SELECTED INTERNATIONAL LEGAL ASPECTS: DISTRIBUTING PRODUCTS ABROAD

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I. Cross-Cultural Concepts and Implications

II. Methods of International Distribution

A. Sales Representatives and Agents

1. Characteristics

a. Secures orders to be accepted or rejected by vendor;
b. Earns a commission;
c. Stocks no inventory and does not assume credit risk.

2. Advantages

a. Vendor control over price, customers;
b. No permanent establishment for tax purposes.

3. Drawbacks

a. Inadequate presale education;
b. Typically no localization of vendor's products;
c. Agency termination laws apply.

B. Distributors

1. Characteristics

a. Purchases vendor's products for own account at discount and resells at profit;
b. Bears inventory' and credit risk;
c. Typically handles presale education and post-sale maintenance.

2. Advantages

a. More effective marketing effort due to more permanent presence;
b. No permanent establishment for tax purposes.

3. Disadvantages

a. Inadequate control over resale prices;
b. No direct relationship with customers.

C. Licensees

1. Characteristics

a. Rights granted to modify, reproduce or distribute copyrighted, patented, or trade secret products;
b. vendor receives royalty.

2. Advantages

a. Flexibility;
b. Less expensive to licensor;
c. No permanent establishment for tax purposes.

3. Disadvantages

a. Loss of control over the products;
b. Greater risk of loss of intellectual property;
c. Withholding taxes on royalties.

D. Direct Safes by U.S. Vendor

1. Advantages

a. Maximum control, flexibility and market penetration.

2. Disadvantages

a. Maximum cost;
b. Permanent establishment for tax purposes.

3. Registered Branch Office

4. Wholly-owned Foreign Subsidiary

5. Joint venture

III. <u>Getting Paid</u>

A. Letter of Credit

B. Cash Against Documents

C. Payment Guarantees

D. Government Financing Program (e.g. Eximbank)

E. Open Account

IV. <u>Protection of Proprietary Rights</u>

A. <u>Proprietary Rights in general</u>

1. Laws abroad generally less developed than in the United States.

2. Injunctive relief may not be available in civil law countries.

B. <u>Copyright</u>

1. Berne Convention

a. The United States is recently a member, but protection may be achieved by simultaneous publication in the United States and in a Berne Convention country (e.g., Japan, Canada or England);
b. Member countries must accord national treatment for works of nationals of other member countries;
c. There are no formalities for copyright protection.

2. Availability of Copyright Protection for Computer Software

a. There is a worldwide trend toward the availability of copyright protection for computer software;
b. Protection does not always equal enforcement (e.g. Korea, Taiwan and PRC).

C. <u>Patents</u>

1. Paris Convention

a. U.S. is a member;
b. Member countries must accord national treatment for patented articles of nationals of other member countries;
c. Any person filing an application for patent registration in any member country has a one year priority period for firing applications in any other member country.

2. Patent Cooperation Treaty

   a. U.S. is a member, with 25 other countries;
   b. U.S. applicant may file an application with the PTO; with the effect of filing in the desired member state countries.

D. <u>Trademarks</u>

1. Important where copyright availability doubtful and the product has a strong trademark.

2. Rights accrue on registration, not use

   a. Client should register before shipping;
   b. Licensee should agree not to register.

E. <u>Trade Secrets</u>

1. Almost every country enforces non-disclosure restrictions in contracts.

2. Effective remedies for trade secret theft may not be available in certain countries (e.g. Japan and Mexico).

3. Technology transfer laws – technology transfer laws may reduce the period that information must be maintained confidential.

V. <u>U.S. Export Control Regulations</u>

A. <u>General</u>

The export of "controlled commodities" and "technical data", including software, require licenses.

B. <u>Applicable Regulations and Agencies</u> (see handout)

1. Export Administration Act of 1979, implemented by the Export Administration Regulations ("EAR" and administered by the Office of Export Administration ("OEA").

2. International Traffic In Arms ("ITAR") Regulations administered by the Department of State.

C. <u>Commodity Control Classifications</u>

D. <u>Penalties</u>

VI. U.S. Anti-Boycott Laws

VII. U.S. Anti-Bribery Laws

VIII. Foreign Customs Formalities and Duties

A. Customs Classifications

B. Harmonized Tariff Code

IX. Preapproval or _ Registration Requirements

A. Currency Control

1. Many countries have currency control restrictions that prohibit in country companies from making payments in a foreign currency unless the agreement has been approved by the appropriate governmental agency or central bank.

B. Technology Transfer Laws

1. Many countries, principally in Latin America, have adopted technology transfer laws (repeal in Mexico).

2. These laws set up a statutory guideline of what are acceptable licensing terms for the local nationals and require that licenses with local nationals be registered and be approved by a local agency in order to be enforceable.

C. Antitrust

1. It may be possible to immunize the U.S. exporter from liability from fines or penalties for certain violations of antitrust laws if the agreements have been registered or "noted" with the appropriate government agencies (e.g. EEC).

X. European Union

A. Antitrust Laws

1. Article 85 – Agreements in restrain of trade.

2. Article 86 - Abuse of a dominant position.

3. Liberalized Block Exemption for exclusive distribution agreements.

B. Data Protection Directive (see handout)

XI. Agency Termination Laws

A. General

Many countries have laws that either impose minimum notice requirements for terminating an agent or impose indemnities to be paid to an agent unjustly terminated. These statutes may apply to dealerships and distributorships, as well as to common law agency relationships.

B. Termination Provisions

1. A number of countries give an agent the right to substantial damages for termination without cause (e.g. Belgium, France, Greece).

2. Some countries permit terminations at will upon proper notice if the agency has an indefinite term (e.g. Germany: 3 months minimum notice if the contract has been in effect for more than three years).

C. Failure to Renew

1. Some countries treat the failure to renew a renewable agreement as a termination without cause for which damages may be due (e.g. France).

2. Some countries treat the successive renewals of a contract for a set term as a conversion of the agreement into one of indefinite duration (e.g. Belgium). Moreover in Belgium, one cannot terminate agency agreements that have a definite date of expiration unless the terminating party gives the other party notice, within a term ranging from three to six months of that date of their intention not to renew the contract upon its expiration.