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WHEN GIVING YOUR REP THE BOOT

By David E. Dubberly

In their negotiations with potential representatives, most companies that export to Latin America tend to focus on price and compensation terms. Usually, little thought is given to the possibility that the distributor or agent may have to be fired.

In the United States, a firm can usually fire a representative "at will," as long as the contract so provides. But in many Latin American countries, local laws often make it nearly impossible to discharge your representative, no matter what the contract says. Other times, you will be required to pay a certain percentage of the representative's annual compensation, multiplied by the number of years he or she has worked for you.

Obviously, it's best to avoid ever having to fire a distributor or agent by hiring the right person or firm in the first place. But everyone makes mistakes. There are, however, a few basic steps to take in the process of hiring a representative.

1. Find out what local labor law says about hiring and firing representatives. Does the country have a law that specifically protects agents and distributors? As a general rule, distributors are less likely to be protected than agents because distributors function less like employees and more like independent contractors. This makes it more likely that whatever contract you negotiate with a distributor will be enforced as written. A basic precaution, whether you use a distributor or agent, is to require that he or she be incorporated. Then draw up your contract with the corporate entity, not the individual.

2. Invest time and money in choosing representatives. To find out about the general reliability of a prospect, get the U.S. Department of Commerce to prepare an International Company Profile Report (ICPR). Formerly known as a World Trade Data Report, an ICPR contains information about the subject's general reputation, organization, year established, number of employees, product lines, principal owners, and financial and trade references. Eximbank and its insurance arm, the Foreign Credit Insurance Association, also can furnish financial data on a prospect. Dun & Bradstreet, Graydon America, Standard & Poor's, Veritas Business Information, and smaller U.S. and Latin American credit agencies can provide similar information.

3. Visit your best prospects. Inspect their facilities. Analyze their facilities. Analyze their marketing organization. Try to get to know them on a personal basis.

4. Once you select a representative, limit the term of hire to two or three years, so you can assess the representative's effectiveness and keep your options open. Avoid automatic renewal.

5. Make clear in the contract that failure to meet objective, realistic performance standards (e.g. minimum purchase or sales quotas) is grounds for immediate termination. Also, spell out that failure to comply with technical support, promotion, and financial reporting requirements can result in dismissal. Then force these provisions: if the representative doesn't measure up and you don't take any action, you may effectively be waiving your right to terminate the representative later.

6. In many Latin American countries the representative is presumed to be exclusive unless the contract specifically says otherwise. Be careful about granting a new representative the exclusive right to sell your products in more than a limited geographical area. Also consider limiting the representative to a specific period of time or to specific channels of distribution. Do not grant broader exclusivity until the representative proves himself by meeting performance requirements. It is easier to expand the territory of a distributor who does a good job than to take away part of the territory of a distributor whose results are disappointing. You should usually reserve to yourself the right to sell directly into the territory.

7. Spell out exactly what the representative must do should he be terminated:
a) return all materials, especially customer lists and documents containing trade secrets; b) cooperate with transfer of business to a new representative; c) cease use of trademarks or names; d) continue to honor confidentiality agreements; e) transfer all inventory.

8. Be prepared in case there are irreconcilable differences (though if you follow these steps closely, there should be little room for dispute). Usually it is best to say in the contract that disputes will be resolved by arbitration outside the representative's country, where results are likely to be more even handed.