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URL: <http://globaledge.msu.edu/resourceDesk/tradeLaw.asp>



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SALES REPRESENTATIVE AND DISTRIBUTION CONTRACTS IN THE PROVINCE OF ONTARIO (CANADA)

International sale of goods

Ontario courts, governing law, international commercial arbitrations

Ontario is the business capital of Canada. Ontario's legal system evolved from the tenets of the British Common law tradition as did the laws of Canada. The basic precept of Ontario contract law is to grant parties negotiating a contract the freedom to contract with minimal intervention from the province.

Under Ontario law, the freedom for parties to negotiate a contract between themselves is exposed to few restrictions. Generally speaking, each party must provide consideration to the other parties in order for contractual obligations to be binding.

It is rare for courts to interfere with contractual obligations agreed to between consenting contracting parties. Only if one of the parties has not freely consented, has been provided inaccurate or false information by the other party in order to induce the other party into the agreement or a term or terms of the agreement are illegal will the courts interfere with the terms of a contract.

One notable exception to the freedom of parties to negotiate a sales representative agreement or a distribution agreements is the *Arthur Wishart Act* (Ontario) (the "**Act**") which governs franchise agreements. The Act creates obligations and mandatory provisions for franchise agreements, in particular for the party granting the franchise, in order to protect the rights of the franchisee. The definition of "franchise" in the Act is expansive. It can therefore govern certain sales representative agreements and distribution agreements which fall under the Act's definition of franchise. The definition of franchise under the Act is:

“franchise” means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, or the franchisor’s associate, in

the course of operating the business or as a condition of acquiring the franchise or commencing operations and,

(a) in which,

(i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's, or the franchisor's associate's, trade-mark, service mark, trade name, logo or advertising or other commercial symbol, and

(ii) the franchisor or the franchisor's associate exercises significant control over, or offers significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or ..."

Outside the scope of the Act, Ontario law does not provide for any mandatory provisions to be inserted into sales representative and/or distribution agreements. However, like most jurisdictions there are certain clauses and variations thereof that have generally been accepted as clauses to be inserted in every contract. This does not mean that they must be inserted. Contracts will still be honoured if they are absent.

Non-Canadians selling goods into Ontario will need to consider the application of the *International Sale of Goods Act* (Ontario) which provides for a detailed set of rules respecting the cross-border sales of goods. One consideration in these circumstances is whether to expressly opt out of the *International Sale of Goods Act* (Ontario). Non-Canadians selling goods into Ontario also need to consider the application of the *Sale of Goods Act* (Ontario) which, among other things, provide for implied warranties of merchantability, fitness for purpose, and conformity of the goods to samples. Ontario also has legislation applicable to the sale of goods to consumers which is generally governed by the *Consumer Protection Act* (Ontario)

As a general matter, the parties to an agreement can select the governing law and forum for disputes. Ontario has enacted an international commercial arbitration law and as a result foreign arbitral awards are generally enforceable in Ontario provided that certain procedural safeguards have been provided to the parties to the arbitration. In our experience, Ontario resident individuals and corporations seek to have international disputes resolved by arbitration rather than litigation given the difficulties in enforcing foreign judgements in the United States. Americans seeking to litigate disputes in Ontario should be aware that (i) Ontario courts generally award costs to successful litigants, generally in an amount equal to between 40% and 60% of their actual costs; and (ii) foreign plaintiffs may be required to post security for costs as a condition of prosecuting civil court proceedings. The security can be in the form of cash or a letter of credit and is posted with the court.

Americans seeking to retain sales representatives and/or distributors in Ontario should ensure that their agreements contain express termination provisions. Absent an express provision, Ontario courts will imply a term to the effect that the agreement can only be terminated upon the giving of reasonable notice. The length of notice is dependent upon whether the relationship is exclusive or

non-exclusive, the length of the relationship, the degree of economic dependence and other factors. In appropriate cases the notice period can be quite lengthy and extend for many months.

Non-compete provisions in Ontario are very difficult to enforce. The courts have consistently held non-compete provisions to be invalid where they are ambiguous in any manner or they will prevent the individual who has granted the non-compete covenant from exercising their profession or career. The more refined the skill set, experience and training of the individual the more precise and less limiting the non-compete provision must be including the term and the geographical zone. If any part of the non-compete provision is found to be ambiguous or unenforceable then the entire non-compete provision will fall. The courts are unwilling to rewrite non-compete provisions if they determine any part of the provision to be unfair. Generally, non-solicitation provisions are much more enforceable than non-competition provisions. Critical to the enforceability of non-competition and non-solicitation covenants is that they are properly drafted and prepared.

In Canada there are federal laws that are applicable to contract law in addition to provincial legislation. For example, if an item being distributed is something that falls under federal jurisdiction pursuant to the division of powers under the Canadian Constitution then relevant federal laws will have to be examined. For example, terms of an agreement that hinder competition or create unfair pricing are both governed under federal legislation such as the *Competition Act*.

Finally, because Ontario neighbours the province of Quebec, when selling or distributing products in Ontario it is important to take into consideration issues that might arise in virtue of a desire to eventually expand into Quebec (Quebec is a civil law jurisdiction) and in virtue of Quebec's language laws such as the obligation to have bilingual (French and English) instructions and packaging.

RESOURCES

Arthur Wishart Act

<http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Ontario&path=/on/laws/sta/2000c.3/20080821/whole.html>

Sales of Goods Act

<http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Ontario&path=/on/laws/sta/s-1/20080821/whole.html>

Consumer Protection Act

<http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Ontario&path=/on/laws/sta/2002c.30sch.a/20080821/whole.html>

Competition Bureau of Canada

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home>

International Sale of Goods Act

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90i10_e.htm

Ontario Ministry of Finance

<http://www.fin.gov.on.ca/english/index.html>

Ontario Ministry of Small Business and Consumer Affairs

http://www.sbe.gov.on.ca/ontcan/sbe/en/home_en.jsp

Ontario Ministry of Government Services

http://www.gov.on.ca/mgs/en/ConsProt/STEL02_045922.html

CanLII – Portal to Canadian Federal and Provincial Legislation

<http://www.canlii.org/en/index.php>