

Structure of Five Types of International Business Contracts

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Types of Business Contracts

- Distributorship
 - OEM
- Agency cf. sales representative
- License
 - Franchise
- Service Agreement
 - Development Agreement
- Sale and Purchase Agreement

Distributor Agreement-1

- **Supplier v. Distributor**
- Buying and then selling eg. reseller, cf. dealer, agency
- Exclusive/non-exclusive? → **If non-exclusive**, needed? No order, no duty to sell. “D-Kn is not a contract to sell but one not (for S) to sell in T” : Back of P.O. enuf. Cf. “authorized distributor”
- **If exclusive**,
 - Scope of exclusive products
 - Upgrade < improvement < next generation < replacement
 - “and Key Parts thereof”, “including OEM”
 - Supplier inside T: D cannot sue other sellers in T -> sue S –but S cannot prevent in advance → “knowingly”
 - Distributor outside T : need to keep other T’s in tact, “knowingly” again

Distributor Agreement-2

- If exclusive, S bears risk of losing a market, so S needs. . .
 - minimum purchase: If not fulfilled, non-exclusive or terminated?
 - territory)
 - Sales efforts: exclusivity/best efforts/commercially reasonable efforts/good faith)
 - Term of exclusivity: at will/term/length

Distributor Agreement-3

- ordering
 - No acceptance of order, no duty to sell. D's absolute power can kill Kn.
 - Offer & acceptance: "p.o.", "invoice", "offer sheet"
- sub-D allowed?: default is to allow (antitrust)
- S-D prices: (pre-determined/good faith change/formula/at-will) cf. D's reselling prices
- Publicity (other than TMs on products) → trademark mini-license → S needs complete control
- Software embedded? mini-license? (use, sell vs. copy)
- Warranty, DISCLAIMER
 - Quality warranty → repair/replace/reimburse; watch out! e.g. "reasonable efforts to repair" → indemnity?
 - PL warranty → Mfg(,Korea US), D (US) shifting PL(indemnification)
 - 3P IP Non-Infringement Warranty (indemnification) → needed?

OEM Agreement

- Similar to non-exclusive Distributorship
- - exclusive since Mfg makes a promise not to sell anywhere? No, no Min Purchase Q. Better to see it as non-exclusive D and add the following conditions.
 - Customer's duty to provide design and specs and manufacturer's duty of confidentiality and reservation on C's IP
 - Manufacturer의 order fulfillment
 - Once adjusted acc to Capacity forecasting과 demand forecasting, must accept
 - Manufacturer's IP and know-how needs be protected (This is NOT a joint development)
 - Control on use of customer's TM

Agency Agreement-1

- Delegate sales: Parties to agency Kn are Principal and Agent
- Main Kn and Agency Kn
- If exclusive → Same as Distributorship (scope of ex products, P in T, A outside T, minimum quantity, T, efforts level, period); If non-exclusive → still needed.

Agency Agreement-2

- Allow Subagent(dealer)? : default No
- Scope of delegation: prices and other terms(Principal's consent required?)
- Who signs main Kn: Principal? agent?
- Who collects \$: principal? agent?
- Commissions:
 - (1) commission rate;
 - (2) commission applicable to what deals:
 - introduced? negotiated? Contract signed? collected? → If first 3, then Dormant Account problem → retroactive to how long after Kn termination
 - (3) Collector's duty: reporting (how often) /record-keeping (how long) /audit (how often);
 - (4) gross receipts or net receipts)?
 - Which layer of revenues, VAT? discount/reimburse/return?

Agency Agreement-3

- Who is responsible for non-collection: usually principal
→ can change by Kn
- warranty, DISCLAIMER
 - P's warranty:
 - Quality warranty → repair/replace/reimburse, which one?
e.g. "reasonable efforts to repair"
 - PL warranty → Mfg(Korea, US), D (US) shifting
PL(indemnification)
 - 3P IP Non-Infringement Warranty (indemnification) →
needed??
 - A's warranty:
 - indemnification for false advertising
 - PL warranty for failure to give proper warnings

License Agreement-1

- A contract allowing the use of intellectual properties such as copyright, patent, trademark, trade secret, “know-how” cf. franchise
- Licensors and Licensees
- Scope of License = what IP? + How to use IP
- NDA? – a license on trade secret b/c disclosure of secret = license
- Do we even need a license?
 - Patent : registered where u want to use?
 - Copyright : still effective where u want to use (Berne convention)?
Expression? Fair use?
 - Trademark: registered where u want to use? Using “as a mark of source” cf. unfair competition law
 - Trade secret: reverse-engineerable? Legally acquired? Cf. knowingly
 - Generally: Only “exercising IP” requires a license. Using the products of such exercise do not require a license

License Agreement-2

- If exclusive → Same as Distributorship
 - Exclusivity on what rights?
 - Scope of exclusivity
 - Lr in T
 - Le outside T
 - minimum quantity → minimum guarantee
 - T
 - efforts level
 - period

License Agreement-3

- Scope of license – “all rights”, “the entire copyright”, “complete IP” – incl. rt to create derivatives?
- Internet domain name – often more important than off-line trademarks
- Royalty = license fee (double taxn preventn trty)
- Avoid withholding thru (1) “service Kn” (2) Hungary (3) “gross-up”
- Minimum guarantee, definition?
- Running royalty: (1) reporting/record-keeping/audit; (2) gross receipts or net profits)
→ which level of revenues? VAT? Rtrn/rmbrsmnt?

License Agreement-4

- Sublicense allowed: none under default
- Who should police piracy? Licensor or Licensee?
- Warranty (IP warranty + maybe Quality warranty not needed) and Indemnification
- PL warranty unnecessary, why?

Franchise Agreement -1

- Main purpose: trademark license PLUS related IPs (copyright, trade scrt)i.e. “TM License PLUS”
- Franchisor - Franchisee
- Trademark use → need to protect Fr’s good will → detailed control on goods and services : often up to Fr’s discretion
- Exclusive/non-exclusive – Same as Distributorship
- Meaning of Exclusivity: Same as Distributorship

Franchise Agreement -2

- Allow Subfranchise? : none under default
- Fr's support duties → training and consulting (travel expenses upon rqst, Frchee)
- Royalty: Same as License
- In Korea: Franchising Law → need to publicly notice franchising conditions

Service Agreement

- Scope of service Cf. master service agreement and work order
- Standard of evaluating services : industry standard/discretion (most controversial)
- Deadline
- service fee: time-wise/work-wise
- Expenses for tools and materials
- Co-service: division of labor needs be clear
- If developing IP → Development Agreement: who owns the products? cf. “work for hire” provision
- Underlying IP: Even if “own 100% of results” → separate royalty needed
- Quality warranty, no PL warranty
- Development Agreement → IP warranty and Indmnftn

Miscellaneous

- Letter of Intent(LOI), Memorandum of Understanding(MOU), Heads of Agreement (HOA), Deal Memo
 - Substantive terms → usually in Attachment
 - Title not important : Important is non-binding language that dilutes substantive terms down to provisional force or into “good faith” negotiation.
 - Exclusive negotiation, NDA → binding
- Non-disclosure Agreement(NDA)
- End User License Agreement: direct b/w consumer and Mfg sidestepping Dstrbtr. Not needed for end user but Mfg requests to limit user’s rights. Click-wrap, shrink-wrap 등.

Boiler Plate-1

- General mutual indemnity: Usually dispensable
- Limitation of liability
- Entire agreement: prior oral exchanges prevailed by written terms in Kn
- personal guaranty
- Relationship to Parties: Independent Contractor
- Language: There is only ONE Kn! (“Equally effective”)
- Assignment: Usually “no assignment” clause. Default: assignment okay Cf. “adverse change” e.g. exclusive distributor bought by S’s competitor
- Amendment: usually allows written only
- Attorneys Fee: Loser-pay. Default: pay own fees. Probably strongest Kn-keeper.

Boilerplate-2

- Governing law: Kn law similar all over. Also, no Kn law discriminates foreigners. More important is the Party's role w/in Kn. Eg. U.S. law more favorable to rights-holders.
- Forum (which court): expense most important. Home game → lawsuit X 2 ; Away game → “political cost” of winning on merit
- Arbitration: Internationally enforceable <<requirement>> Arb org/Place of Arb
- Arb also good b/c 3rd country venue possible, no appeal, secrecy