

Session 306

Cross-Border Partnerships: Promises and Pitfalls for In-house Counsel

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**BUSINESS INTELLIGENCE:
A NEW FORM OF “DUE DILIGENCE”
ON INTERNATIONAL BUSINESS PARTNERS**

By Ernest Brod

Virtually every article about the business and legal world of the final years of this century focuses on globalization. Companies around the world are looking beyond their domestic markets for opportunities across borders and across oceans to improve their returns on investment or simply to remain competitive. They may be U.S. companies looking at bargain basement prices for Asian firms, Western European companies searching for distribution relationships in Russia, or Latin American companies considering strategic alliances in Japan. What all these strategic decisions have in common is that they are all vital to the strategy – and therefore the business success – of the firm.

In a global economy, where privatization and deregulation are expanding the opportunities as well as sharply increasing the competitive pressures, doing nothing can often be fatal and taking the bold steps required is fraught with risks.

The pressures produced by this climate often find their way to the doorstep of in-house counsel in the form of “due diligence.” In the global context, it is often recognized that companies need to know more about their overseas business partners and about the competitive climate in which decisions are being made. But many firms are stuck in the traditional “due diligence” mode of little more than exchanging documents.

The consequences of operating without the full range of intelligence about local partners and the practical risks of doing business in a distant, culturally unfamiliar market are becoming clearer with each passing day.

Consider the following:

- The local operating partner chosen by a large telecommunications firm for its privatization project in Eastern Europe had been convicted of criminal fraud on four separate occasions in Germany. In two years of posing as an operational expert from the west, his past had never been uncovered.
- A U.K. professional services firm was considering a joint venture with an Asian entrepreneur whose companies had been involved in ventures with several other cross-border firms. Intelligence gathered from other past and present partners showed that ventures in which the Asian partner was allowed free rein worked well; those in which foreign partners insisted upon hands-on involvement did not work.
- The proposed local partnership team of a broadcast venture in Russia was closely connected to a particularly violent faction of Russian organized crime. As the investors pursued the partnership, one of the proposed participants was murdered and a second suffered a serious “accident.”
- A U.S. company bidding for corporate properties through a Latin American privatization was unaware that local government authorities were deciding to make available additional properties, which would tilt the process toward the specific interests of a competing bidder.

Lawyers and accountants correctly stress how difficult it is to conduct “due diligence” abroad, where potential business partners have a different approach to legalities, financial

niceties and the exchange of “private” information. Business development managers are understandably reluctant to put pressure on their potential new partners. To better understand the strengths, weaknesses and dangers of a given business engagement, company executives are often encouraged to travel abroad, “press the flesh” and make their own assessments.

While that step should certainly be taken, executives must remember that a personal assessment of business people from another culture may be of limited effectiveness.

When managers decide they need more business information than they can obtain from their own sales force, colleagues, normal advisors and contacts, they may be confused by the bewildering number of “consultants” available. There are experts on specific regions, countries, particular industries, geopolitical issues, business strategies and other specialized areas.

However, it is very difficult – and often critical – to know the connections, loyalties and motivations of one’s consultants. For example: In India, an American power company recently hired one such “advisor” to assist in finding an appropriate local partner and to aid in raising local capital. As a key qualification, the Indian consultant had touted his local connections, especially his direct family relationship to a senior government official. It was later found that this local consultant had no appropriate personal or business relationships and no experience in any related industry. All he had was a common, famous last name.

Corporate counsel must perform another of their difficult balancing acts. On the one hand, they must be the company’s vigilant monitors of relationships that may cross ethical or legal lines. On the other hand, they must not inappropriately interfere with the business negotiations and relationship building.

The New Business Intelligence

In a new approach to obtaining precise, practical intelligence about individuals, companies and markets around the world, companies are increasingly turning to global investigative firms that are well known for their work in most parts of the world and are able to leverage unusual local connections and intelligence gathering capabilities abroad.

In fact, intelligence is a new buzzword in international business, for a full range of business needs – everything from high-end assessment of major companies in worldwide corporate contests, to planning new trade in an unfamiliar market, to identifying partners for overseas ventures, to checking out the integrity of large numbers of vendors.

Of course, not all intelligence engagements produce such dramatic outcomes as have been described above. But if done properly, they all provide accurate, timely, carefully assessed intelligence to enable companies expanding into uncertain new environments to make more informed strategic and operating decisions.

For corporate counsel, while this intelligence can be extremely helpful, he or she must be assured that the means used to gather the intelligence will not themselves be illegal or potentially embarrassing.

Targets of Understanding for Business Intelligence

Based on the recent lessons of business intelligence in new markets, a certain minimum of understanding is required when companies are candidates for an acquisition, joint venture, strategic alliance, involvement with project finance or critical supplier or distributor relationship.

This intelligence includes the following:

- Is the company available?
- Is it over-leveraged, over-expanded or badly operated?
- Does it have significant contingent liabilities?
- What is its legal nature – public or private, single asset or complex business?
- What is the nature and extent of its operations?
- Is its management strong, well-connected, committed?
- What is the state of its technology; how committed has it been to research and development?
- Are they people of integrity?
- Do they have a track record as partners?

Intelligence-gathering skills can also be used to determine key information about one's competition. "Competitor intelligence" can, for example:

- Identify current competitors in a geographic and industry market;
- Assess their various operating, financial and management strengths and weaknesses;
- Evaluate the likelihood of a competitor's moves or strategies that will significantly impact one's company.

Focusing next on “customer intelligence,” similar skills can help companies understand how buying decisions are being made by current and prospective customers – and who in the company is making them. For example, an exporter of high-end capital goods learned that buying decisions were not being based on price and support but rather on broader political matters.

Still other relationships and techniques can reach political risk judgements and provide a blueprint to the rules of doing business in a given country.

Intelligence can also be critical to solve problems once companies have already moved into an overseas market without an accurate appraisal of their partner. For companies selling goods or services in foreign countries, investigative support is especially critical to identify and solve headaches related to:

- Distribution systems controlled by the partner;
- Distributions systems with kickbacks to customers;
- Distribution systems with equity ownership by customers and employees.

For example, a consumer goods manufacturer eager to attack the China market relied heavily on a local partner to build and activate its distribution network. The manufacturer later learned that the systems is rife with kickbacks and pay-offs and is loyal to the local partner.

It should not be surprising that investigative and intelligence services are often used to address possible corruption or mismanagement of one’s affiliates or business associates.

What is novel, however, is a growing reliance on intelligence services to plan, initiate a conduct marketing and business activities, especially in new geographic and industry markets.

Today’s wisdom: Gain as much as intelligence as possible about your future business environments and associates – tapping the best possible international expertise and proven

trustworthy sources. And do so before and during market entry – not after – to avoid falling victim to the many seen and unseen threats of unfamiliar waters.

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Issues in Global Supplier Relationships

Wayne Brody, Vice President & General Counsel, N.A.O.
Arrow Electronics, Inc.*

What are the goals and possible effects of such an agreement?

- **Standardization of relationship and terms** Each side will want to set the standard at what it views as “best practices”, which often are diametrically opposed. Not all practices “mix and match” very well (can you get Italian payment terms and Asian purchase prices?)

- **Leveraging the global scope of the relationship** – Penetrate new markets, bring appropriate available corporate resources to bear wherever necessary, solve problems caused by local enmities or shortfalls. The worldwide operations likely mean more to each other than any local relationship does individually, but, again, that leverage cuts both ways in terms of negotiating strength.

- **Elimination or reduction of currency risks.** Works better for the seller than the buyer. Single currency, centralized purchasing may also eliminate currency fluctuation profit opportunities and, ultimately , simply pass the risk further down the channel – to the party who is buying and holding inventory in dollars and selling it in escudos and yen.

- **Efficient service of global customers and markets** Probably the “holy grail”, making the global supplier a key part of the global customers’ supply chain management. But be forewarned, all customers want, in addition to premium service and uninterrupted supply, the world’s lowest price- Hong Kong prices to supply factories in Scotland or Sonora. And it is not simple to pay commissions to the field application engineer who won the design in Tokyo or Silicon Valley, while purchasing worked with the inside sales team in Tempe, on product shipped to a factory in Costa Rica.

- **Rationalization of global distribution channels** This can lead to both efficiency and economy of scale- creating a single (“virtual”) inventory to address needs such as local or regional shortages, spikes in demand leading to imbalance of supplies, interruptions in product flow, etc. Existing corporate information, logistics and finance systems, however, may not be sufficient to allow the buyer in Denver to adequately address market needs in Auckland.

Who are the contracting entities?

- **Parents, regional holding companies, national operating companies.** Choice among the various possible signatories has obvious implications for autonomy and control questions, piercing of veils, internal reporting and control structures, inter-corporate guarantees (which may impact negative covenants in lending agreements), etc. Attendance to the “formalities” of inter-company guarantees etc. may be driven by the nature of the relationship; e.g., is there any risk that one party would let another “hang out to dry” on the default or disappearance of a sub.

If the contract is driven from “above”, will key local entities and players see improvements in local relationships, and if not will they buy in? Though the overall relationship may improve, standardization may involve “give-backs” in market(s) where the relationship was strongest.

What is being replaced?

Does either corporate team have a good handle on existing contracts and practices around the world? Local “handshakes” and side letters may differ markedly from known contracts, and may play an important role in the economics of the relationship they impact.

The General Structure of our Solution (at the moment)

We have developed a standard form of worldwide distribution agreement which, in whole or in part, forms the basis of a number of large contracts. These contracts are divided into core and variable provisions.

Core provisions- aspects of the agreement that should be uniform throughout the world, typically because they define the structure/nature of the relationship or because they are typically viewed as strictly “legal.”

These include:

- pricing mechanisms
- order placement and cancellation
- stock returns and rotations
- warranties
- compliance with laws
- intellectual property representations and indemnification
- term, termination, events of default
- y2k compliance
- miscellaneous legal provisions (choice of laws, dispute resolution, confidentiality, integration, reformation, assignment, etc.)

Variable (and default) provisions – These frequently vary from region to region or even by specific countries within a region. The “core” agreement addresses each subject, usually incorporating the North American terms, and each is addressed on a series of “Territory Term Sheets”. If the pertinent term sheet does not include a specific provision, the “default” provision in the core agreement applies. Currently, most of our worldwide agreements incorporate separate term sheets for North America, South America, Northern Europe (including South Africa), Central Europe, Southern Europe and Asia/Pacific.

These variable provisions include:

- territories
- payment terms
- currency
- reporting mechanisms and requirements
- EDI requirements
- shipping and risk of loss provisions

Conclusion

Effective use of worldwide contracts requires an understanding of pre-existing relationships (contractual and otherwise) and the buy-in of local management (including a willingness to accept the results of “trade-offs”). They take time to prepare and negotiate, particularly if the input of local management is required.

Properly done, however, they appear to be an effective device for exporting (or importing) best practices and developing uniform and stable inter-corporate relations on a large scale, ultimately reducing issues of relationship management and fostering long-term, world-wide growth.

DISTRIBUTION AGREEMENT

Effective Date: September ____, 1999

Term: This Agreement shall continue in effect until terminated by Supplier or Distributor.

Supplier:

Distributor: Arrow Electronics, Inc.
25 Hub Drive
Melville, NY 11747

Products: All products generally offered for sale by Supplier as described in Supplier's current price list.

As of the Effective Date of this Agreement, Supplier appoints Distributor, and Distributor agrees to perform as, a non-exclusive authorized distributor of Products in the Territory, in accordance with the terms and conditions set forth in the following attachments:

- Agreement Provisions
- Territory Term Sheet(s)
- Supplier's Standard Warranties

Supplier:

Distributor:

By:

By:

Name:.....

Name:

Title:

Title:

AGREEMENT PROVISIONS

1. RESPONSIBILITIES OF DISTRIBUTOR

Distributor will use its reasonable best efforts to (i) promote the distribution of Products, (ii) provide timely delivery of Products to Distributor's customers, and (iii) participate in such training programs as may be offered by Supplier.

2. RESPONSIBILITIES OF SUPPLIER

Supplier will use its reasonable best efforts to (i) furnish Distributor with current price and product information via EDI (as hereinafter defined) and with a supply of such printed price lists, catalogues and sales literature as Supplier may prepare and such training and technical and sales support (including sales forecasting and planning assistance) as may be necessary to assist Distributor in effectively distributing Products, and (ii) ensure that the Products, as manufactured and sold to Distributor, fully comply with all applicable laws, standards, codes and regulations, are duly marked and labeled and are suitable for distribution.

3. REPORTS AND AUDITS

a. Distributor Reports If required by the applicable Territory Term Sheet, within fifteen days after the end of each month, Distributor will send to Supplier, in a mutually agreeable format, (i) a stock status report showing the month-end on-hand quantities of Products by device type and warehouse location and (ii) a point of sale report showing Product sales for the month by device type, selling location, customer name and address, and sale price, for the products and sales covered by the applicable Territory Term Sheet. No more than twice during any year, upon reasonable prior notice, Supplier may (i) conduct a physical inventory of Products in any stocking location (or, in automated facilities, observe cycle counts and related methodology) or (ii) audit such business records, located at Distributor's corporate headquarters, as pertain solely to the purchase of Products hereunder during any such year.

b. Supplier Reports Within fifteen business days after the end of each month, Supplier will send to Distributor, in a mutually agreeable format, a point of sale report

showing Product sales for the month by device type and by selling distributor, including direct sales made by Supplier. Within three business days after Distributor's request, Supplier will send to Distributor, in a mutually agreeable format, an open order status report listing all accepted orders that have not yet been shipped, and indicating the part number, quantity, order date, purchase order number and Acknowledged Shipment Date (as hereinafter defined) for each such order.

4. ORDERS; DELIVERY; RESCHEDULING; CANCELLATION

a. Orders Distributor will place written, telefaxed, telexed or electronically interchanged purchase orders (or do so verbally with written confirmation within thirty days), which will include the Products ordered, quantities requested, delivery dates, prices, and shipping instructions (when necessary). Supplier will acknowledge each order in writing, by telefax, by telex, or electronic interchange within ten business days of the receipt thereof and will confirm the requested shipment date or specify an alternative shipment date ("Acknowledged Shipment Date").

b. Shipping and Packing All shipments from the point at which the obligation to pay freight and the risk of loss pass from Supplier to Distributor will be made in accordance with Distributor's then current shipping instructions. If Supplier elects to ship otherwise than in keeping with Distributor's shipping instructions, it will do so at its own cost and bear all risk of loss until the shipment is received on Distributor's dock.

c. Rescheduling and Cancellation Distributor may, on at least fourteen days prior written notice, reschedule the Acknowledged Shipment Date of, or cancel, any order without cost or penalty.

d. Distributor's Acceptance Distributor's acceptance of an order will occur upon its receipt of the Products, unless Distributor notifies Supplier within thirty business days of such receipt that the Products are defective or do not conform to the

Supplier's applicable warranty, the terms of this Agreement, or Distributor's order.

e. Early Shipments Products delivered prior to their Acknowledged Shipment Date may be accepted or rejected by Distributor. If Supplier is notified of Distributor's intention to reject any such delivery, it will issue (or will be deemed to have issued) a Return Material Authorization within five days. The return will be made freight collect. If Distributor elects to accept any such delivery, payment terms on the related invoice will be based on the original Acknowledged Shipment Date.

5. PRICES The prices for Products will be as set forth in Supplier's Price List in effect as of the date of this Agreement, subject to change from such date forward upon at least thirty days prior written notice from Supplier to Distributor.

a. Price Increases Prior to the effective date of a price increase, Distributor may order Products, requesting delivery within ninety days, at the prior (i.e., lower) price. Products shipped under orders submitted by Distributor prior to the effective date of any price increase will be shipped and invoiced at the price in effect at the time of order placement.

b. Price Decreases In the event Supplier decreases the price of any Product, Distributor will receive a credit equal to the difference between the price paid for the Product by Distributor (less any prior credits taken by Distributor on such Product) and the new decreased price for the Product multiplied by the quantity of such Product in Distributor's inventory, or in transit to Distributor, on the effective date of the decrease. Price protection will also apply to all Products returned to Distributor by its customers within thirty days of the effective date. Distributor will submit to Supplier, within thirty days following the later of the effective date of such price decrease or the date Distributor actually receives notice thereof, a list of the Products upon which such credit is due. All Products shipped after the effective date of any price decrease will be shipped and invoiced at the price in effect at the time of shipment.

c. Supplier's Representation

Supplier represents and warrants that its practices and policies, including prices and discounts, comply with all applicable laws. Such prices and discounts will not be less favorable than those extended to other purchasers of similar quantities of Products from Supplier for resale or other distribution.

d. Terms Terms of payment are three percent 10th and 25th (prox) net 30, unless otherwise provided on the applicable Territory Term Sheet.

6. RETURN OF PRODUCT

a. Quarterly Rotation Once in each quarter, Distributor may return to Supplier, for credit, a quantity of Products the value of which will not exceed ten percent of the amount invoiced by Supplier to Distributor for all Products purchased by Distributor during the previous quarter. Credit issued for such returned Products will equal the price paid by Distributor for such Products, less any prior credits taken thereon. Such returns, which may be made from one or more stocking locations, will be shipped F.O.B. Supplier's domestic facility, freight prepaid. Distributor must obtain a return authorization from Supplier prior to shipment, and all Products returned must be in their original unopened packaging, or undamaged and in merchantable condition.

b. Initial Purchases Any and all Products ordered by Distributor within ninety days of the date of this Agreement or of the date of the addition of such Product to Supplier's price list may be returned for credit within twelve months of either of such dates, subject to all of the terms and conditions of paragraph (a) above, but will not be counted as a "stock rotation" for purposes of computing the amount of Products returnable under paragraph (a).

c. Scrap Allowance Distributor may utilize up to one half (by dollar value) of any rotation permitted under paragraph (a) above as a scrap allowance and will receive a credit from Supplier of the then current list price of Product identified by Distributor as "scrap." Scrapped Product will no longer be eligible for price protection, stock rotation or return upon termination of this Agreement.

7. PRODUCT CHANGES

a. Addition and Deletion of Products

Supplier may add or delete Products from its price list upon thirty days prior written notice to Distributor.

b. Obsolescence and Modification

Supplier reserves the right to discontinue the manufacture or sale of, or otherwise render or treat as obsolete, any or all of the Products (or to modify the design or manufacture of any Product so as to preclude or limit Distributor's sales of such Product) upon at least ninety days prior written notice to Distributor. Distributor may, in its discretion, within sixty days of its receipt of such notice, notify Supplier in writing of its intention to return any or all such Products which remain in its inventory for a credit equal to the net price paid by Distributor for such Products. The Products will be returned within sixty days of the date of Distributor's receipt of Supplier's return authorization. Supplier will pay all freight and shipping charges in connection with any such returns. Such returns will not be counted for computing the amount of Products returnable under paragraph 6(a).

c. Introduction of New Products

Supplier will give Distributor at least ninety days prior written notice of the introduction of any new Products that preclude or materially limit Distributor from selling any Products in its inventory and will work with Distributor to resell the affected inventory. If, despite such efforts, affected Product still remains in Distributor's inventory, Supplier will replace it with the new Products within one hundred twenty days of the official public announcement, or Supplier's first shipment, of such new Products, whichever occurs first. Such returns will not be counted for computing the amount of Products returnable under paragraph 6(a).

8. WARRANTY The Products will be covered by Supplier's standard warranty. The warranty period will begin with Distributor's shipment to its customer, and the warranty will extend directly to Distributor's customer as if it had purchased the Products directly from Supplier. Supplier will pay (or refund the amount of) all freight and shipping charges for any defective Products returned under its warranty.

9. COMPLIANCE WITH LAWS Despite anything to the contrary contained in Supplier's warranty or elsewhere in this Agreement, Supplier will indemnify Distributor against, and hold it harmless from, any cost, loss, damage or liability (including reasonable attorney's fees) arising from or related to Supplier's conduct or the failure, or alleged failure, of the Products, as manufactured and sold to Distributor, to fully comply with all applicable laws, standards, codes, specifications and regulations or to be suitable for resale or other distribution by Distributor as contemplated by this Agreement. All warranty and indemnification provisions of this Agreement will survive the termination hereof.

10. YEAR 2000 COMPLIANCE As used herein, "Year 2000 Compliance" means that Supplier represents and warrants that a Product accurately processes and stores date and time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other products or software, used in combination with such Product, properly exchanges date and time data with it.

With respect to all Products offered for sale by Supplier, Supplier represents and covenants that it has assessed each such Product for Year 2000 Compliance, and has classified each Product as Year 2000 Compliant, Year 2000 non-compliant, or containing no date logic. Supplier agrees to promptly provide the results of such classification to Distributor. Distributor may, but shall have no obligation to, offer Year 2000 non-compliant Products for sale to its customers, and any other warranty that would ordinarily apply to such Products will not be affected by their status as Year 2000 non-compliant. In addition, Distributor may, at its election, return any Year 2000 non-compliant Product to Supplier for credit at any time, separate from and in addition to any stock rotation or other return privilege available to Distributor hereunder. Further, before accepting any order from Distributor for any Product that is Year 2000 non-compliant, Supplier will advise Distributor of such Product's non-compliant status.

If Supplier develops or makes available to any customer any patch, fix or program capable of rendering any non-compliant Product compliant, Supplier will make the same available to Distributor's customers, at Supplier's expense and on terms no less favorable than those offered to Supplier's direct customers. In the case of Year 2000 non-compliant software Product, Supplier will provide Distributor's customers with a Year 2000 compliant upgrade, at Supplier's expense and on terms no less favorable than those offered to Supplier's direct customers.

Should Supplier fail to advise Distributor that a Product is Year 2000 non-compliant, or should Supplier erroneously classify a non-compliant Product as compliant or as containing no date logic, Supplier agrees to defend, indemnify and hold Distributor, its subsidiaries and affiliates and their respective directors, officers, employees and agents harmless from and against any and all resulting liabilities, damages, claims for damages, suits, proceedings, recoveries, judgments, executions, costs, losses, penalties, fines or expenses (including but not limited to litigation costs and expenses and reasonable attorneys' fees, including those incurred by any indemnified party in establishing its or his right to indemnification hereunder) brought by any third party.

11. INTELLECTUAL PROPERTY Supplier will indemnify, defend and otherwise hold harmless Distributor, its affiliates and its customers from all cost, loss, damage or liability arising from any proceeding or claim brought or asserted against Distributor, its affiliates or its customers, to the extent such proceeding or claim is based on an allegation that the Products, any part thereof, or their distribution or use infringe any patent, copyright, trademark, trade secret, right in a mask work, or any similar claim, if Distributor notifies Supplier of any such proceeding or claim promptly after it becomes known and provides all the assistance and cooperation to Supplier that is reasonably requested. Supplier will not be liable to Distributor under this paragraph to the extent that any claim is based on a use for which the Product or part was not designed, or an alteration of the Product by Distributor or at its direction which caused the infringement.

12. TERM AND TERMINATION

a. Term This Agreement is effective once signed by both parties and until terminated in accordance with the provisions of this paragraph. Either party may at any time terminate this Agreement without cause and for its convenience by giving ninety days prior written notice to the other. Supplier and Distributor represent that they have considered the making of expenditures in preparing to perform under this Agreement. In that regard, both parties acknowledge that neither party will in any way be liable to the other for any loss, expense or damage (including special, consequential, or incidental damages) by reason of any termination of this Agreement without cause, excepting only the then current value of equipment purchased or improvements made by either party and dedicated to the Products or services of such other party.

b. Events of Default Any of the following is a default under this Agreement:

i) the assignment of this Agreement by either party without the prior written consent of the other party;

ii) either party's failure to cure any breach of this Agreement within sixty days following written notice thereof from the other (or, if not curable within sixty days, if the cure is not commenced within that period and thereafter diligently completed); and,

iii) the assignment by either party of its business for the benefit of creditors, or the filing of a petition by either party under the Bankruptcy Code or any similar statute, or the filing of such a petition against either of them which is not discharged or stayed within sixty days, or the appointment of a receiver or similar officer to take charge of either party's property, or any other act indicative of bankruptcy or insolvency.

c. Remedies upon Default In the event of either party's default, the other party may terminate this Agreement for cause by written notice and/or avail itself of any remedy available at law or equity.

d. Return of Inventory In the event of any termination of this Agreement, Supplier will repurchase from Distributor any or all unsold Products designated by Distributor from its inventory at the price paid therefor by Distributor, less any prior credits taken by Distributor on such Products. If Distributor terminates this Agreement without cause, or Supplier terminates it with cause, the price will be reduced by a five percent handling charge and Distributor will pay all freight and shipping charges (which otherwise will be paid by Supplier). In the event of any termination, Supplier will, at Distributor's request, honor any Distributor purchase order then outstanding.

Supplier will be required to accept only those Products which are in their original unopened packaging or are undamaged and in merchantable condition. No termination of this Agreement will affect any obligation of either party to pay amounts due to the other hereunder.

13. DATA INTERCHANGE Supplier and Distributor agree to establish and maintain a facility for the electronic exchange of business information (hereinafter "electronics data interchange" or "EDI"). Each party has the capacity to handle electronically those exchanges and transactions contemplated by this Agreement or will reimburse, upon demand, the other for any incremental costs associated with the exchange of data other than by electronic means. All exchanges and transactions between the parties transmitted, received or acknowledged by electronic data interchange shall be governed by the terms and conditions of this agreement. The American National Standards Institute ("ANSI") business data interchange standards for the transmission of documents (including transaction sets, data dictionary and transmission controls), known as ANSI X12, shall be the standard utilized for the exchange of electronically formatted information between Supplier and Distributor. To facilitate communications between Supplier and Distributor a value added network ("VAN") will be used to forward EDI transmissions. Neither Supplier nor Distributor will change its VAN without the written consent of the other. Supplier and Distributor shall pay their respective costs of maintaining a VAN, including any minimum use charges. Connect time and similar session charges shall be paid

for by the party initiating each communication. Each party shall be responsible for those costs associated with sending communications to the other's electronic address.

14. MARKETING COMMUNICATION To assist Distributor in advertising and promoting the Products, Supplier will accrue into a cooperative marketing fund the percentage specified on the applicable Territory Term Sheet of the net sales dollars invoiced to Distributor each month, to be used by Distributor for promotional efforts approved by both Distributor and Supplier.

15. NOTICES Any written notice required by this Agreement that relates to the addition, deletion or modification of any Product or to a change in the price of any Product, must be delivered to Distributor via EDI such that Distributor can readily identify, through an automated process, to which Products any such change may apply. All other notices under this Agreement will be deemed given when delivered by hand or deposited in the United States mail as certified mail, postage prepaid, addressed to the president of either party at its then principal place of business and as specified on the applicable Territory Term Sheet.

16. TRADEMARKS This Agreement does not create, and neither party will have any right in, or to the use of, any mark, name, style or logo of the other party. Distributor is, however, hereby granted a nonexclusive right to use Supplier's marks, names or logos to identify itself as an authorized distributor of the Products and for advertising and promoting its services under this Agreement.

17. CONFIDENTIAL INFORMATION Each party will receive and maintain in confidence all proprietary information, trade secrets or other know-how belonging to the other (including but not limited to knowledge of manufacturing or technical processes, financial and systems data, and customer information) provided that any such information, secrets or know-how is expressly designated as being confidential, except and to the extent that disclosure is required by law, regulation or court order, or enters into the public domain through no fault of the party obligated to maintain such confidentiality. Without limiting the foregoing, all material and information made known to

Supplier by Distributor pursuant to paragraph 4 of this Agreement is hereby designated as confidential.

18. CREDITS In the event Distributor is entitled to a credit from Supplier which exceeds Distributor's obligation to Supplier at the time, Supplier will promptly pay the amount of such excess to Distributor.

19. AUTHORIZATION NOT UNREASONABLY WITHHELD Whenever any consent, action or authorization is required or requested of either party hereunder, it will not be unreasonably withheld or delayed. Any required return authorization will be granted (or deemed to have been granted) within thirty days from the day it is requested.

20. FORCE MAJEURE Neither party will bear any liability to the other for any failure or delay to the extent that it results from acts of God, labor difficulties, inability to obtain materials or any other cause beyond such party's reasonable control.

21. RELATIONSHIP OF PARTIES The parties are independent contractors, each in full control of its business. Under no circumstances will either party have the right or authority to act or make any commitment on behalf of or bind the other or represent the other as its agent in any way.

22. PUBLICITY This Agreement is confidential within the meaning of paragraph 17. Except as required by law, no press release or other like publicity regarding the relationship between Distributor and Supplier, this Agreement or its termination will be made without the other party's prior approval.

23. INTELLECTUAL PROPERTY RIGHTS Supplier warrants that it is the owner or licensee of all intellectual property provided to Distributor under this Agreement (whether or not included or embedded in any other Product), and has the authority to permit Distributor to use or resell or sublicense that property to third parties. Distributor will not resell or sublicense the intellectual property without the license agreement provided by Supplier for that purpose and will advise Supplier of any known breach of the terms thereof.

24. GENERAL

a. Entire Agreement This Agreement supersedes all prior communications or understandings between Distributor and Supplier and constitutes the entire agreement between the parties with respect to the matters covered herein. In the event of a conflict or inconsistency between the terms of this Agreement and those of any order, quotation, acknowledgment or other communication from one party to the other, the terms of this Agreement will be controlling.

b. Amendment This Agreement cannot be changed in any way except by a writing signed by the party against which the enforcement of the change is sought.

c. Governing Law This Agreement is made in, governed by, and will be construed solely in accordance with, the internal laws of the State of New York. Any action brought under or in connection with this Agreement must be instituted in the state or federal forum covering the defending party's principal place of business. In any such action, the prevailing party's reasonable legal fees will be paid by the other party.

d. Reformation In the event any provision of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will attach only to such provision and will not affect or render invalid or unenforceable any other provision of this Agreement. Any such provision may be reformed by a court of competent jurisdiction so as to render the same valid or enforceable while most nearly effectuating the intent of the parties.

e. Assignment Neither party has the right to assign this Agreement in whole or in part without the prior written consent of the other except to another corporation wholly-owned by or under common control with it. For purposes hereof, an assignment includes, without limitation, a merger, sale of assets or business, or other transfer of control by operation of law or otherwise.

TERRITORY TERM SHEET

to the
Distribution Agreement
Between

and

Company Name(s)

Primary Territory

Payment Terms

2% 10, 25; Net 30

Freight and Risk of Loss

FOB Distributor's Dock

Currency

Scrap Allowance

Supplier Address for Notices

Distributor Address for Notices

Required Reports

Electronic Data Interchange

ARROW ELECTRONICS, INC.

By: _____
Name:
Title:

By: _____
Name:
Title: