
Practical Tips For Representing Foreign Principals

Preparation and due diligence are critical when it comes to representing foreign principals. Those and other points are emphasized in a list of steps manufacturers' representatives should take prior to entering into an agreement with a foreign — not to mention a domestic — manufacturer.

The following business tips were offered by Florentino Ramirez, Ramirez & Associates, P.C., Dallas, Texas. Ramirez, who has participated in the MANA-sponsored Attorney Symposiums, has previously been featured in the pages of *Agency Sales* magazine.



Tip #1:

Before negotiating, the rep should make every effort to gather as much information as possible concerning the foreign manufacturer and the country where he is located. This includes becoming aware of as many aspects of the manufacturer's laws, terminology, customs and usages.

By way of example, Ramirez stresses the importance of knowing:

- What is meant by the word "dissolution"?
- What does it mean when we say "tenant's duties of maintenance of the premises"?
- What does nodding mean? Does it mean "yes," or does it serve as an affirmation that "I'm listening to what you have to say"?
- What holidays are observed in the countries you'll

Before negotiating, the rep should make every effort to gather as much information as possible concerning the foreign manufacturer and the country where he is located.

be conducting business with? Are only skeleton staffs available on those days in those countries?

- Do workers take extensive and lengthy vacations at certain times of the year? Will this affect delivery schedules?

Other considerations include an understanding as to when a deal is truly complete and who are the authorized representatives of a foreign principal.

Ramirez cautions that at the very beginning, “the manufacturers’ representative needs someone (e.g., an attorney experienced in rep law and international rep law) to guide him through the process.”

Tip #2:

First and foremost it’s important that the rep determine exactly what it is he is going to be doing; that is, what is expected of you and what do you deem will be necessary to be done in order to get orders for your principal?

Among the considerations here are:

- Is the market already established or are you merely replacing an existing rep or company staff?
- Will it be necessary to develop name recognition or develop a market? If so, you might need two contracts. A promotional agreement will commit the rep and the principal to do certain advertising and promotion for a fee. If expectations are not met, will that affect the sales rep agreement? Keep the sales rep agreement and the promotional agreement separate.
- Is the rep’s role a mix of the two functions? How will the rep’s role/duties be described and compensated?
- Will it be necessary for the rep to act as a distributor — to buy and resell?
- Will the rep be required to have goods on consignment?

Ramirez emphasized the importance of having everything spelled out in writing. “Be specific and be very clear. We may know what we mean, but they don’t.”

Tip #3:

Despite the applicable law and legal implications, a foreign principal may have a different meaning for a term such as “agent.” To many it may mean that you will represent the principal on its behalf. In the United States an “agent” assures a “fiduciary duty” and can bind a principal.

Tip #4:

In defining your role, avoid the use of terms such as “agent,” “marketing representative” or “sales representative.” Instead describe your role.

Tip #5:

Do not present your contract and expect to negotiate from it to its signing. It is taken as presumptuous in many cultures and bogs down progress. This can occur when U.S. terminology is used and the principal is not familiar with the terms and meanings. Also, some terms may be understood as dictates. For instance, consider: “Company shall immediately acknowledge a purchase order...” This may not be acceptable to a foreign manufacturer.

Tip #6:

Rather than attempting to negotiate from your contract, present, discuss and work from a “term sheet.” The term sheet is an outline of the important and principal points that will need to become a part of the contract, but should first be fully explored to a minutia of understanding. For example, compensation must be mentioned in the contract. You must find out and establish when it will be paid, by what means, and if it will be guaranteed. If so, how? Will they (the manufacturer) set up a letter of credit or issue a payment bond? If so, who is the bank, the bonding company? Only after these questions are answered can you prepare a contract clause.

Tip #7:

Avoid clichés such as “The representative is hereby

Keep the sales rep agreement and the promotional agreement separate.

“Be specific and be very clear. We may know what we mean, but they don’t.”

Be protective of your assigned territory and any exclusivity granted, and build mechanisms to protect them from invasions from abroad.

appointed the company's marketing representative." Instead, define your role and state your general authority in universal terms, such as "The company hereby authorizes the representative to solicit and obtain customers in the territory (described below) who shall place orders for the company's products (which are listed in the attached exhibit A)."

Tip #8:

Be protective of your assigned territory and any exclusivity granted, and build mechanisms to protect them from invasions from abroad.

Often, foreign companies will have distributors (resellers) located in other countries who, in turn, may attempt to penetrate your U.S. market from abroad. As a suggested protection for this type of arrangement, Ramirez offers that the rep may obtain the exclusive license to a trademark/copyright and become the sole importer of those goods.

Tip #9:

Use separate entities and contracts to perform diverse services. Consider how and if each terminates/violates the other.

Tip #10:

Try to get the foreign principal to establish a legal presence in your territory — i.e., establish a U.S. business entity.

If such an entity is established:

- Determine what role you (the rep) would have in its management.
- This entity could be the sole and exclusive importer of record and could close the border.

- You (the rep) could represent a U.S. entity subject to U.S. jurisdiction.
- Such an entity could more easily obtain U.S. insurance.

Regarding this point, Ramirez cautions, "If a question of liability develops, whoever has the deepest pockets — including the rep — will probably get named in a suit. While there are exceptions, insurance companies generally don't insure foreign manufacturers against liability in the United States. They prefer to insure U.S. entities."

Tip #11:

Be aware of how a foreign principal views the duties of the different middle-persons in the sales chain. For instance, consider:

- Sales reps may be looked upon as agents.
- Agents usually do everything from getting customers, soliciting orders, buying to resell and holding goods on consignment.
- Distributors are seldom given exclusivity and usually are called upon to make minimum annual (or other periods) purchases.

Tip #12:

Know with whom you have contracted and who is authorized to contract with you.

- Keep in mind that foreign companies often have tiers of companies — usually for tax purposes.
- Know with whom you need to contract.
- If necessary, get all persons to sign the contract.
- Be sure to get copies of power of attorney.

Tip #13:

Do not be afraid of choices of applicable law, jurisdiction, venue or manner of dispute resolution. Ramirez emphasizes, however, that it is very important to be knowledgeable concerning applicable law. "If I had occasion to go to England, for instance, to arbitrate under English law, I probably wouldn't have much concern. If I was dealing in India under their law, I would be wary. There may, in fact, be some countries where there are no enforceable treaties."

In addition, he stresses the importance of knowing the law — especially applicable treaties and if those treaties trump local laws. Also, know the costs and procedures of available arbitration bodies.

Tip #14:

In providing for post-termination compensation, tie that compensation to any requested post-termination confidentiality and/non-compete obligations. According to Ramirez, "One of the things reps dislike the most is the anticipation that he (the manufacturer) is going to terminate me, and following termination I won't be able to compete.' If there is discussion/agreement concerning post termination, the rep might agree to non-compete if the manufacturer agrees to pay a certain amount."

In conclusion, Ramirez emphasized how important it is for the rep to avail himself of professional legal counsel to see himself through the challenges that accompany dealing with foreign principals. □

Copyright © 2006, Manufacturers' Agents National Association

One Spectrum Pointe, Suite 150, Lake Forest, CA 92630-2283 • Phone: (949) 859-4040 • Toll-free: (877) 626-2776 • Fax: (949) 855-2973
E-mail: MANA@MANAonline.org • Web site: www.MANAonline.org • All rights reserved. Reproduction without permission is strictly prohibited.