CARLTON FIELDS

Rules of the (International) Road: Make an Informed Decision on Agency

April 29, 2016

Once you decide to do business in another country, you have choices as to the form your business presence there will take. The various options entail different types of commitments, investments, risks, and benefits. Your best option will depend on factors such as your level of familiarity with the country, and the country's legal and tax systems. This article discusses the option of appointing an agent to sell to businesses in your chosen country on your company's behalf. **The Agency Option** Appointing an agent is the least intrusive way to establish a business presence, and may be a good first step toward penetrating a foreign market. If, for example, your company is just starting to sell in Country X and you do not know if sales will justify incurring large overhead, appointing an agent, with certain restrictions on the agent's ability to bind you, may make more sense than establishing a more significant in-country presence. The agent earns a commission on sales it generates. If the agent has no ability to bind you, and you make all decisions at your home office as to price, terms, and even whether a sale will occur, as a general rule you should not be deemed to have a physical presence in Country X for income tax purposes. **Choosing an Agent** Choose and vet your agent carefully. In addition to being trustworthy and organized, the ideal agent is well-connected in the market, used to dealing with U.S. companies, and familiar with the restrictions on serving as a U.S. company's agent. If your U.S. lawyers are familiar with agency issues, they may be able to use their connections in Country X for your benefit and help you determine a given agent's reputation. Industry sources may also be helpful in this regard. Business advisory firms, like FTI Consulting and Kroll Inc., are other, albeit potentially expensive, options. The more familiar you are with a country, the better positioned you will be to know the market's players and choose wisely. You should have a written agency agreement that clearly delineates what the agent can and cannot do. Think ahead about what will happen if, for some reason, the market is not receptive to your product. Set goals for your agent. Ensure that your agent understands and will abide by the U.S. Foreign Corrupt Practices Act's restrictions. **Terms and Conditions of Sale** Ensure that your purchase orders' terms and conditions of sale protect you. They should address payment, delivery and return terms; what happens if a payment is late or not made at all; what happens if catastrophic events prevent you from providing all or some of the merchandise; who is obligated to insure the shipment; and what law governs the order. **International Commercial Terms (Incoterms)** These rules, promulgated by the International Chamber of Commerce, specify shipment and delivery obligations. They provide a way to designate which party in a cross-border transaction is responsible for delivering the goods, providing insurance, and retaining liability for the goods. Your Incoterms should reflect a sale in the United States and require the customer to pay the carrier and import the goods into its country. **Pitfalls** Beware of making exclusive agent appointments—should you choose the wrong agent, this may affect your ability to have your goods imported into the applicable country. You may be unable to appoint another agent, or may only be able to do so after reacquiring the rights from the exclusive agent. Know that you will owe a termination indemnity to any terminated agent, whether exclusive or non-exclusive. Finally, an agent who is an individual, as opposed to a company, may be viewed by a labor tribunal as your employee. Advance attention to these pitfalls may save you future headaches.

Authored By

Andrew J. Markus

Related Practices

International
Business Transactions