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Sales Representative and Distributorship contracts in Mexico

By: Adolfo Lugo
Cuevaslugo Abogados
Av. Constituyentes 345, piso 7
Col. Daniel Garza
Delegación Miguel Hidalgo
México, D.F.
C.P. 11830
Tel. +52.55 5516.8973
Fax. +52.55 2614.5452
www.cuevaslugo.com.mx

Mexico is based on the Civil Law tradition. The Mexican Civil Code (CC) regulates various relationships between people and people and property.

The CC also regulates *the mandate* which under Mexican Law is the basic figure under which a person acts on someone else's behalf in a legal or business matter. The person authorizing the other to act is the *principal*, and the one authorized to act is the *agent*. The agent must obey the principals' instructions and when acting under no instructions must rely on prudence and take care of the principal's business as if it was its own business.

Although each State within the Mexican Republic has its own Civil Code, almost all refer to the basic figure of the "mandate".

Other statute that regulates the relationship between a principal and an agent in commerce is the Commerce Code, which is of Federal application. The Commerce Code regulates the "Mercantile Commission" which is the most common relationship between the principal and a sales representative. The payment of commission as remuneration for products sold is a common way to reward sales people. Payments often will be calculated on the basis of a percentage of the goods sold.

Both the sales representative and the distributorship normally include the elements common to either the mandate and/or the Mercantile Commission.

Freedom of Contract

Under general principles of Civil Law in Mexico, the parties have freedom to negotiate the terms of their contracts, including sales representative or distributorship contracts. Mexican courts will generally enforce the terms the parties have agreed upon, except when such terms are against the Law, where they would be deemed invalid. Mexican Law does not require specific terms to be included in such contracts.

Exclusivity

Exclusivity provisions are normally honored in Mexico between the contracting parties and are normally enforced by Courts, under the general assumption of the freedom of contracts.

However, there is a limitation to exclusivity clauses in sale representative contracts as well as in distributorship contracts when such contracts constitute relative or absolute monopolistic practices (as regulated under the Federal Antitrust Law).

Monopolistic practices exist where the following circumstances are met:

- 1) A relevant participant in a specific market (geographic and temporal market where suppliers and consumers concur for similar products) holds substantial power in the specific market. Such power may be determined when a relevant participant is able to fix prices or realize other unlawful practices without real opposition from other competitors.
- 2) Commercial practices by a relevant participant in the market: a) unlawfully displace competitors from the specific market; b) impede their access to the specific market; and/or c) benefit exclusively one or more participants in the specific market.

Lastly, for a commercial practice to be deemed monopolistic it is required that such practice produce no gains in efficiency in the market. That is rarely the case in such contracts as the franchise, where there are exclusivity clauses but there is also an exchange of knowledge, which normally contributes to efficiency in the market.

In short, only when no alternatives are available to consumers, may an exclusivity clause be sanctioned as a relative monopolistic practice.

Choice of Law

The parties choice of law will regularly be honored, unless the agreement is null and void under Mexican law. Mexico is a contracting state of the Hague Convention of 30 June 2005 on Choice of Courts agreements.

Non Compete Provisions

- 1) Mexican Civil and Commercial Law admit non-compete provisions, attending to freedom of contract rule, provided there exist no violations to Laws of general application (i.e. Federal Antitrust Law, the Constitution).
- 2) The Mexican constitution also admits non compete clauses as valid, provided that such clauses do not constitute a waiver to participate in certain professional activity, industry or commercial activity, in which case they would be invalid.
- 3) The Federal Antitrust Law considers non-compete clauses valid, provided that such clauses do not constitute a monopolistic practice, be it relative or absolute. The Federal

Competition Commission has determined that such clauses are valid when limited in time, territory, subject matter and people.

Mandatory Provisions

No mandatory provisions. Freedom of contracts is privileged.

Special Tax Considerations

Corporations resident in Mexico are taxable on their worldwide income from all sources at a 28% rate for income tax. A non resident corporation is subject to income tax in Mexico if it carries on business in the country. Corporations are considered residents of Mexico if they are established under Mexican law or if their principal place of business is located in Mexico. In case a non resident corporation earns income with a Mexican source of wealth it would have to pay taxes at a 25% on the total amount of the transaction, however the U.S.-Mexico Double Taxation Convention might offer some exceptions from taxation or reduction through lower rates.

Additionally, a flat tax of 17% is levied on the income obtained by corporations resident in Mexico for the sale of goods, rendering of services and the grant of the free use of goods. The flat tax is a kind of alternative minimum tax from which the taxpayers would have to pay the higher of the income tax and the flat tax. Non resident corporations are not obliged to pay this tax.

Additionally commercial transactions carried out in Mexican territory (sale of goods, rendering of services, grant of the temporal use and importation of goods or services) will be subject to Value Added Tax at a 15% rate. In the border zones the applicable rate is of 10%. This tax is economically paid by the acquirer of the goods, the recipient of the services, leasee of the goods or importer of the goods or services.

UN Convention on Contracts International Sale of Goods

Mexico is a signatory of such treaty since December 29, 1987.

Convention on Recognition and Enforcement of Foreign Arbitration Awards

Signatory since April 14, 1971