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International distribution agreement checklist

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abstract

Large exporters can afford to set up branches in distant markets and thereby handle their own distribution. Most other exporters must rely upon an independent distributor to buy and then distribute their products.

The selection of an independent distributor is perhaps the most critical decision an exporter will make. It can take years to repair the damage and loss of goodwill caused by a poorly performing distributor. That's why it is so important for an exporter to carefully check the 'bona fides' of a prospective distributor before entering into a relationship with the distributor.

A distribution agreement is the basic legal contract that an exporter has with a distributor. Distribution agreements come in many different sizes and shapes, ranging from a simple letter understanding to a twenty page formal contract. The essential ingredients of all distribution agreements are the same. They are:

- **Territory**
Specify the distributor's territory.
- **Exclusive or non-exclusive**
Specify whether the distributor has exclusive or non-exclusive distribution rights.
- **Performance**
Specify minimum performance requirements that the distributor must achieve.
- **Products**
Specify the products covered by the distribution agreement.
- **Price and payment terms**
Attach a price schedule and specify your payment terms.
- **Shipping Terms; Risk of Loss**
- **Restrictions on the Distributor Carrying Competitive Products**
- **Term of the Distribution Agreement**

The above is just a brief list of the key ingredients in a distribution agreement. Each ingredient is considered, in depth, in the Distribution Agreement Checklist. The exporter is encouraged to download the checklist and tick off the points, one by one. By doing so, the exporter will avoid any surprises, disappointments and misunderstandings with the distributor.

Depending upon the circumstances, the Distribution Agreement Checklist may serve as a helpful agenda for a meeting with a prospective distributor. By going over the checklisted points with the distributor in person, the whole basis upon which the relationship evolves becomes more participatory in nature instead of adversarial.

The exporter should be realistic. While a distribution agreement may encourage the distributor to comply, it is by no means a guarantee of compliance. However, experience has borne out that most disputes between an exporter and a distributor arise out of different expectations concerning their respective obligations to each other. This Distribution Agreement Checklist will flush out each party's expectations and thereby reduce the possibility of any surprises in the future.

schedule of exhibits

Exhibit A	Conditions of Sale?
Exhibit B	Product Description or Specification?
Exhibit C	Warranty?
Exhibit D	Price List?
Exhibit E	Anything else?

1. details about distributor

- 1.1. Name:
- 1.2. (hereinafter referred to as the "Distributor")
 - 1.2.1. Is this a corporation?
- 1.3. Address:
- 1.4. Telephone No:
- 1.5. Facsimile No:
- 1.6. Name of Principal:
 - 1.6.1. Title?

2. territorial limitations

- 2.1. By geographic area.
 - 2.1.1. e.g. only the United States.
- 2.2. By type or class of customer.
- 2.3. A combination of 2.1 and 2.2 above.

3. exclusivity

- 3.1. Can Client appoint other distributors in the same territory?
- 3.2. Can Distributor sell outside the territory?
- 3.3. Can Client sell direct to certain "house ac-counts"?
 - 3.3.1. These are accounts in the Distributor's territory that were obtained directly by Client through its own marketing efforts.
- 3.4. Client shall refer all inquiries from potential customers within the Distributor's territory.

3.5. Can Client license someone else to manufacture the products?

3.5.1. In the territory?

3.5.2. Outside the territory?

4. minimum performance requirements

4.1. The Distributor should be required to meet certain purchase targets during the term of the agreement.

4.1.1. Specify the minimum purchasing requirements.

4.2. Determine consequences of failing to meet those targets.

4.2.1. Option to terminate contract.

4.2.2. Loss of exclusivity.

4.2.3. Reduction in size of territory.

4.2.4. Other penalty (specify).

5. products covered by agreement

5.1. What products of Client are covered?

5.2. What about other products manufactured by Client?

5.3. What about new products?

6. price of the products

6.1. Attach a current price schedule to the agreement.

6.1.1. Note any volume discounts.

6.2. Are prices:

6.2.1. FOB (where?).

6.2.2. CIF (where?).

6.2.3. Other (specify).

6.3. Does the price include these items?

6.3.1. Customs brokerage.

6.3.2. Demurrage and storage charges.

6.3.3. Inland freight.

6.3.4. Inland freight insurance.

6.3.5. Applicable taxes.

6.3.6. Any other costs and expenses associated with the customs clearance procedure.

6.4. Mode of shipment.

6.4.1. Air.

6.4.2. Sea.

6.4.3. Land.

6.5. Will prices be quoted in U.S. dollars, New Zealand dollars or some other currency?

6.6. How much advance notice of price changes?

7. risk of loss

7.1. When does the risk of loss pass from Client to the Distributor?

8. maintenance of stock and parts

8.1. The Distributor shall maintain an adequate level of stock and spare parts to service its customers.

8.1.1. Define what constitutes an "adequate" level.

9. payment terms

9.1. Letter of credit.

9.2. Open account.

9.2.1. If so, up to what limit?

9.3. When is payment due?

9.3.1. e.g. 30 days from receipt of goods.

9.4. For contracts in Australia, New Zealand or the United Kingdom, include a Romalpa Clause.

10. ordering procedure

10.1. How is an order placed?

10.1.1. Review the Distributor's standard order form.

10.1.2. If it does not have a standard order form, prepare one and attach it to the agreement. Make sure the order form includes these items:

- Purchase order number
- Date

- Description of Products, including any options or accessories
- Quantity
- Price
- Payment details
- Shipping instructions
- Date required by
- Any other instructions
- Signature

10.2. What constitutes acceptance of an order by Client?

10.2.1. Stipulate a time limit between the placement of an order by the Distributor and its acceptance by the Client.

10.3. Stipulate amount of lead time required between acceptance of an order by Client and its shipment.

10.4. Stipulate a minimum order size.

10.5. Stipulate a maximum order size predicated upon existing capacity limitations.

10.6. Split deliveries and partial shipments shall be permitted.

10.7. Will the Distributor place an initial order simultaneously with the execution of this Agreement?

11. promotional strategy

11.1. The agreement should specify exactly what the Distributor shall do in terms of promoting products manufactured by Client.

11.1.1. e.g. one half page advertisement each month in a principal trade magazine.

11.1.2. e.g. one booth at a trade show exclusively devoted to the display of Client's products.

11.1.3. Other promotional efforts (specify).

11.2. Will such promotional efforts be paid for by the Distributor or is Client expected to contribute?

11.2.1. Develop a promotional budget and specify how much each party shall contribute to it.

11.3. Will Client be providing any promotional materials?

11.3.1. If so, at what cost?

12. anticipated forward requirements

12.1. The Distributor should provide Client with its anticipated forward requirements updated on a quarterly basis.

12.1.1. Such report shall also include de-tails regarding any promotional activity planned by the Distributor.

12.2. The Distributor shall keep Client abreast of important market developments within the Territory including, without limitation:

12.2.1. Information about competitors, their products and prices.

12.2.2. Comments on the Products by actual and prospective customers.

12.2.3. Opportunities for further market development.

12.2.4. Upcoming trade shows.

12.2.5. Market research.

12.2.6. Any other market intelligence.

13. expenses

13.1. Define what, if any, expenses of the Distributor are to be reimbursed by Client.

14. trademarks and brand names

14.1. Describe circumstances under which the Distributor may use Client's trademarks and brand names.

14.2. Describe obligation of the Distributor to protect Client's trademarks and brand names from infringement.

15. product enhancements

15.1. Client reserves the right to make modifications or enhancements to the Products.

15.1.1. Routine modifications and enhancements shall not affect the price of the Products.

15.1.2. The price of substantial modifications and enhancements shall be determined by mutual agreement of the parties.

16. covenant not to compete

16.1. If possible, have the agreement provide that the Distributor may not handle competitive lines of products:

16.1.1. During the term of the agreement; and

16.1.2. For a period of one year thereafter. [This is protection against the Distributor knocking off your product lines with another manufacturer].

16.2. Define as clearly as possible what constitutes a "competitive" line of products.

17. protection against "knock-offs"

17.1. Insert standard anti-knock-off provision if there is a valid concern.

18. compliance with law

18.1. The Distributor should assume responsibility for determining whether products manufactured by Client comply with applicable law, including:

18.1.1. Country of origin marking requirements

18.1.2. Product safety standards

18.1.3. Warnings and labelling

18.1.4. Registrations and approvals

18.1.5. Anything else?

18.2. The Distributor should advise Client in what respect any product fails to so comply.

19. warranty

19.1. Insert warranty given by Client to the Distributor.

19.2. Any warranties given by the Distributor to its customers shall comply with local jurisdictional requirements.

19.3. The Distributor shall also assist Client in the preparation of any point of sale material, instructions or owners manuals that may be required.

19.4. Will the Distributor have any responsibility for making warranty repairs?

19.4.1. If so, determine the nature of the obligation, how much the Distributor shall be paid to perform this function, etc.

20. products liability insurance

20.1. Who is responsible for purchasing?

20.2. Does it afford protection to both parties?

21. customs clearance and payment of customs duties

21.1. Specify any responsibilities that the Distributor may have in these areas.

22. confidential information and trade secrets

22.1. Define what constitutes confidential information or a trade secret and prohibit its disclosure.

23. choice of law; arbitration

23.1. The law of what country will apply?

23.2. Should the contract provide for arbitration?

23.2.1. If so, where?

24. assignment; appointment of sub-agents

24.1. The Distributor's right to appoint sub-agents should be heavily circumscribed, if not prohibited entirely.

24.1.1. Many New Zealand companies unwittingly appoint an agent for a large territory, Europe for example, only to discover that the agent is simply operating a pyramid scheme involving the appointment of sub-agents in specific territories. Remember: If there are too many fingers in the pie, your products won't be competitive.

24.2. At the very least, I suggest that the agreement provide that the Distributor may not appoint any sub-agents without Client's express written approval of the terms, conditions and qualifications of the sub-agent.

24.2.1. The Distributor should assume liability for the acts and omissions of its sub-agents, distributors and brokers.

24.3. The Distributor may not assign this agreement without Client's express written consent.

25. term of agreement

25.1. Length of term.

25.2. Right to cancel agreement prior to the expiration of the term.

25.3. Obligations upon early cancellation.

25.4. Renewal option.

25.5. How exercised?

25.6. What happens to the Distributor's unsold stock upon termination?

25.6.1. Does Client have an obligation to buy back unsold stock from the Distributor, or only an option to do so in its discretion?

25.6.2. In other words, is the re-purchase of unsold stock mandatory or discretionary on the part of Client?

25.6.3. At what price will unsold stock be repurchased?

26. alternative dispute resolution procedure

26.1. Do the parties wish to establish an alternative dispute resolution procedure prior to submitting the dispute to arbitration or commencing court proceedings?

26.1.1. Review standard provision with client.

27. arbitration

27.1. Do the parties wish to provide for the arbitration of all disputes between them?

27.1.1. Review standard provision with client.

28. other clauses, if applicable

28.1. Visits by Client to market for promotional purposes.

28.1.1. Review standard provision with client.

28.2. Training of personnel.

28.3. Samples.

28.4. Patents.

28.5. Exchange of market information.

28.6. Audit and inspection rights.

28.7. Force majeure.

28.8. Signature by facsimile transmission.

28.9. Termination rights in the event that there is a change in control of the Distributor.

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