



Candex do Brasil Ltda

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Agents and Distributors Relationships in Brazil - A Comparison

The globalization of markets around the world has intensified the interests of international businesses in strengthening sales efforts in large and developing markets such as the Brazilian market. That newcomers are steadily initiating activities, and retaining agents and distributors to sell their products is an important step. However, a number of pitfalls exist in our market, which the newcomer should be careful to avoid if he wishes to be successful.

Trademarks

The Brazilian National Congress passed a new law to regulate trademark and patents in 1996. It is a relatively new law, but has settled some important rules to protect to the real owner of the trademark. It is Law 9279, dated May 14, 1996. It defines a trademark owner as the individual who first deposits a specific trademark with the Patent and Trademark Office (INPI). This is a very important aspect to be dealt with when entering into an agency or distributorship agreement. Once a trademark has been deposited by an agent or distributor, the principal is left with the tricky task of reclaiming the trademark ' which he is entitled to do under the Paris Union Convention (1883), but could take years of unnecessary litigation. Therefore, before entering into negotiation with an agent or distributor, it is essential to ascertain that trademarks are duly protected.

Written or Informal Agreement?

Another question often confronting newcomers is which is a better agreement, a written or an informal agreement with an agent or distributorship. This is an issue that seldom arises in connection with North American exporters but frequently manifests itself in connection with European and Asian exporters.

The answer to the question is that an exporter is definitely better off with a written agreement. In a written agreement, the exporter can, among other things, limit his liability in case of defective products, establish the type of warranty he wishes to offer, protect his trademark, establish sales and volume targets, discipline purchase proceedings, precisely define exclusivity arrangements, and stipulate agents' remuneration and obligations etc.

Termination: Agency X Distributorship Agreements

Under Brazilian Law, an agency agreement must provide that an agent is entitled to a termination equivalent to at least 1/12 of all commissions received. This is an important aspect that shows the difference between an agency agreement and a distributorship agreement. The distributor acts on his own. He sells the products in his name, and not on behalf of the principal, as is the case with the agent. In a distributorship agreement, the parties are allowed the possibility to discuss and establish the clauses in a more open manner.



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In an agency agreement the parties are bound to the rules of Law 4886/64 and Law 8420/92. The agent receives a rather protective treatment, because he is almost seen as an employee, since he acts on behalf of the principal, according to the principal's determinations. However, the Brazilian courts have been deciding that a distributorship agreement in which the distributor is not as free to act as would be expected, and which has been executed throughout a long period of time entitles the distributor, in the case of termination, to the damages.

It is not advisable to establish a termination date to the agency agreement in order to avoid paying the damages. The situation in which the agreement is properly ended and then a new agency agreement is entered into by the same parties has been seen by the courts as fraudulent. In which case, the judge may determine the payment of the damages.

It is also important that an agreement expressly provide that agents have no power to contractually bind their principals in transactions occurring in Brazil, in order to avoid adverse tax consequences, because the foreign exporter will be deemed to be "doing business in Brazil", and taxed accordingly.

Other common pitfalls may be found in connection with default, arbitration and choice of forum/law clauses.

Default Clauses

There are two types of default clauses under Brazilian law. One type, the "cláusula resultória expressa," allows an innocent party to unilaterally terminate an agreement in the event of default, while the other, which is the presumed contractual rule in the absence of express stipulation of the other, requires a court ordered termination of the agreement after a determination as to whether a breach of contract has occurred.

In the first instance, if a contract is wrongfully terminated, the non terminating party has the right to claim damages but is not entitled to specific performance of the original contract pending resolution of its claims. Considering that, in the second instance, a case may take years to resolve once it has entered into the court system, it is vital that a "cláusula resolutoria expressa" be included in the agreement thereby allowing for a swift change of agent or distributor on the occurrence of default.

Arbitration Clauses

Arbitration clauses have become more frequently used in Brazil because of the new Law 9307/96. Arbitration is considered to be an option that may be freely chosen by the parties as a means of reaching a dispute resolution in Brazil. However, there is no established tradition in the area and therefore many questions arising in connection with an arbitration have not yet been definitively decided by the courts.



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Choice of Law

As to the choice of law, if litigation is likely to take place in Brazil, an exporter is probably better off if Brazilian law applies, since the application of foreign law in Brazilian courts will always add an element of uncertainty.

Choice of Forum

In the same vein, the best option in terms of choice of forum is for a claimant to bring its action in the jurisdiction of a defendant's domicile. Thus, if an agent or distributor claims payments or damages, he should sue in the jurisdiction where the principal's business is located. And, if the principal wishes to sue its agent or distributor, he is better off bringing an action in Brazil, since problems of service of summons and enforcement of foreign awards in Brazil are such that it is seldom advisable or practical to sue a Brazilian resident abroad.