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DISTRIBUTION AGREEMENTS

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A. GENERAL REMARKS

1. Definition of Distributorship

A distributor buys goods and resells them in his/her own name and on his/her own behalf, and is more than just a middleman between the manufacturer and the buyer. The distributor organizes and implements the distribution of products within his/her territory, in a country or countries where the manufacturer is not established.

While in some respects the position of a distributor does not differ substantially from that of a customer, the distributor is not simply a wholesaler since the distributor and the manufacturer are generally in a reciprocal relationship for mutual benefit. Characteristics for a distributorship are as follows:

a. As a reseller, the distributor promotes and organizes the distribution in a specific territory;
b. The manufacturer grants a privileged position to the distributor in a specific territory;
c. A distributorship agreement is generally limited in duration unless the parties agree to an indefinite term agreement with certain termination rules;
d. Generally, the distributor must refrain from competition;
e. Almost always, the distributor distributes branded products.
f. The distributor may not contractually bind the manufacturer.


Distribution agreements are common throughout the world, and most courts, regardless of the title of the agreement, will interpret the nature of the contract according to the rights and obligations specified by the parties. Contrary to principal-agency relationships, most countries do not significantly regulate distributorship contracts. Even countries which do regulate these contracts generally focus only upon certain aspects such as the nationality of the distributor, protective labor laws, choice of law provisions and/or forum selection clauses.

With such wide latitude, it is in the best interests of the parties to create agreements which are as precise and comprehensive as possible. The following points should be considered when entering
into a distributorship agreement.

**Written Form:** International distributorship agreements should be in writing, as the written agreement may be the only demonstrable proof of the agreement and provides a source for adjudication of technical provisions, such as territory, exclusivity, remuneration, product lines, forum selection clauses and choice of law provisions.

**Title of Agreement:** The Agreement should be titled "Distributorship Agreement".

**Parties to Agreement:** The agreement should state the names of all signatories, whether they represent legal or natural persons, a business address (where all correspondence and legal notices are to be served), and an assertion that each party has the capacity to legally enter into the contract.

**Definitions:** All important terms of the agreement should be clearly defined, either as agreed on by the parties, or using an international format such as Incoterms.

**Controlling Language:** If the text of the agreement is in more than one language, the parties should state which language controls. If both languages are treated equally, each party should insure that the translated document is accurate (i.e. professionally translated).

**Exclusion of Power to Represent:** The distributorship agreement should specifically exclude any power of the distributor to represent the manufacturer. If the distributor should be empowered to act as agent of the manufacturer in certain circumstances, the parties need to specify the rules applying to each type of activity, including particular rights and obligations.

**Registration and Government Approval:** Each party should agree to acquire and abide by export/import requirements imposed by their respective governments. Note: some countries, such as Saudi Arabia, Kuwait, Colombia, and Brazil require registration of all distributors.

**Terms of Sales:** The parties should specify that the conditions for sale are contained within the distributorship agreement and that the agreement will prevail over general conditions of sale. The parties should also state when payments for goods are due, at what location, and in what currency payable. If the manufacturer uses price lists, the agreement should specify how much notice the manufacturer must give regarding price changes. Note: France requires that a fixed price or basis for calculating price be included in the contract.

**Assignment:** The parties should decide whether the contract may be assigned, and under what conditions. Generally, the manufacturer should include a clause stating that the distributor must notify the manufacturer of any assignment and receive the manufacturer's permission. If the distributor is a legal entity managed by a person who has certain abilities essential to the agreement, the manufacturer may desire a clause allowing for the termination of the agreement should that person leave the distributor. Both parties may also desire to include a mutual duty to notify each other of significant changes in management or ownership.

**Commencement and Expiry of Agreement:** As international distributorship agreements are
often signed by the parties at different times, the commencement and expiry dates should be specified. If not specified, the date of commencement is generally the day when both parties have approved the contract. Indefinite period agreements should specify the conditions for termination.

**Exclusivity of Contractual Products:** In an exclusive distributorship agreement, the distributor agrees to purchase products exclusively from the manufacturer, in consideration for the manufacturer's obligation to sell said products exclusively to the distributor within the contractual territory. Therefore, the contract should list all products to be distributed in the foreign country. If the parties intend to include the manufacturer's entire line of products, the contract should specify whether any new products developed shall also be included. If the manufacturer sells identical goods under different trademarks through different networks, the agreement should clearly indicate which products are within the purview of the distributorship agreement. In addition, the parties should consider whether the manufacturer or distributor has the right to exclude subsequently developed products from the distribution contract. Note: two issues need to be considered: (1) whether the right to exclude products allows either party to drain the agreement of substance (by restricting the line of products until the agreement is meaningless); and (2) what are the consequences of a manufacturer developing a product which competes with other products carried by the distributor.

**Contractual Territory:** The territory of the distributor should be defined with particular attention. The parties may consider provisions which apply outside the territory, i.e. the distributor may agree not to sell outside his/her territory, or sell competing products within the territory, or the manufacturer might be prohibited from selling to customers who export products to the distributor's territory. Note: U.S antitrust laws and EC competition laws may preclude ironclad provisions.

**Warranty:** The parties should specify how warranties will be handled. Generally a warranty provision should (1) define the scope of the warranty, including what is and is not warrantied; (2) specify the duration of the warranty; (3) specify notification or filing procedures for customer claims; and (4) specify how expenses for valid claims will be shared.

**Limitation of Liability:** Generally, suits by third parties can be brought against both the distributor and the manufacturer. The EU imposes on an importer who is resident in the EU the same responsibilities as those placed on the manufacturer. A clause limiting or excluding product liability between the distributor and the manufacturer may well violate public policy. However, manufacturers may want to include clauses which: (1) limit damages to direct damages and exclude consequential damages; (2) obligate the distributor to mitigate any losses; and (3) place a ceiling on the loss, i.e. an amount equal to or less than the total purchase price allocable to the transaction. The manufacturer and the distributor might be well advised to take out special insurance to cover such risks.

In addition, the manufacturer should specify that he/she is not responsible for the distributor's gross negligence nor for products used in hazardous or ultra-hazardous activities, unless specifically so designated.

**Renegotiation of Terms:** In countries where the legal environment surrounding contracts is unsettled, i.e. China and the Russian Federation, parties may want to provide for a context to reformulate elements of the contract. In this case, the parties should prepare a flexible document