. Setting minimum purchase requirements is a sensitive point in negotiations with a distributor, but it is something I encourage clients to include. Minimums should be reasonable, however. If they are not realistic, then they run the risk of being disregarded in a dispute.

With respect to layering in protections, here is what I mean: In some countries, the local law statutes only specifically protect sales agents. These statutes are applied to distributors by analogy through court opinions. Sometimes local counsel will advise that there are certain changes you can make to differentiate your agreement from the ones in which the sales agent rules have been applied by analogy. For instance, in the European Union, local counsel will often advise that, if the US company requires the distributor to provide customer information to the US company, then the distributor will almost certainly be entitled to the same protections as a sales agent by analogy. Thus, if it is okay with the client, I will remove those types of obligations. That is one layer of protection. Now there is a question of whether the protective statute even applies. Next, I will try to utilize a governing law provision other than the local law. Then, I will provide for arbitration rather than use local courts for dispute resolution. Now the contract includes several features that make the distributor less inclined to litigate and more inclined to settle if there is a dispute. One can never prevent the distributor from ignoring all of these layers of protection and filing a case in its local court under local law, but the right contract can make it less likely that path will be a slam dunk and less likely that they will get a clean "go ahead" from their counsel that such an approach will work.

The governing law and dispute resolution provisions are important in this regard. I do not advise simply resting on the fact that the terms of the international distribution contract call for the US company's home state law as the governing law and its home county court as the venue for disputes. The more one-sided these are, the more likely the distributor will succeed in, or at least have the confidence to try, setting aside the provision and suing in a local court. I recommend arbitration in a reasonable location for both parties. If the location is reasonable, then there is some more flexibility on selecting a favorable governing law for the contract. Even where it seems reasonable for the US company's home state law to govern, I

sometimes still prefer to use the law of a recognized commercial law state like New York—assuming there is a nexus with that state's law.[4] The key is to be protective, but reasonable. The distributor will certainly have arguments that its protective local laws apply as a matter of public policy, but the US company will, in most cases, like dealing with that argument in front of an arbitrator outside the distributor's home jurisdiction much better than dealing with it in the distributor's local court.

Conclusion

International distribution contracts do not fit well into a process where the distributor is identified, business terms are worked out and then those terms are handed to the attorney to prepare a contract. There are too many non-obvious risks built into the legal landscape that can change the anticipated business arrangement. If an attorney is in a position to provide counsel further up the business decision chain, he or she can provide real value to his or her business client by helping the client understand some of the risks profiled throughout this chapter early in the process of engaging international distributors—helping plan and formulate a clearer picture of costs. A proactive approach is the best way to assist clients who are considering international distribution. In some organizations or client relationships, this may mean that the attorney works to ensure that the business clients are generally aware that international distribution is an "unusual animal" that requires legal planning early in the process of adding a new distributor or a new international territory. If these matters are funneled through legal counsel earlier in the process, the chance of assuming unknown or unintended risks or costs can be much reduced.

Key Takeaways

- The best way to avoid a costly distributor dispute and breakup is to: carefully exercise due diligence regarding the business fit between the US company and the distributor and assess the distributor's capabilities to deliver on their promises about the new market; and

[4] Of course, the state law utilized should also be examined so that any distributor or sales agent protections in that state are identified and considered as to how they might impact the parties' relationship.

exercise the discipline, and have the hard conversations necessary, to work through the international distribution contract and get it signed before the parties begin performing.

- International distribution contracts involve far more than typical drafting and negotiating. To have a clear picture of the risk profile and costs associated with an international distribution contract, one must do a local law analysis and identify and understand the protections afforded to the distributor under local law.
- In sales territories with a high perceived corruption level, due diligence needs to extend to the distributor's compliance with respect to local anti-bribery laws and the exposure its conduct and relationships create for the US company under the US Foreign Corrupt Practices Act. The international distribution contract will need to provide protections for the US company in this regard, including potentially allowing monitoring or audits of the distributor's activities.
- Once the protections afforded to the distributor under local law are understood, though they cannot likely be contracted away or waived, a strategic drafting approach can help position the US company to better deal with those protections and respond to distributor allegations should a dispute arise.

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Distribution Agreements," Columbus Bar Association International Law Committee (May 15, 2014), "International Distribution," Ohio State Bar Association Corporate Counsel Institute (October 7, 2011) and, as organizer and moderator, "Planning and Managing International Transactions and Operations Panel Discussion," Ohio State Bar Association Corporate Counsel Institute (October 1, 2010).

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