

THE LEGAL SETTING FOR EXPORTING

A Guide for U.S. Companies

PREPARED FOR THE HUDSON VALLEY CHAPTER OF THE NEW YORK DISTRICT EXPORT COUNCIL

By

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Contents

	<i>Page</i>
Introduction	1
U.S. Laws That May Apply to U.S. Exports	1
Export Controls	1
Contract Law	2
Antiboycott Regulations	2
Foreign Corrupt Practices Act	3
Antitrust Laws	4
Foreign Laws That May Apply to U.S. Exports	4
Customs	4
Other Laws	4
International Intellectual Property Protection	5
Trademarks	6
Patents	7
Copyrights	7
Trade Secrets	8
International Contracts	9
Agents, Sales Representatives and Distributors	9
Products and Territory	9
Performance Requirements	10
Term and Termination	10
Dispute Resolution	11
Choice of Law	11
Forum	12
Arbitration	12
Conclusion	12

INTRODUCTION

This pamphlet provides an overview of some important legal considerations for U.S. companies that are considering exporting or expanding their export programs. One of the underlying themes is that a knowledge of the relevant laws can reduce the risks of international sales. A second theme is that a written, negotiated contract will reduce the likelihood of a dispute and may enhance the chance of success of your international venture.

This pamphlet is intended to assist U.S. companies and individuals considering exporting. It is intended as a broad introduction to the subject of exporting and should not be viewed as legal advice. Readers are urged not to act on the information contained in this pamphlet but to consult with legal counsel and other professionals. The topics and their treatment are illustrative, not exhaustive.

U.S. LAWS THAT MAY APPLY TO U.S. EXPORTS

Export Controls

The export of most products and services to most countries in the world requires no special government approvals. Your freight forwarder can assist you in preparing the necessary documentation. Nevertheless, there is an extensive set of laws and regulations that cover exports, and certain exports will require government approvals, while others will be prohibited entirely. The failure to comply with these export laws and regulations can result in civil and criminal penalties, including the possible denial of export privileges.

The U.S. Treasury Department strictly regulates and often prohibits virtually all trade with certain countries through its Assets Control Regulations under the authority of the Trading With the Enemy Act. These countries include Libya, Iraq, Iran, Cuba and Cambodia. In most cases, it makes no difference what goods or services are to be exported to these countries.

The Commerce Department restricts the export of particular goods to particular countries for reasons of national security, foreign policy or short supply. The Commerce Department does so under the Export Administration Act and the Department's Export Administration Regulations. Under these regulations, exports of military equipment and equipment that could be used for military purposes ("dual use" exports) may be prohibited or may require written approval for export to particular countries. The export of computers, computer software and components is also regulated. In fact, the export of all goods and services is theoretically regulated by the Commerce Department. Nevertheless, the export of most goods and services to most countries requires no written approval. Exports that require no written license are said to have a "general license", which is essentially an exemption. Restricted exports require a "validated license", meaning that if such exports are to be permitted, they require a written application and approval for export authorization. Goods or technology that may fall under a

general license for export to one country may require a validated license for export to another country.

The Treasury and Commerce regulations also prohibit unauthorized reexportation by the foreign distributor if the U.S. supplier knows that his product will be reexported directly or indirectly to a country in which the U.S. supplier would not be permitted to sell the goods directly.

Contract Law

Contracts in the U.S. are generally governed by state law. Contracts for the sale of goods are generally governed by Article 2 of the Uniform Commercial Code (“UCC”), a state law that is very similar from state to state. The UCC governs such questions as whether a binding contract has been formed, what warranties may be implied, what remedies the parties may have for breach, and many other related questions. To a large extent, the UCC comes into play with respect to issues on which the contract may be silent or ambiguous.

When the sale of goods is between parties in different countries, another set of rules sometimes applies, namely the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). The CISG applies to contracts between parties whose places of business are in different countries that have adopted the convention. At least thirty countries have ratified the convention. These countries include, among others, the U.S., Italy, Germany, France, Mexico, Australia, Chile and Argentina. The United Kingdom is not a signatory to the CISG.

Like the UCC, the CISG governs such questions as whether a binding contract has been formed, what warranties may be implied and what remedies the parties may have for breach. In fact, the CISG is generally similar to the UCC.

Nevertheless, there are important differences between the CISG and the UCC. For example, the CISG does not cover contractual delivery terms, while the UCC does. Delivery terms are the ones that indicate, among other things, who pays for shipping and insurance, and when the risk of loss passes to the buyer. These are described in commercial shorthand with the abbreviations F.O.B., C.I.F. and C.& F. and others. Even if the CISG applies, then, it is important to know which law generally applies (e.g. the law of a particular state), since that law will govern the delivery terms. On the other hand, in international transactions it is not uncommon to use internationally accepted definitions of delivery terms rather than the definitions in the UCC. The most common are the INCOTERMS, published by the International Chamber of Commerce.

Antiboycott Regulations

The twenty-two countries of the Arab League have had a boycott in effect against Israel since Israel was established in 1948. The boycott has three levels. The primary boycott prohibits companies from doing business with Israel. The secondary boycott is against

companies anywhere in the world that do business with Israel. The tertiary boycott is against companies that do business with blacklisted companies.

Companies that fail to observe the Arab League boycott run the risk of being blacklisted in the boycotting countries. The blacklist is maintained by the Damascus-based Central Boycott Office. Companies all over the world that want to have business relations with the countries of the Arab League must deal in some manner with this boycott. Responses around the world have ranged from accepting the boycott to allowing one's company to be blacklisted. U.S. companies, however, must comply with U.S. laws, which prohibit compliance with the Arab League boycott.

Two U.S. government agencies have antiboycott regulations: the Commerce Department and the Treasury Department. Violation of the Commerce Department regulations can result in criminal and civil penalties, including fines and other sanctions. Violation of the Treasury Department regulations can result in the loss of certain tax benefits for U.S. companies and affiliates.

Compliance with the boycott may take many forms. It may mean refusing to do business with an Israeli company or a blacklisted company. Merely supplying information regarding such business is prohibited, even if the information is publicly available. The regulations prohibit the use of boycott-related language in letters of credit, shipping documents, contract conditions and purchase orders. A U.S. company seeking to register a trademark in an Arab League country may be confronted with a request to comply with the boycott. This may mean that the U.S. company cannot complete its registration of the trademark in that country without violating U.S. law. The regulations also require any U.S. person who receives a request to take any action which has the effect of furthering or supporting the boycott to report such request. Failure to report a request is itself a violation.

Foreign Corrupt Practices Act

U.S. companies that are seeking to make sales to foreign government entities or who need foreign government approvals must be mindful of the U.S. Foreign Corrupt Practices Act ("FCPA"). The FCPA comes into play whenever a payment is made or anything of value is given to a foreign official to assist a U.S. company in obtaining or retaining business.

It is not enough to retain an agent to procure the government contract or approval in order to avoid that application of the FCPA. The U.S. company can be liable even if the payment to the government official is made by the agent and not by the U.S. company. The question is whether the U.S. company has reason to know of the improper payment. Accordingly, it is important to assess whether the amount paid to the agent is reasonable. The reputation of the agent is also important.

In addition to prohibiting improper payments, the FCPA imposes strict accounting standards on public corporations and their subsidiaries operating in foreign countries.

Antitrust laws

The U.S. antitrust laws can apply to an international transaction even though the agreement calls for no sale of goods or services in the U.S. These laws apply if the conduct has a direct, substantial and reasonably foreseeable effect on competition in U.S. In most cases, this is not an issue. However, an exclusive agreement with a foreign distributor may bring U.S. antitrust law into play, for example, when the foreign distributor is so important in his market that the agreement would effectively exclude all other U.S. suppliers from that market. Such an agreement would violate U.S. law.

Agreements among companies to fix prices is prohibited under U.S. antitrust law. Price fixing is also prohibited in Europe and a few other countries. Most countries, however, do not have antitrust laws. In an international sale of goods, a U.S. company might be tempted to engage in practices that would be contrary to U.S. antitrust laws if the sales were made to U.S. buyers. It would be advisable, however, to avoid temptation. Setting different standards for international sales can set a dangerous precedent within the company. It is too easy for the people making the sales to forget about the U.S. restrictions when they move from the international to the domestic context.

FOREIGN LAWS THAT MAY APPLY TO U.S. EXPORTS

Customs

A U.S. exporter must be mindful of the laws of the destination country that might affect the proposed export to that country. All countries have customs laws that include import duties and quotas. Some countries prohibit imports of certain products entirely. One example is alcoholic beverages in the Middle East, which is prohibited for religious reasons. In other countries, the reasons for customs duties and quotas may be to protect local industries. Normally, the buyer bears the cost of customs duties, and this should be clearly reflected when an exporter establishes its export prices. Sometimes, the added cost of customs duties will make the exported product uncompetitive in the destination market. Foreign laws also may include country of origin marking requirements, which may affect your production costs. It is important to know these import requirements before you spend too much effort on any particular sale.

Some manufacturing companies are in the fortunate position of being able to benefit from free trade zones and duty drawback programs in the U.S. and abroad. These programs generally save companies much of the cost of import duties when they import goods, process them or add them as components to other products, and then bring them into the country or reexport them.

Other Laws

Many countries have laws that protect their local agents and distributors. These laws will come into play when the U.S. exporter has an ongoing business relationship with a buyer abroad. In some cases, the local agent might be protected under the local labor laws, in which case it might be very expensive to the exporter to terminate the relationship. Agents or sales

representatives that are companies rather than individuals also benefit from protection against termination of their contracts under the laws of a number of countries. In some countries, the law may require an agent to be local national or an entity owned by local nationals. In most cases, a distributor that purchases goods for its own account for resale will not be protected by such laws. When these laws do apply, however, they often override specific contract provisions.

Foreign laws may also affect the enforceability of the dispute resolution clause in an international agreement. These laws may invalidate clauses that call for litigation outside the country (e.g. in the U.S.A.) or for the application of the laws of another country. A common way that companies deal with this problem in international sales agreements is to provide for arbitration. Many countries are signatories to international treaties that require local courts to enforce arbitration clauses, even those providing for arbitration abroad under the laws of another country.

In any event, when you are entering into a long-term agreement with a company abroad, it is always a good idea to have the agreement drafted by your U.S. attorney, who should then consult with foreign counsel to confirm that the agreement will be enforceable abroad in accordance with its terms. Each part of the world has its own legal characteristics and quirks. The U.S. legal system is based on the common law. Many other countries have a civil law tradition. In some countries, law is based on religion.

INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION

Intellectual property law covers four distinct but overlapping subjects: trademarks, patents, copyrights and trade secrets. They raise questions under both U.S. and foreign law. A trademark is a brand name or logo that identifies the source of goods or services. A patent provides a legally-protected monopoly in an invention. Copyrights are legal rights in creative works. A trade secret is confidential information that has business value.

Before selling a product or service abroad, it is important to consider whether your invention or brand name will infringe on the intellectual property rights of another person in the destination country and whether you can or should seek to protect your invention or brand name in that country. The fact that your intellectual property is protected in the U.S. does not necessarily mean it will be protected in the destination country.

The level of intellectual property protection varies from country to country. In many countries, it is not possible to get an injunction to stop unauthorized use of a trademark or to prevent unauthorized use of an invention, disclosure of a trade secret or copying of an original creation. Litigation itself is rare in some parts of the world.

Trademarks

Trademarks come into play when the discussion involves marketing issues. What do you call your product or service? Will customers readily recognize the brand and distinguish it from competing products? In this sense, a trademark is said to identify the source of goods or services. It is possible to own trademark rights not only in a word or logo, but also a slogan, a package design or even the overall impression of a store design, as in a franchise system.

A trademark is essentially a brand designation that indicates the source of the goods or services. From a marketing point of view, what works in the U.S. may not work abroad. From a legal point of view, you will want to be sure that your sale of a product under a particular trademark will not infringe someone else's rights. The best approach to the international sale of goods under a brand name would include an international trademark registration program.

In the U.S., trademark protection arises simply from the commercial use of a trademark, provided that the mark does not infringe on the preexisting trademark rights of another person. Registration of a trademark at the federal Patent and Trademark Office gives the trademark owner certain advantages, including the fact that registration puts the world on notice of the owner's rights. Trademark registration in the U.S. is not an absolute necessity. A person who is using a trademark that is not registered may notify the public that such person claims rights in the mark by placing the designation "™" alongside the mark. A mark that is used in conjunction with services rather than goods is called a "service mark". The designation "SM" denotes a service mark. Once the mark is registered, the owner may place the designation "®" beside the mark.

While trademark registration is not a necessity in the U.S., in most other countries only trademark registration will create trademark rights. In fact, use is not necessary in most countries. This means that a foreign company that is not even using your trademark can stop you from selling your goods under that mark in a particular country if that company was the first to register.

When you are considering an export program, one question is whether the relevant mark is available for registration in the destination country. Another question is whether the mark can be protected at all in that country. For example, a mark designating services rather than goods may not be registrable in some countries. If your marks can be registered in the destination country, it is a good idea to register them before you start selling there.

The Paris Convention is a multilateral treaty that covers patents and trademarks. The U.S. and virtually all other industrialized countries are signatories to this treaty. Under the Paris Convention, an application for trademark registration made in a treaty country within six months after the filing in the first treaty country receives the benefit of the earlier filing date in the first country. If you miss the six month deadline with trademarks, you can always apply later without the benefit of the priority date if the mark is available.

Patents

Patents protect rights in inventions. The government grants the inventor a monopoly on the rights to the invention for a specified number of years. This period was once seventeen years in the U.S., but is now twenty years. Patent law is intended to encourage inventors to file for patent protection. Patents are published. Therefore, patent law encourages the dissemination of new inventions. The fact that patents are published distinguishes them from trade secrets, which also protect the underlying invention.

In order to be patentable, an invention must be non-obvious and it must have a useful purpose. Laws of nature, such as mathematical formulae, are not patentable. For this reason, it was once not clear whether computer source code could be patented. Today, it is settled that source code is patentable.

Proof of a patent infringement does not require that the infringer had access to and actually copied the original invention. In this sense, patent law affords stronger protection than copyright law.

An invention is not protected by patent law in the U.S. unless the U.S. Patent and Trademark Office issues a patent. The application process is lengthy and expensive. Enforcement of patent rights is also expensive. In addition, once the twenty-year patent term expires, patent protection is ended and the invention is available for all to use. For these reasons, patents make sense for inventions with broad appeal that will be commercially viable for years. Patent protection is not appropriate for all inventions. Computer software may already be obsolete by the time a patent issues. A soft drink company may want to preserve its concentrate formula as a trade secret forever.

Inventors and companies that use patentable inventions are under some time pressure to consider their international plans. While trademark applications may be filed at any time, once a patent application is filed in one country, there is a limited amount of time in which to file for protection of that invention in other countries. A common approach is to make a filing under the Patent Cooperation Treaty (the "PCT"). A PCT filing within one year of U.S. patent filing gives you up to thirty months to decide whether and in which countries to apply for patents. Most developed countries belong to the PCT, and the patent protection available in non-PCT countries is generally weak. There is no similar treaty for trademark or copyright protection.

Copyrights

Copyright law protects original, creative expression in the form of books, films, music and other works of art. In the commercial area, copyrights can protect advertising materials, trade publications, label designs, operations manuals and photographs. Copyrights can also protect computer software, data bases, directories and Internet page layouts.

Copyright law does not protect slogans, titles and short phrases. While these lack a requisite amount of objective originality for copyright protection, they might be the subject of trademark protection. There are also limitations to copyright protection under the doctrine of

“fair use”. Copyrighted works can be copied under the fair use doctrine without infringement for purposes of criticism, comment, news reporting, teaching, scholarship or research.

Copyright law protects against unauthorized copying. The law protects the expression, not the idea. In this sense, copyright law differs from patent and trade secret law. Copyright protection in the U.S. begins when the work is created. Federal copyright registration is not a prerequisite to copyright protection in the U.S. However, registration is necessary before the copyright owner can bring a lawsuit for infringement.

It is always a good idea to place a copyright notice on a creative work in order to put the world on notice that the owner is claiming copyrights in the work. The usual notice would appear as follows: “Copyright © 1996 Halket & Pitegoff LLP. All rights reserved.” Such a notice will provide copyright protection in many countries pursuant to international treaties.

Copyrights in the U.S. generally last for the life of the author plus fifty years. When a work is created by an employee in the course of his or her employment, it is generally considered to be a work made “for hire”. Copyright protection for a work made for hire lasts seventy-five years from publication or one hundred years from creation, whichever is shorter.

Trade Secrets

Trade secrecy law protects confidential information that has commercial value. Such information may include inventions, whether patentable or not. It may also include sensitive competitive information, such as customer lists, methods of doing business, financial information and the like.

One important advantage of maintaining information as a trade secret is that a trade secret can last as long as the information remains a secret. The formula for Coca Cola, for example, has remained a secret for more than a century. Trade secrecy protection in the U.S. lasts as long as the confidentiality is maintained. Once the information goes into the public domain, trade secrecy protection is lost forever.

Trade secrets are protected under state laws in the U.S. as long as the owner of the secret takes the appropriate steps to protect their secrecy. This means, for example, prominently marking all secret information as trade secrets. Trade secrets can also be protected by contract. Unlike copyright law, trade secrecy law protects the ideas themselves.

Companies that have confidential information they wish to protect must take steps to safeguard that information. This is an ongoing effort. The owner of the information should prominently mark it as secret or confidential, disclose it only to the extent necessary, and obtain confidentiality agreements where appropriate.

Many countries do not have laws that protect trade secrets. Secrets may be protectable only by contract in these countries, and this protection may be limited. In some cases, then, the best protection is not to disclose at all. Where disclosure is necessary, it is important to select an

honorable trade partner. In other countries, however, it is a crime to appropriate confidential information. Such countries include Mexico, England and Italy.

INTERNATIONAL CONTRACTS

Agents, Sales Representatives and Distributors

There are many types of export arrangements. A U.S. company might be making isolated sales to end users abroad. It might be making sales to customers abroad with orders placed by a foreign agent or sales representative, or it might be selling to a distributor abroad for resale. Many small manufacturers also sell indirectly into foreign countries, using U.S. agents, export management companies, export trading companies, and other export intermediaries.

A common type of agreement that creates the framework for sale of your company's goods into a particular country for resale is generally called a distributorship or distribution agreement. On the other hand, if you are looking for a person or company abroad to find customers and place orders for your company's products in the destination country, that company might be acting as your company's agent who will be paid on a commission basis. In the U.S., it is common to make this type of appointment that of a "sales representative" rather than an "agent". In a principal/agent relationship, the principal can be held liable for the acts of its agent under the common law in New York and other states. A sales representative, on the other hand, is an independent contractor, who is responsible for his or her or its own acts. In a sales representative arrangement, your company, as the supplier, should reserve the right to accept or reject the orders. In other words, your sales representative should not have the authority to enter into contracts on behalf of your company. In many foreign countries, sales representatives and true agents are both broadly referred to as "agents". In order to avoid confusion, it is preferable to avoid the use of the term "agent" when a U.S. company is entering into an international contract, unless the intention is to create a true agency relationship.

While there are a number of contract considerations, a few of the important ones are discussed below.

Products and Territory

In any agency or distribution agreement, it is important to describe clearly the products covered by the agreement and the territorial rights granted. Does the agent or distributor have exclusive rights? Are there any restrictions on competitive activities by the agent or distributor? Is the U.S. manufacturer permitted to sell to others or through other channels in the territory? What about the manufacturer's rights to sell other products in the territory?

Giving the agent or distributor exclusive rights provides an incentive for the agent or distributor to market the product. The U.S. manufacturer will often want the assurance of knowing that the local agent or distributor will not sell competing products, although this might not always be possible. It sometimes happens that one company may have the strongest

distribution in a particular line of goods, carrying more than one competing product line. The U.S. manufacturer may have little choice.

The laws of some countries do not allow distribution and license agreements to contain restrictions on exports outside the granted territory. For example, export restrictions are prohibited under the Treaty of Rome among the countries of the European Economic Community. This means, for example, that a U.S. manufacturer may not prohibit a French distributor from selling the manufacturer's goods into Germany. The EEC regulations do allow for some leeway in exclusive distribution agreements and franchises.

Performance Requirements

When an agent or distributor has an exclusive territory and a contract that cannot be terminated without cause on short notice, it is important to require some minimum level of promotion and sale. The agreement might obligate the foreign company to spend a specified minimum amount on advertising and promotion, or to sell to a minimum number of outlets, or to meet certain specified minimum purchase or sales volumes. While it may be difficult to estimate future sales, some requirement along these lines is important. An exclusive agent or distributor with a fixed term agreement who performs poorly can seriously delay a company's entry into a foreign market.

What sanctions can the contract provide for failure to meet the stated performance requirements? One approach would be to provide for a short term with no right to renew. Upon expiration, the contract would be renewed only if both parties agree. Another approach would be to reduce the size of the territory or to make it nonexclusive. It is probably preferable, however, to test an agent or distributor out with a small territory and allow for expansion if that company is successful. The contract might provide incentives for meeting stated sales targets as well as sanctions for failing to meet minimum sales. The ultimate sanction, of course, is termination.

Term and Termination

Agency and distributorship agreements are often terminable without cause at any time on short notice, such as thirty or sixty days. Distribution agreements also sometimes have a fixed term. With a fixed term agreement, a distributor typically wants a long term, with automatic renewals. The U.S. supplier typically wants a short term with renewals only if both parties agree. A short, trial period minimizes the potential liability if the agreement is not renewed.

In countries in which there is weak protection of intellectual property rights or injunctive relief is not available, termination of a contract may not stop the foreign distributor from using trade secrets, trademarks or other property of the U.S. company. Although damages may not be an adequate form of relief, the contract should provide for serious enough monetary penalties that might give the foreign distributor an incentive to negotiate with the U.S. company.

A number of countries have laws that protect local agents and sales representatives, and sometimes distributors. In particular, these laws may limit the enforceability of contract

termination provisions. Termination and nonrenewal might be permitted only for good cause, and there may be statutory damages for wrongful termination, regardless of what the contract provides. One way to minimize the effects of these laws might be to draft a contract with a short, fixed term. Another way to deal with these laws is to clearly define what constitutes cause for termination. As noted above, the best protection is to exercise great care in selecting the local company before any agreement is signed.

DISPUTE RESOLUTION

The uncertainties of international contracting make dispute resolution clauses extremely important. They are not simply boilerplate. These clauses determine which law will govern. They also specify whether disputes will be resolved by litigation, arbitration or mediation, and they often specify an agreed location or forum for dispute resolution. These are difficult issues, and they are frequently points of contention in the contract negotiation. The absence of a dispute resolution clause, however, can result in costly and unnecessary litigation over procedural issues.

Many factors go into drafting a dispute resolution clause. What types of lawsuits might arise? Would they be handled in a satisfactory manner by the foreign courts? Is enforcement easier if judgment is in local country? What type of relief is available in the destination country? Is application of foreign laws or the selection of foreign courts permitted locally? Would a U.S. judgment enforceable in the defendant's jurisdiction?

Choice of Law

When parties in different countries enter into an agreement, it is almost always a good idea to include a clause that indicates what law will govern. Courts in the U.S. differ in the rules they apply to the choice of law in contractual settings, and they are unpredictable in their results. In an international context, the unpredictability is exacerbated. A choice of law clause in an international contract provides some degree of certainty in the interpretation of the agreement. When a New York company is establishing an export program, it is common for such company to provide in its international agreements that New York law will apply, at least to the extent that the foreign countries will permit. This promotes a uniform approach in international contracting.

Many countries will not allow an international agency, distribution or license agreement with a local agent, distributor or licensee to provide for the application of the laws of any country other than their own. A clause that provides for the application of U.S. law in such a country would be unenforceable, and the local law would be applied. It is important for your U.S. attorney to check with local counsel in the destination country to find out whether any such law will apply.

New York generally favors freedom of contract, allowing the parties essentially to make their own law by contract unless the contract violates a specific law or policy. In New York, the general rule is that parties may freely choose what law will govern an international agreement. The rationale of the courts is their desire to protect the autonomy and justified expectations of

the parties. This promotes certainty and predictability, which are basic objectives of contract law.

Forum

New York companies will generally also want to provide in their international agreements that disputes will be resolved in New York. For a small company, the cost of going abroad to litigate or arbitrate a dispute can be so high that the company will not want to enter into any dispute. A uniform provision that calls for dispute resolution in New York under New York law also promotes uniformity in international contracting.

Arbitration

Arbitration is a common method of resolving international disputes. Because of international treaties, arbitration clauses are more likely to be enforced than clauses providing for litigation outside of the country of a foreign distributor or agent. The parties have a great deal of freedom to determine the procedural rules for the arbitration, the method by which the arbitrators will be selected and the substantive law that will govern the arbitration.

Arbitration is less formal than litigation and may end up costing less than litigation. It need not follow the procedural rules that call for extensive pre-trial discovery. This means that there will be no depositions, and there will be a limit to the extent to which each party will be required to produce copies of relevant documents. The decision of the arbitrator or arbitrators also generally may not be appealed. This can be an advantage or a disadvantage, depending on the result.

The American Arbitration Association, which is frequently the body that administers international arbitrations in the U.S., has an office in White Plains that services the counties of the Hudson Valley, although international arbitrations are normally administered from their New York City offices. The American Arbitration Association maintains panels of qualified arbitrators in all fields, appoints arbitrators and administers arbitrations under its own rules of commercial arbitration and under various other sets of rules.

CONCLUSION

International sales fall within a complex web of U.S. and foreign laws. A knowledge of the relevant laws can reduce the risks of international sales.

If yours is a manufacturing company establishing an export program, your company may want to enter into framework contracts with its agents or distributors abroad. Such a contract program can lead to a consistent approach to international sales through the use of standard forms, and through the application of a single law to govern these transactions, to the extent permitted by local law and by the local parties to these contracts. It is worthwhile to enter into such contracts if for no other reason than to provide for the resolution of all disputes by means of arbitration in New York under the rules of the American Arbitration Association.

Well-written contracts may also minimize the likelihood of disputes with your local agents and distributors, and may enhance the chance of success of your international venture. The exercise of having the local agents and distributors sign contracts will clarify to them the way in which you carry out your international sales, and it will give them the opportunity to object to specific provisions and perhaps suggest alternatives that would make sense in a particular context.

The presentation of your form contract to the local agent or distributor need not be on a take-it-or-leave-it basis. Negotiation will inevitably lead to a better agreement than one that is not negotiated. It will be a true reflection of the business deal and may even lead to a better relationship of the parties. Negotiating is the means by which the parties think the deal through, refine it, and ensure that they are in accord on all important points. Sometimes, deals fall apart in the negotiating process, as each party learns what the other has in mind on specific points, presents its own specific needs, and considers whether the deal will make sense from its own point of view. If the negotiation process succeeds, it means that there is a meeting of the minds on the framework for the working relationship of the parties.

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Computers - Mr. Pitegoff represents corporate computer users, suppliers and consulting companies, large and small, in their development, acquisition, integration, licensing and maintenance of software, equipment, networks and World Wide Web sites and in the legal aspects of Year 2000 compliance. In the Business Law Section of the American Bar Association, Mr. Pitegoff is Co-Chair of the International Electronic Commercial Transactions Subcommittee of the Cyberspace Law Committee. Mr. Pitegoff is a member of the Computer and Technology Law Committee of the International Bar Association. He is also a member of the Computer Law Association and a former member of the Computer Law Committee of The Association of the Bar of The City of New York.

Franchising - Mr. Pitegoff is listed in AN INTERNATIONAL WHO'S WHO OF FRANCHISE LAWYERS (Law Business Research, London, 1997) as one of 162 "leaders in the field of franchise law" worldwide. Mr. Pitegoff represents franchisors, franchisees and area developers, and advises others on the applicability of franchise laws to license and distributorship arrangements. Mr. Pitegoff is a former member of the Governing Committee of the American Bar Association's Forum on Franchising (1993-1996), its former Technology Officer (1995-1997) and a former Associate Editor of the ABA FRANCHISE LAW JOURNAL (1990-1993). He is the Technology Officer of the Franchise Law Committee of the New York State Bar Association's Business Law Section and a member of the Franchise Law Committee of the International Bar Association.

Publications - Mr. Pitegoff's publications include: *International Franchise Agreements* (New York State Bar Association Program on International Agreements, 1998); *Y2K Implications for Franchising*, 18 FRANCHISE L. J. 1 (1998); *The Role of ADR In Resolving Y2K Disputes Outside of the Overcrowded Courts*, CCM: THE AMERICAN LAWYER'S CORPORATE COUNSEL MAGAZINE (June 1998) (co-authored with Thomas D. Halket); *The Inadvertent CyberFranchisor*, CYBERSPACE LAWYER (April 1998); *Negotiating a Computer Software License*, THE FRANCHISE UPDATE REPORT (April 1998); *Franchisors as Web Developers*, THE FRANCHISE LAWYER (Spring 1997); *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289 (1989), reprinted in the American Bar Association's BUILDING FRANCHISE RELATIONSHIPS (1996); *Choice of Law in Franchise Relationships: Staying Within Bounds*, 14 FRANCHISE L. J. 89 (Spring 1995).