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**FITZPATRICK LENTZ & BUBBA**

**ATTORNEYS AT LAW**

# Export University – Export 201 Overseas Representation Legal Issues Overview

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Room 746, 1801 Liacouras Walk  
Philadelphia, Pennsylvania

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# Fitzpatrick Lentz & Bubba, PC

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- Founded in 1988
- 30 attorneys based in Center Valley, PA
- Firm represents a variety of regional, national, and international organizations

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## Services:

- Establishing overseas joint ventures/other entities
- Licensing and protection of intellectual property
- Preparing/negotiating contracts with foreign agents, distributors, etc.
- Counseling on US Foreign Corrupt Practices Act
- Export and import compliance programs and audits
- Working with government agencies and responding to investigations

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## Services (continued):

- Preparation/review of agreements for international sale of goods or services
- Representation of foreign entities establishing operations in the U.Ss
- Advice on mergers & acquisitions involving international components
- Due diligence on transactions and coordination with foreign counsel

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## Services (continued):

- Business-related immigration, visas and H.R. issues
- Litigation or arbitration of disputes
- Review of financing and payment arrangements, such as letters of credit

# Tim Charlesworth

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- Primary Shareholder active in the field of International Law
- Member of the American Bar Association's Section of International Law
- Member of the Union Internationale des Avocats and the World Trade Center of Greater Philadelphia
- Admitted to practice before: US Supreme Court, US Court of International Trade, US Courts of Appeals for the Federal Circuit and 3d Circuit, US District Court (ED Pa.), all PA State Courts
- Professional network developed over more than 30 years of practice
- Access to legal experts in virtually any country

# INTERNATIONAL “PARTNERSHIPS”

Steps To Help Ensure A  
Successful Relationship

# Examples of International “Partners”

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- A. Agent
- B. Distributor
- C. Supplier
- D. Purchaser
- E. Licensed Manufacturer
- F. Joint Venturer
- G. Employee



# Due Diligence

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## **Need for Local Legal / Accounting Professionals**

A. Cost vs. Benefit

B. Professional guidance, contacts

# Due Diligence

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## General Areas of Inquiry

### A. Legal

1. Compliance with U.S. and foreign law – written policies and beyond
2. “Know Your Customer” and “Red Flags”
3. Denied persons and other lists
4. Due diligence checklists

# Due Diligence

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## **General Areas of Inquiry**

B. Foreign Corrupt Practices Act / Other Compliance

C. Team Approach - Role of Each: Manufacturer's depts.; Outside consultants

D. Successor liability

# Importance of Good Documentation

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1. Confidentiality agreements – NDA's
2. Transaction documents – RFP; Quote; PO; Invoice; Terms of Sale
3. Coordination and review
4. Letter of Intent/Memo of Understanding
5. Termination problems
6. Exclusivity / competition restrictions

# Practical Considerations

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1. Reputation of Partner: (e.g., strength in market, ethics)
2. Use of translator / interpreter
3. Be aware of local customs, but beware of generalizations
4. Scheduling, travel, dining and other necessities
5. Importance of developing relationships
6. Anticipate delays
7. Don't give latest technology until trust is proven
8. Medical evacuation insurance

# Options if Relations Sours

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1. Act quickly. Don't assume things will improve.
2. Have strong legal framework in place
3. Termination, winding-up, litigation / arbitration

# International “Partnership” Conclusions

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1. Build and use a strong team
2. Commit time and resources
3. Direct involvement

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- Learn from others' mistakes

“War Stories”

- Hot topics – FCPA, compliance, deemed exports
- Reasonable care; due diligence; informed compliance

# MARKET ENTRY STRATEGIES (ASSESSING THE RISKS/BENEFITS)

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1. Direct Sales; E-Commerce
2. Sales Rep or Agent
3. Distributors
4. Joint Venture
5. “Permanent” Establishment  
(Branch or Subsidiary)
6. Franchising

# INTERNATIONAL DISTRIBUTION AGREEMENTS

Use This Checklist As A Part Of  
Agreement Negotiations

## 1. Appointment of Distributor

- i. Products: Limited items or open-ended (i.e., entire line)? May simply attach Schedule and amend as it evolves.
- ii. Territory: Limited area or entire world? Option / first refusal on additional territory.
- iii. Markets: To whom may distributor sell within territory?
- iv. Exclusivity: Yes / No.
  - Certain territory only?
  - Revoke if goals not met?
  - (Other remedies: e.g., termination.)
- v. Sub-distributors: Retain control due to quality and other concerns.
- vi. Sales rep. agreement (optional): Different role for distributor for other products.
- vii. Non-Compete

## 2. Term: Fixed / Option / Evergreen

### 3. Special Responsibilities of the Distributor

- i. Promotion: Specific or general description of efforts. Sales (and service) force size and expertise, trade shows, etc.
- ii. Reports: products, competitors, etc.
- iii. Product activity reports: Format / substance?
- iv. Compliance / approvals / labeling: Many levels to consider. Shift burden.
- v. Training: Sales personnel

### 4. Performance Requirements

- i. Minimum annual sales
- ii. Initial purchase
- iii. Stocking
- iv. Product shortage

## 5. Inspections

## 6. Prices

- i. Prices and terms
- ii. Adjustments
- iii. Resale Prices: Suggested

## 7. Orders

- I. Placing orders: methods, acceptance
- II. Shipments: frequency, minimum size, etc.
- III. Freight: cost, place, risk of loss, etc.
- IV. Order cancellation/acceptance
- V. Credit
- VI. Insurance

## 8. Advertising & Sales Promotion: Material, costs, etc.

## 9. Returns

- i. Error Returns: Whose error? Procedure.
- ii. Discontinued Items: Timing, Costs of Return, etc.
- iii. Amount of Credit
- iv. Recalls

## 10. Termination

- i. Basic provision: with/without cause. By whom?
- ii. Additional termination rights (of each party): Bankruptcy, breach, etc.
- iii. Repurchase of inventory: mandatory/voluntary? Price, terms, etc.
- iv. Distributor's right to sell after termination or expiration: yes / no / conditional?
- v. Non-liability after termination: pre-existing obligations, unforeseen claims
- vi. Non-use of trademarks, etc.
- vii. Effect of termination or expiration on pending orders: duty to ship? Payment terms?

11. Confidentiality: Do not rely on prior Secrecy Agreement

12. Warranty

- i. Standard Warranty: Allow for changes at your discretion. Distributor's duties - report, investigate, service, etc.
- ii. Limitations/Disclaimers: Obtain maximum legal benefit for which you can negotiate.
- iii. Release/Indemnity

13. Intellectual Property

- i. Ownership: Does distributor acquire any interest?
- ii. Patent indemnity/liability: Third party claims; notice requirements; limit incidental/consequential damages.
- iii. Names and trademarks: Distributor may use only with express consent. Provide copies.

14. Relationship: Independent vs. Agent; Title to goods; Authority to bind other party.

15. Force Majeure: Broad definition. Delayed performance. Opinion to terminate.

## 16. Arbitration (or Litigation)

- i. Forum / procedure
- ii. Governing law

## 17. Miscellaneous

- i. Notices: methods, place. Do not name person; use title. CC to counsel.
- ii. Assignment: Consent/notice; affiliates; sales, merger, etc.
- iii. Language: contract; arbitration; ENGLISH!
- iv. Severability
- v. Waiver: Strict compliance.
- vi. Conflicting Terms/P.O.s: Beware of unintended modifications to agreement.
- vii. Entire contract, modification
- viii. Definitions: INCOTERMS, specific / industry terms.
- ix. Survival of terms: Warranty, indemnity, etc.

## 18. Representations and Warranties (a "two-way street" and not a substitute for due diligence)

- i. Organization: Corporation, L.L.C., etc.
- ii. Authority / legal capacity
- iii. No Conflicts: Organizational documents, law, other contracts, etc.
- iv. Legality
- v. Legal opinions

# Questions & Answers?



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