THE THIRD ANNUAL AMERICAS BUSINESS FORUM

Creating Jobs Through Exports
Legal Issues in Global Markets – Sales and Distribution Agreements
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Foreign Customer

“Getting To Know You”
1. Know your customer
   a) Weak enforcement mechanisms
   b) Successful Latin American businesses generally place a high value on honor

2. Get your agreements in writing
   a) Avoid misunderstandings
   b) More likely to be enforceable in Latin America
   c) Importance of written invoices
3. Governing Law

a) Unless otherwise agreed, the U.N Convention on the International Sale of Goods applies to sales of goods whenever the buyer and the seller are from countries that have ratified the Convention.

i. Similar to the UCC, but some important differences, such as price term will not be implied, and use of INCOTERMS.
b) Foreign Law

i. Some important differences: no injunctive relief; penalties provisions are common; importance of the notary; importance of poderes; difficulty of collecting consequential damages; limited recoveries for tort damages

ii. Don’t enter into an agreement governed by foreign law unless you know what you are doing
4. Dispute Resolution

a) U.S. courts
   i. Problem with enforcing a judgment abroad

b) Foreign courts
   i. Delays
   ii. Irregularities
   iii. Availability of criminal relief
   iv. Special pre-judgment attachment rights with pagare’s

c) Arbitration
   i. Generally favored in Latin America
   ii. Variety of different arbitration bodies are available
5. Getting Paid

a) Trade letter of credit
b) Standby letter of credit
c) Open account with pagare’s
d) Open account with invoices and receipts
e) Availability of Ex-Im Bank and other U.S. governmental guarantees
6. Protection of Intellectual Property Rights
   a) Register trademarks as soon as possible once you have decided that exporting is a possibility
Foreign Agent or Distributor

“Going Steady”
1. Know your agent or distributor

2. Get your agreement in writing
3. Check on legislation designed to protect agents or distributors from termination

4. Make sure your intellectual property rights are secure.
Foreign Subsidiary or Joint Venture

“Committed Relationship”
1. Investment Regulations
   a) Sector restrictions
   b) Governmental approvals

2. Structures for Doing Business
   a) Corporation
   b) Limited Liability Company
   c) Other
3. Labor Regulations
   a) Severance pay
   b) Christmas bonus; profit sharing
   c) Labor unions
   d) Work visas for expatriate employees

4. Tax Issues
   a) Income tax
   b) Value added tax
   c) Foreign tax credit
   d) Tax treaties
   e) Transfer pricing issues
5. Infrastructure Projects
   a) Elaborate bidding procedures
   b) Governmental/private financing
   c) Local employment
   d) Joint ventures

6. Foreign Corrupt Practices Act
   a) Makes it a U.S. crime to bribe a foreign governmental official
      i. Up to five years prison time for willful violations
      ii. “Grease” money exception
b) Third-party payments; knowledge requirement

c) “Red flags”:
   i. Country in question
   ii. Reputation of the agent
   iii. Amount of the commission
   iv. Agent refuses to provide FCPA representations
   v. Relationship of the agent to the government
   vi. “Improper payment” audit
   vii. Payments to cash, to third persons, or in third countries
   viii. Unusual bonuses to foreign operational managers
   ix. Suspicious conduct

d) Record-keeping and accounting requirements for public companies
LET’S DO IT