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CONTRACTING WITH A FOREIGN PRINCIPAL©

By Randall J. Gillary

It is quite common in my law practice of representing manufacturers' representatives for my clients to have sales representation relationships with principals in foreign countries. Historically in Michigan, this has ordinarily meant manufacturers located in Canada or Europe. Typically, these foreign principals have been automotive suppliers. Recently, with globalization in the automotive industry, more companies in the Far East and, in particular, those located in China and India, are becoming bigger players. Often I am asked about some of the pitfalls of having a sales representation agreement with a foreign principal. Some of the typical questions are:

1. Do I need a foreign lawyer?
2. Do I have to go to court in another country to enforce my claim if I don't get paid?
3. How can I collect a judgment from a foreign principal if I win in Court in my home state?

These are all good questions and, before you finish reading this article, I will answer all of them. Let's start at the beginning, with negotiating your sales representation agreement and the key provisions which should be included.

Be sure that there is a clear understanding regarding currency and exchange rates as they relate to the manner in which sales commissions will be calculated and paid.

You may think that this is obvious, but do not overlook this point. You do not want to have to be dealing with exchange rates and getting nicked coming and going. Fortunately, if you are selling to a U.S. customer, the sales price will be most probably in U.S. dollars, and your commission payment will likely also be calculated and paid in U.S. dollars. This should be clearly defined in your sales representation agreement. If you are representing a Canadian principal who collects the sales price in Canadian dollars, be sure that you are in agreement with the methodology for determining how the exchange rate will be established.

Be sure the contract specifies that the law of your own state will apply.

Occasionally I have seen proposed contracts which specify that the law of a European country where the principal is located would apply. In one instance, for one of my Michigan

clients, the principal was located in one European country and the principal wanted to “compromise” and have the law of a different European country apply, with arbitration taking place in that third country. Their argument was that each party would be equally inconvenienced. Frankly, this was ridiculous, because now both parties had to go to a foreign jurisdiction to resolve any disputes. This would increase the cost to both parties and would be the worst of both worlds.

You should insist on having the law of your own state apply. Chances are that this is where the customers are going to be located and your principal will likely have occasion to come to your state anyway. Your principal is also generally in a better position to hire an attorney in your state than you are to hire an attorney in the foreign country where your principal is located. In many cases, your principal will already have a relationship with an attorney or law firm in your state.

You do not want to have to pay an attorney to issue a legal opinion regarding the impact that foreign laws will have on your rights and obligations pursuant to your sales representation agreement. Furthermore, if your state has a sales commission act protecting the right of sales representatives to be paid commissions in a timely manner, specifying that the laws of your home state will apply should make it easier for you to utilize this home state protection. Most states currently have laws on the books protecting the rights of sales representatives to be paid their commissions. You should assume that the foreign jurisdiction will have no such sales commission protection.

Be sure the contract specifies that any legal disputes will be resolved in your state.

You do not want to have to hire a lawyer in a foreign jurisdiction or to go there for the duration of a trial or arbitration in the event that you have to litigate or arbitrate a claim for commissions. In many cases, the costs will outweigh the benefit of pursuing the claim. Don’t think that this factor is overlooked by your principals. You will need to have a very large commission claim in order to justify litigating or arbitrating the claim in another country. It’s likely that you may end up not pursuing your claim for commissions because of the significant up-front costs.

If your sales representation agreement specifies that the law of your state will apply and that any dispute resolution process (litigation, arbitration, mediation) will also take place in your state, an attorney from your state experienced in sales representation law should be able to represent you in completing the sales representation agreement. The Manufacturers’ Agents National Association has suggested guidelines for sales representation agreements. I would also refer you to my book, *Protecting Your Commissions—A Sales Representative’s Guide*¹ for additional information on typical terms and conditions which you should consider including in your sales representation agreement.

Be sure that the purchase orders are issued in the name of your principal.

This is an important consideration. If the foreign principal has an American subsidiary, you should be sure that both companies are signatories to your sales representation agreement. Additionally, be sure that both companies have the contractual obligation to pay the commissions. You do not want to be in the position where

¹ R.J. Law Publishing LLC. This book is available on Amazon.com, on my website www.gillarylaw.com, or by calling my office at (800) 801-0015.

the company which receives the sales dollars is not the same company which has the obligation to pay your commissions. For this reason, always try to make sure that the purchase orders are issued in the name of the principal who has the contractual obligation pay your commissions pursuant to your sales representation agreement. Otherwise, you may have difficulty enforcing the commission payment obligation.

How can I collect my commissions from a principal located in a foreign country?

As long as your principal sells products to customers located in the United States and, hopefully, in your home state, you should be able to collect your commission money. This is one reason why you should be sure that the purchase orders are issued in the name of your principal and not in the name of some affiliated entity without a contractual obligation to pay you. If you receive a judgment against your principal after a trial or an arbitration, then your attorney should be able to file a garnishment against the customer and attach the funds owed to your principal. This definitely sends a wake-up call to your principal.

A few years ago, I had the occasion to file a garnishment against an automotive customer for a good client of mine who owns a sales representation agency which specializes in engineering intensive screw machine products and applications. We filed suit against the U.S. subsidiary as well as the parent company in Europe. The U.S. company was just a shell sales organization with no assets. Purchase orders were issued in the name of the European parent.

Due to the failure of the principal to take our case seriously, the parent company defaulted, and we obtained a default judgment for the full amount of the commissions due of \$154,291, plus future commissions of \$95,340 and penalty damages of \$100,000 under the Michigan Sales Representative Commission Act. The total judgment, including interest and attorney fees, was \$384,666. The parent company apparently kept their head in the sand until we filed a garnishment against one of their customers, an automotive supplier that happened to be located a few miles from my office. The customer owed more to the principal than the amount of the judgment.

Because of the garnishment, the customer was required to pay the full amount of the judgment into court, and my client was thereafter paid in full. Obviously, my client was quite pleased.

Answers to questions posed at the beginning of article.

1. Do I need a foreign lawyer?

Answer: Not as long as you follow the suggestions in this article.

2. Do I have to go to court in another country to enforce my claim if I don't get paid?

Answer: See answer to #1.

3. How can I collect a judgment from a foreign principal if I win in court?

Answer: Obtain a judgment and file a garnishment against the customer.

Conclusion

Although there are obviously some unique problems which need to be addressed and dealt with in representing foreign principals, your primary concern will generally be the same as when representing domestic principals. First, you should focus upon having a good sales representation agreement which ensures that you get paid for what you do. Second, you should then go to work and get as much business for your principal as you can. If you ensure that the topics addressed in this article are adequately covered in your sales representation agreement with your foreign principal, your commissions should be protected.

Caveat

To paraphrase a portion of the Prologue to my book *Protecting Your Commissions—A Sales Representative's Guide*, you should remember that “you get what you pay for.” You should have a relationship with an attorney who understands your business and sales commission law. I would not recommend that you rely on articles written by attorneys as a substitute for legal advice tailored to your specific situation. Consult with your attorney in the planning stages of your sales representation agreement. If you wait until you have a problem, it may be too late.

About the Author

Randall J. Gillary is recognized as a top legal expert on sales commissions. He has handled landmark sales commission cases and is an active litigator, counselor, legal writer, and lecturer. His law practice is devoted to insuring that sales professionals are paid the commissions they have earned. He is also the author of *Protecting Your Commissions—A Sales Representative's Guide*. To contact Mr. Gillary or to order a copy of his book, you may visit his website at www.gillarylaw.com, call 1-800-801-0015, go to Amazon.com, or contact him at The Law Offices of Randall J. Gillary, P.C., 201 W. Big Beaver Road, Ste. 1020, Troy, MI 48084.