



the in-house bar association SM

Material Type: Article

Title: Outline of Legal Specifications in the Design of International Strategic Alliances

Source: Stephen J. Petras, Jr.; Baker & Hostetler LLP

Outline of Legal Specifications in the Design of International Strategic Alliances

As presented to the ACCA Northeast Ohio Chapter, June 17, 1999

Reprinted with permission.

I. *FRAME ISSUES*

- A. Structure
- B. Operations
- C. Tax

II. *FRAME RELATIONSHIPS*

A. Direct Sales

1. Structure

- a. Response to Purchase Order or Inquiry
- b. Generally No Permanent Establishment

2. Operations

a. Terms of Sale

- i. Delivery
- ii. Freight
- iii. Packaging
- iv. Customs and Charges
- v. Title Transfer

b. Payment Terms

- i. Cash or Credit
- ii. Letter of Credit
- iii. Collection Procedures
- iv. Acceptance
- v. Warranty

- A. Express
- B. Implied

c. Risks

- i. Non-payment
- ii. Damage to Goods
- iii. Product Liability

3. Tax

- a. Domestic v. Foreign Source Income
- b. Use of Foreign Sales Corporation

B. Representative / Agent

1. Structure

- a. Longer Term Contractual Relationship
 - 1. Paid a Commission to Develop Direct Sales
 - 2. Commitment to Support
 - A. Materials
 - B. Technical and/or Marketing Assistance
- b. Employment v. Independent Contractor
- c. Access to Confidential and Proprietary Information
 - i. Customers List and Data
 - ii. Trademark or Trade Name Usage
 - iii. Technical Information
- d. Potential Permanent Establishment

2. Operations

- a. Title Not Transferred to Agent/Representative
- b. Agent Does Not Bear Risk of Non-payment
- c. Agent Does Not Take Possession
- d. Authority to Bind
 - i. Express
 - ii. Implied
- e. Risks
 - i. Non-Payment
 - ii. Damage to Goods
 - iii. Product Liability
 - A. General
 - B. Unauthorized Representations
 - iv. Foreign Employment
 - v. Restrictions on Termination
 - A. Foreign Law Protection
 - 1. Just Cause
 - 2. Notice Period
 - B. Indemnity Payments

3. Tax

- a. Domestic v. Foreign Source Income
- b. Use of Foreign Sales Corporation

C. Distributor

1. Structure

- a. Longer Term Contractual Relationship
 - i. Supply and Stock
 - ii. Commitment to Support
 - A. Materials
 - B. Technical and/or Marketing Assistance

B. Technical and/or Marketing Assistance

- b. Independent Contractor
- c. Access to Confidential and Proprietary Information
 - i. Trademark or Trade Name Usage
 - ii. Technical Information
 - iii. Control of Local Customers List and Data
- d. Potential Permanent Establishment

2. Operations

- a. Buys at Wholesale and Resells at Mark-up
- b. Title Transfers
- c. Stocks the Goods
- d. Bears Risk of Non-payment from Customer
- e. Authority to Bind
 - i. Generally None as to Sales
 - ii. Implied as to Warranties
- f. Risks
 - i. Non-payment from Distributor
 - ii. Damage to Goods
 - iii. Product Liability
 - A. General
 - B. Unauthorized Representations
 - iv. Uncontrolled Pricing
 - v. Intra-Network Competition

3. Tax

- a. Domestic v. Foreign Source Income
- b. Use of Foreign Sales Corporation

D. Direct Sales Office

1. Structure

- a. Permanent Establishment in Foreign Country
 - i. Branch
 - ii. Subsidiary Corporation
 - iii. Subsidiary Limited Liability Entity
- b. Ownership and Control
 - i. Local Restrictions
 - ii. Local Incentives
 - iii. Local Reporting
- c. Confidential and Proprietary Information
 - i. Control of Customer List and Data
 - ii. Trademarks and Trade Names
 - iii. Technical Items
 - A. Local Protections
 - B. Mandatory Local Disclosures
 - C. Compulsory Licensing

2. Operations

- a. Promote Sales and Service

- b. Stock Goods
- c. Employees
 - i. Immigration Restrictions
 - ii. Local Employment Requirements
 - iii. Communications
- d. Risks
 - i. Local Labor Laws
 - ii. Workers' Compensation
 - iii. Medical Benefits
 - iv. Property Rights and Ownership
 - v. Damage to Goods
 - vi. Product Liability
 - vii. Business Interruption
 - viii. Restrictive Repatriation

3. Tax

- a. Subject to Foreign Taxation
 - i. Income
 - ii. Employment
 - iii. Property
 - iv. Sales / Value Added
 - v. Others
- b. Subject to U.S. Income Taxation
 - i. Attempts to Equalize Effect of Branch v. Subsidiary
 - ii. IRS may Reallocate Income, Deductions, Credits or Allowances
 - iii. Domestic v. Foreign Source Income
 - A. Limitations on Foreign Tax Credits
 - B. Baskets
- c. International Tax Planning
 - i. Tax Treaty Analysis
 - A. Avoidance of Double Taxation
 - B. Reduce or Eliminate Withholding Tax
 - ii. Use of Intermediary Company
 - A. Favorable Treaty Relationships
 - B. Favorable Rates

E. Joint Venture

1. Structure

- a. Joining of Two to Create a Third Business
- b. Entity Selection Options
 - i. U.S. Corporation
 - ii. U.S. Partnership
 - iii. U.S. Limited Liability Company
 - iv. Foreign Corporation
 - v. Foreign Partnership
 - vi. Foreign Limited Liability Entity
- c. Entity Selection Issues
 - i. Control
 - ii. Foreign Presence

- ii. Foreign Presence
- iii. Taxation

d. Permanent Business Establishment

2. Operations

- a. Manufacturing and/or Selling
- b. User of Technology
 - i. Licensing
 - ii. Development
- c. Issue of Control
- d. Assets Contribution and Ownership
- e. Risks
 - i. Local Labor Laws
 - ii. Workers' Compensation
 - iii. Medical Benefits
 - iv. Property Rights and Ownership
 - v. Damage to Goods
 - vi. Product Liability
 - vii. Business Interruption
 - viii. Restrictive Repatriation

3. Tax

- a. Subject to Foreign Taxation
 - i. Income
 - ii. Employment
 - iii. Property
 - iv. Sales / Value Added
 - v. Others
 - b. Subject to U.S. Income Taxation
 - i. Entity Selection Determinative
 - ii. IRS may Reallocate Income, Deductions, Credits or Allowances
 - iii. Domestic v. Foreign Source Income
 - A. Limitations on Foreign Tax Credits
 - 1. The Lesser of:
 - a. US Tax on World-Wide Income <--> Foreign Source Income/World-Wide Taxable Income
 - b. Actual Foreign Income Taxes Paid
 - B. Baskets
- c. International Tax Planning
 - i. Tax Treaty Analysis
 - A. Avoidance of Double Taxation
 - B. Reduce or Eliminate Withholding Tax
 - ii. Use of Intermediary Company
 - A. Favorable Treaty Relationships
 - B. Favorable Rates
- d. Very General Guidelines

d. Very General Guidelines

- i. Entity Recognized as Partnership for U.S. Income Tax Purposes Allows Flow Through of Profits and Losses
- ii. Structure Foreign Source Income to Offset Effect of Foreign Income Taxes
- iii. Beware of Potential to Recognize Built In Gain upon Contribution of Assets
- iv. Beware of Penalty Provisions of
 - A. Personal Holding Company
 - B. Accumulated Earnings If Foreign Investment Company
 - C. Foreign Personal Holding Company
- v. Beware of Controlled Foreign Corporation Subpart F Income being Currently Taxed
- vi. Beware of Sale of Interest in Controlled Foreign Corporation Generating Dividend Income
- vii. Beware of Superroyalty on Contribution of Intangible Property

III. U.S. Laws

A. Export Administration Act

1. Export License
 - a. General
 - b. Validated
2. Restricted Commodity
3. Prohibited Destination
4. Application to Technology
 - a. Equipment
 - b. Personnel
5. Prohibited Trans-shipment
6. Civil and Criminal Penalties

B. Foreign Corrupt Practices Act

1. Anti-bribery
2. Having a Reason to Know Circumstance Exists that Bribe is Substantially Certain to Occur
3. Facilitating Payments
4. Civil and Criminal Penalties

C. Anti-Boycott Provisions of EEA

1. Illegal Boycotts Prohibited
2. Discrimination Prohibited
3. Civil and Criminal Penalties

D. Anti-Trust

IV. Foreign Investment Risks

A. Political

1. Expropriation
2. Nationalization
3. Confiscation
4. Contract Repudiation

B. Currency Inconvertibility

B. Currency Inconvertibility

1. No Exchange into Dollars
2. Discriminatory Exchange Rates

C. Political Violence

1. War
2. Revolution
3. Insurrection
4. Civil Strife

D. Politically Motivated Violence

1. Terrorism

E. Credit

F. Environmental

1. Compliance
2. Emission Standards
3. Waste
4. Clean-up

G. Foreign Laws

1. Contract Restrictions
 - a. Choice of Law
 - b. Dispute Resolution
 - c. Mandatory Severance
 - d. Control
2. Competition
3. Intellectual Property
 - a. First to File
 - b. Compulsory Licensing
 - c. Public Domain
 - d. Short Term Monopoly
 - e. Weak Protection Systems

H. Custom and Practice

1. Business Relations
2. Litigation

STEPHEN J. PETRAS, JR.
Baker & Hostetler LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485
Phone: (216) 861-7862
Telefax: (216) 696-0740
E-Mail: spetras@bakerlaw.com

[Back to Top](#)

American Corporate Counsel Association. 1025 Connecticut Ave, NW, Suite 200, Washington, DC 20036-5425. 202/293-4103. webmistress@acca.com. © [Copyright 1998](#) American Corporate Counsel Association. All rights reserved.