

# Rules of the (International) Road: Choosing and Appointing a Distributor

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Appointing an agent to sell to businesses in your chosen country on your company's behalf may be a good first step toward penetrating a foreign market, as we previously discussed in *Rules of the (International) Road: Make and Informed Decision on Agency*, *Expect Focus International*, Winter 2016. But you may choose to appoint a distributor instead. This article discusses this option, which represents a greater commitment.

## Benefits

There are numerous reasons to appoint a distributor, which can enable you to make better margins than you would selling through an agent:

- No physical presence needed in the country
- You sell to the distributor in the United States
- The distributor is responsible for:
  - Shipping the products to the country
  - Importing them into the country
  - All associated freight and insurance costs
  - Import and customs duties
- The distributor pays you for the goods so there is no need to worry about whether buyers in the country pay for your product

## Pitfalls

If your products damage consumers inside the country, you are exposed to lawsuits. Product liability insurance is one possible answer. Additionally, when you end your relationship with a distributor whose territory is outside the United States, you risk being required to pay a severance type payment. That applies whether the distributor was at fault or not. In at least one jurisdiction, Puerto Rico, once you choose a distributor you are, by law, stuck with them. So as when choosing an agent, choose your distributor wisely.

## Distribution Agreements

It is often preferable, depending on the location of the distributor's territory, to have a written distribution agreement. Frequently, a company already has a preferred distribution agreement. While some companies simply use that one agreement worldwide, it is best not to. Because each country's laws are different, your terms of sale, restrictions on territory, termination provisions, and other provisions may be unenforceable in the applicable country. Certain restrictions such as prohibitions on selling competing goods and discounting, and requirements regarding minimum pricing may be deemed matters of public policy and not permitted under local law. So, we recommend clients have us engage a lawyer in the applicable country to conduct a limited review of the specific issues and advise us on how to tweak the agreement to comply with local law.

A distribution agreement should always contain the terms and conditions on which you are supplying goods to your distributor. These should include payment, delivery, and return terms; and provisions that address what happens if payment is late or not made at all, or catastrophic events prohibit you from providing all or some of the merchandise. It is also

important that the agreement address how disputes will be resolved.

Using the right International Commercial Terms (Incoterms) is critical. As previously discussed in Rules of the (International) Road: Make and Informed Decision on Agency, *Expect Focus International*, Winter 2016, these rules, promulgated by the International Chamber of Commerce, specify shipment and delivery obligations.

Sellers commonly misuse the free on board (FOB) Incoterm, using it when goods are being shipped by air, or when they designate delivery at the seller's factory. As a seller, a company should determine exactly what it wants to agree to do and then choose the correct Incoterm. For instance, if a seller will make the goods available at its warehouse or factory for pickup and transport by the distributor, it might want to make the goods available ex works (EXW) warehouse (specifying where) so everyone's duties are clear. That way, there will be no unexpected expenses for the seller and insurance will cover the goods without gaps—assuming the distributor complies with the EXW obligations.

Note that the Uniform Commercial Code, the uniform law applying to sales of goods, specifies its own "Incoterms." We suggest using the ICC 2010 version Incoterms for international sales.

Distribution agreements raise numerous considerations beyond the basics discussed here. We will address more nuanced concerns in future articles. For a short checklist that covers some major aspects of the distribution relationship, [click here](#).

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