



103 Selling Your Products Abroad

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Joseph A. Lestyk
Vice President & General Counsel
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Thomas R. Wilcox, III
Adjunct Professor of International Law
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Faculty Biographies

Michel P. Cloes

Michel Cloes is the Paris-based European general counsel for Dana Corporation, a \$13 billion tier-one automotive parts supplier based in Toledo, OH.

Mr. Cloes has a wide range of legal experience in Europe, Asia, and the United States where he worked for approximately 10 years. Prior to joining Dana, he was European counsel for the Denver-based Gates Corporation. Prior to that, he was in private legal practice in Los Angeles where he also worked for EuroDisneyland Corporation.

Mr. Cloes is a member of the California Bar and the Los Angeles County Bar Associations. He is a former member of the Brussels Bar. He is the founding president of the Global Corporate Counsel Association - Europe, ACCA's European Chapter, and is a member of ACCA's Board of Directors. He is coauthor with Prof. Ralph Folsom of *European Union Business Law*.

Mr. Cloes holds a JD from the Faculty of Law at Liège State University, Belgium and an LLM from the University of San Diego School of Law.

James S. Godderz

James S. Godderz devotes his practice to representing and counseling a broad spectrum of companies to achieve their strategic business objectives in a timely and cost-effective manner. Specific expertise in complex corporate, commercial, and intellectual property transactions, labor and employment, and litigation matters, allows him to provide comprehensive and pragmatic advice that ultimately reduces the client's total legal costs.

Mr. Godderz served more than 12 years as division counsel and senior management team member with four publicly traded companies, including roles as chief counsel for a \$2 billion division of Motorola, Inc. and as chief labor and employment attorney for Occidental Chemical Corporation.

In addition to his career responsibilities, Mr. Godderz maintains an active schedule of professional and community activities. His ACCA experience includes serving as president of the Dallas-Fort Worth Chapter, chair of the Commercial Law Committee and Council of National Committees, and most recently as the 2002 programs chair for the International Legal Affairs Committee. He has served as a law school instructor, as a volunteer in urban public schools, and as a court appointed special advocate for abused and neglected children. Mr. Godderz enjoys providing *pro bono* legal services, coaching youth basketball, and lecturing on a variety of legal and business topics.

Mr. Godderz holds a BA from Rutgers College and a JD from Widener University School of Law. While in law school, he was articles editor and administrative board member of the *Law Review* and a member of the Moot Court Honor Society.

Mark F. Katz

Mark F. Katz is general counsel, international at E*Trade Group, Inc. in Menlo Park, CA, where he previously served as deputy general counsel.

Prior to joining E*Trade, Mr. Katz had been a senior partner for over 15 years at the Los Angeles law firm Kinsella, Boesch, Fujikawa & Towle and had worked with law firms in Singapore and New York. During his more than 30 years as a corporate and international business lawyer, he has had extensive experience in structuring and negotiating domestic and cross-border distribution, licensing, joint venture, and M&A agreements and has participated in transactions involving over 40 countries. He is fluent in French and conversant in German and Mandarin Chinese.

Mr. Katz is chair of ACCA's San Francisco Chapter's International Committee. In addition, he chaired the subcommittee on international sale of goods of the International Bar Association (IBA), and is currently vice chair of the IBA subcommittee on international sales contracts. He has also served on the board of advisors to the *Guide to the International Sale of Goods Convention*. In addition, he has acted as a mediator in more than 75 business-related cases.

A graduate of the Woodrow Wilson School of Public and International Affairs of Princeton University, Mr. Katz received his JD cum laude from the University of Michigan Law School.

Joseph A. Lestyk

Joseph A. Lestyk holds dual positions as vice president and general counsel of Ahlstrom USA Inc. and as senior international counsel of its parent company, Ahlstrom Corporation of Helsinki, Finland, a global leader in production of high performance, fiber-based materials serving niche markets worldwide. Mr. Lestyk is responsible for general legal matters for Ahlstrom, particularly for matters in the United States and in the Asia-Pacific Region. He has served as general counsel for various Ahlstrom subsidiaries in both the United States and in Singapore, where he spent over three years supervising Ahlstrom's legal affairs in the Asia-Pacific region. Mr. Lestyk has broad experience in mergers and acquisitions, project finance, corporate law, and negotiation of large engineering and construction contracts.

Prior to his assignment in Singapore, Mr. Lestyk was the chief counsel for Ahlstrom's power generation business, which they divested in 1995. Before joining Ahlstrom, he was the general counsel of General Atomics in San Diego in both the contracts and law departments for this high technology company.

Mr. Lestyk is a member of ACCA, and is vice chair of ACCA's International Affairs Committee. He is a member of the Executive Committee of the International Section of the State Bar of California. He also served for a number of years as a personnel commissioner for two school districts in the suburban San Diego area.

Mr. Lestyk attended the Massachusetts Institute of Technology and received a JD cum laude from the Thomas Jefferson School of Law in San Diego, where he was an adjunct assistant professor of law.

Thomas R. Wilcox, III

Thomas R. Wilcox III is the former corporate counsel for Siemens Medical Solutions Health Services Corporation in Malvern, PA. While at Siemens he was responsible for advising on, drafting, and negotiating a wide variety of domestic and international commercial contracts including software licenses, ecommerce agreements, vendor contracts, joint development, reseller arrangements and customer information technology systems, and services transactions. He also handled labor, employment, IP, and general corporate law matters.

Before Siemens, Mr. Wilcox served as a senior attorney and a labor and human resource director during a ten-year period with Mack Trucks, Inc. He also served concurrently as chief counsel and secretary for Mack Leasing System, Inc., a subsidiary of Mack Trucks, Inc. He has a broad background in general corporate and commercial law, with particular expertise in contracts, licensing, ecommerce, international, antitrust, commercial transactions, employment discrimination, labor, marketing and distribution, products liability defense, leasing, and environmental.

Mr. Wilcox teaches two courses at Villanova University Law School as an adjunct professor in international law. Before entering private practice, Mr. Wilcox served as a federal law clerk to the current Chief Judge Gregory Carman at the U.S. Court of International Trade in New York City, and taught international business law at Xian Jiaotang University in the People's Republic of China.

Mr. Wilcox received his BA from Gordon College, JD from Widener University School of Law, and MBA from Temple University School for Business & Management. He served as an editor on *Law Review* while at Widener University School of Law and earned his MBA in international business and human resource management.

AMERICAN CORPORATE COUNSEL ASSOCIATION ANNUAL MEETING
OCTOBER 21, 2002, WASHINGTON, D.C.

SESSION 103: SELLING YOUR PRODUCTS ABROAD

A CHECKLIST FOR INTERNATIONAL DISTRIBUTION AGREEMENTS

Prepared by Mark Katz, General Counsel, International, E*Trade Group, Inc (mark.katz@etrade.com), with the assistance of Joseph Lestyk, Vice President and General Counsel, Ahlstrom USA, Inc (joe.lestyk@ahlstrom.com), and Thomas Wilcox (TRWilcoxEsq@aol.com)

1. Geographic Territory

- a. What geographic territory is granted to distributor (and what restrictions are placed on its activities outside territory)?
 1. Is all or part of distributor's territory exclusive (subject to Articles 81 and 82 of the Treaty of Rome, in the case of the European Union and subject to the US anti-trust laws, in the case of the US market)?

2. Customers

- a. Which markets/customers are granted exclusively to distributor (retail/wholesale/residential/ commercial/on-line, etc)?
- b. Does manufacturer retain right to deal exclusively with certain international "house accounts"?
- c. Will distributor have right to appoint sub-distributors or dealers?

3. Products

- a. Which of manufacturer's existing line(s) are granted to distributor?
- b. Will distributor have rights to manufacturer's new products/ new product lines?
- c. Is manufacturer entitled to discontinue products/ product lines initially furnished to distributor?

1. If so, will there be notice requirements and limitations on manufacturer's ability to discontinue a product constituting more than a significant percentage of distributor's sales over past several years?
 2. If so, will distributor have right to manufacture that product itself or obtain competing product from other source (both very rarely granted)?
- d. Are there any restrictions on other competitive products distributor can sell within territory to identified classes of trade?
 - e. Will manufacturer produce products conceived by distributor for local market under certain circumstances ? (virtually never accepted as an obligation in initial agreement; but subject to individual negotiation for each individual product as situation arises post-contract, with IP rights to be agreed to).

4. Term

- a. How long is initial term?
- b. Are there any renewal rights?

5. Quotas

- a. Will there be quota for the initial 12-18 months?
- b. What will quotas be during term of agreement?
- c. Will these quotas be based on purchases or on sales by distributor?
- d. Will they be yearly quotas (the standard approach) or will initial or subsequent quotas be for shorter time periods (such as 6 months)?
- e. Will sales be deemed made for quota purposes when orders placed, delivered or paid for?

- f. Will there be a grace period if a quota is not met, for example, will distributor be given an additional year to cure a shortfall?
- g. If products covered by the agreement are discontinued by manufacturer, will the quotas be adjusted in some fashion?
- h. If manufacturer is obligated to furnish any new products which are added to a product line granted to the distributor, will quotas be increased to reflect these additional products?
- i. What are consequences of failure to meet quota (agreement terminates or becomes non-exclusive or liquidated damages are triggered, etc.)?

6. Price and Delivery

- a. Will manufacturer commit to hold the initial prices for a 12-18 month period?
- b. Will there be any restriction on the manufacturer's right to increase prices (generally there is none)?
 - 1. For example, will there be "most favored nation" clause, giving distributor right to most favorable price given to any other distributor in the world or in the broader geographic region which the territory is part of?
 - 2. Will manufacturer only be allowed to increase prices to reflect increased labor and material costs, plus a certain percentage?
- c. Manufacturer's prices are for delivery F.O.B at a specified point or on what other terms? Are duties and sales tax distributor's responsibility?
- d. Is there any minimum order, measured by containers or otherwise?
- e. Any volume discounts?

- f. Does manufacturer commit to deliver products by specific time period after acceptance of order (or to use its best efforts to do so)?

7. Business Plan, Marketing & Advertising

- a. Will distributor provide initial business/marketing plan?
- b. Will there be quarterly or annual updates?
- c. Will there be any cooperative advertising program or advertising allowances from manufacturer, based on volume or otherwise?
- d. Is manufacturer providing any other special incentives to maximize distributor's performance?
- e. Will the distributor have to incur any minimum quarterly or annual marketing expenses, including for trade show participation?
- f. Have the parties avoided any "inadvertent franchisee" problems under U.S. state or federal laws?
- g. Will distributor have access to and the right to use manufacturer's advertising materials; and will there be any advertising pre-clearance procedures for advertising developed by distributor?
- h. Under what trademarks and using what copyrights will products be sold and what rights to these will manufacturer have?
- i. Will distributor be entitled to co-brand products?

8. Warranties, Repairs and Indemnities

- a. Will manufacturer provide warranties and, if so, for what time period ?
- b. Will warranties be that products are free from defects in materials or workmanship or will they also cover fitness for intended purpose?

- c. Will there be non-infringement warranties for trade secrets and other IP or any other warranties?
- d. If repairs or other after sales service is normally required for products, who will perform these, who will pay for these and who will handle customer complaints (and at whose cost)?
- e. If there are any manufacturing defects or claimed defects in manufacturing, which party will bear the indemnity and defense costs and how will product returns be effected?
- f. Will one party provide products liability insurance on behalf of the other and, if so, in what amounts and on what other terms?

9. Options to Enlarge Scope of Agreement

- a. Will distributor have an option/right of first refusal to expand geographic territory/ product lines under certain circumstances, such as upon meeting or exceeding quotas?
- b. Will distributor have the right to manufacture certain of the products for the territory, after achieving certain sales volume, in exchange for a royalty payment? (Virtually never given in initial agreement).

10. Terms of Payment

- a. Cash in advance?
- b. Cash against documents?
- c. Irrevocable confirmed letters of credit?
- d. Combination of downpayment, plus some credit?
 - 1. Discount for payment of balance by fixed date?

2. Will any security interest/charge/ lien be granted to manufacturer to cover unpaid balance?

11. Termination

- a. What type of non-performance by one party will permit other to terminate (for example, a distributor's untimely payment, failure to achieve quotas, making sales beyond territory in violation of agreement or sale of competing products; a manufacturer's failure to deliver merchantable products, imperfections in title to its IP in violation of agreement; or insolvency or bankruptcy of either party)?
- b. Will manufacturer have the right to terminate upon a "change of control" and, if so, what will constitute such a change?
- c. When does notice of breach have to be given and what opportunities will there be for parties to cure?
- d. What will be disposition of any IP rights upon termination?
- e. Will any indemnities be payable to distributor upon any termination (or upon any wrongful termination)?
- f. Will there be any liquidated damage provisions?

12. Governing Law, Dispute Resolution and Attorneys Fees

- a. Which law will govern?
 1. Are there any mandatory local laws which will apply regardless of contractual choice of applicable law?
 2. Have parties excluded applicability of International Sale of Goods Convention or of any other laws that can be specifically waived?

- b. Will any dispute be subject to litigation and, if so, will there be any restrictions on where suit can be brought by either party?
- c. If disputes will be subject to arbitration, how many arbitrators will there be, who will choose them, where will arbitration occur, what language will be used and what rules will govern proceedings?
- d. Will the parties be required to attempt to mediate any dispute before going to court or arbitration and, if so, what will be requirements for mediation?
- e. How will attorneys fees and costs incurred in any litigation, arbitration or mediation proceedings be allocated between the parties?

13. Miscellaneous Provisions

- a. Other obligations of distributor (compliance with local laws, etc) and of manufacturer
- b. Confidentiality provisions for trade secrets or other confidential information
- c. Notices
- d. Any representations made by either party to induce execution of agreement
- e. Severability
- f. Force majeure

Mr. John Smith
VP, Sales
USA Electronics Company
Middletown, OH 12345
U.S.A.

Re: Product Purchase Agreement

Dear John:

The following items set forth the term sheet for the transaction contemplated between USA Electronics Company as Seller and Poland Communications as Buyer.

1. Product. Seller agrees to design, manufacture, and sell to Buyer, DVB-compliant broadband communications devices for Buyer's use and distribution of these products within Europe. Seller shall make available a minimum of \$500,000.00 USD for general marketing and advertising costs in support of the launch of the product in the region.
2. Term and Termination. Buyer shall have the right to terminate the agreement at any time if Seller commits a material breach of any term of the agreement.
3. Price. Buyer shall receive most favored nations status and the price for all products and services provided by Seller shall be the lowest charged to any customer anywhere in the world. All prices for goods and services shall be in Euros and fixed for the term of the agreement. Buyer will pay all undisputed invoices within ninety days following receipt of invoice.
4. Governing Law. The agreement and all arrangements involving the transactions contemplated between the parties shall be governed by and construed in accordance with the laws of Poland and both parties agree to submit themselves to the exclusive jurisdiction of courts located in Poland and agree that the determination of said courts shall be final and binding upon both parties.
5. Warranties. Seller warrants that all products and services shall be in conformance with the specifications and description of each, shall be of merchantable quality and performed in accordance with the highest industry standards. Seller shall repair, replace, or reperform any part of the goods or services that fail to achieve these standards at its sole cost and expense for a period of seven years after initial deployment of the products.

6. Definitive Agreements. The parties shall meet at Buyer's offices in Poland to negotiate and finalize definitive agreements and documents setting forth all terms and conditions of the points set forth above and shall complete the definitive documents within two weeks following the date of this term sheet. Seller's failure to complete the definitive agreements within this time frame shall result in a cost reduction of five percent per week until the definitive agreements are signed by both parties.

Very truly yours,

Ivan Putski
Director of Procurement

AGREED TO AND ACCEPTED HEREBY:

USA Electronics Company

By: _____

Printed Name: _____

Title: _____

Date: _____

By: _____

Selling Your Products Abroad

ACCA/GCCA
2002 Annual Meeting
October 21-23
Washington, DC

Jim Godderz
Tom Wilcox
Mark Katz
Joe Lestyk
Michel Cloes

Facts

- Seller (USA Electronics Company) receives LOI from Buyer (Poland Communications)
- Seller desperately wants to increase international presence
- Seller's President tells VP Sales and GC: "Close the deal ASAP"

Interactive Role Play

- Follow the business teams of Seller and Buyer through:
 - Internal strategy session
 - Initial meeting
 - Negotiation session
 - Debriefing
 - Wrap-up

Term Sheet

Mr. John Smith
VP, Sales
USA Electronics Company
Middletown, OH 12345 USA

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Very truly yours,
Ivan Putski
Director of Procurement

AGREED TO AND ACCEPTED HEREBY:
USA Electronics Company

By: _____ Printed Name: _____
Title: _____ Date: _____

Seller's Strategy Session

- Identify critical deal points
- Discuss "timing" of negotiation and respective "roles"
- VP asks about Polish law considerations
- GC responds with InternationalCounsel.org

Sample 'return' listing from InternationalCounsel.org

Andrzej W. Kawecki
Soltysinski Kawecki & Slezak
Ul. Konstruktorska 1A
02-673 Warszawa Poland
Phone: 42-8 39 12 21 93
Fax: 48 39 12 21 94

This is probably the best firm in Warsaw for handling general business matters for an American or Western European company, including setting up companies, and advice on general business and corporate law, as well as tax law. The lawyers in this office have very good English skills and are well acquainted with Western business methods and style.

Joseph A. Lestyk
Vice President & General Counsel
Ahlstrom USA, Inc.
139 E. Third Ave., Ste. 107
Escondido, CA 92025

Phone: 1 760 746 4287
Fax: 1 760 746 2894
Mobile: 1 760 497 1257

Tips for Going Abroad

- Learn about the country in advance - especially about its culture, people, geography and language.
- Learn how to say "thanks," "Good Morning," "Do you speak English?" in their language.
- Find out what they think is most offensive about Americans.
- Get a soft-sided suitcase with wheels.

(Tips for Going Abroad, cont.)

- Try to discern what your counterparty's objectives are likely to be. Put yourself in his place and try to figure out what you would want. Have empathy.
- Use ATMs for currency exchange -- best rates and ubiquitous.
- Get qualified local counsel (not necessarily an American firm) for any tricky legal questions or major investment. [Check for firms on InternationalCounsel.org, an ACCA/GCCA website.]

(Tips for Going Abroad, cont.)

- An around-the-world air ticket may be cheaper than a round trip, but there are limitations.
- Beware of tax laws, such as inadvertently creating a permanent establishment (e.g., an ex-pat living in country for more than 180 days). Good tax advice is often available from local offices of accounting firms (the few that are left).
- Don't buy a Rolex watch from some guy on the street.

(Tips for Going Abroad, cont.)

- Accounting firms also often provide good advice and free publications on doing business in countries where they have offices. They can be useful in assisting with the set-up of branch offices or local subsidiaries, and are usually cheaper than a law firm.
- Don't say: "That isn't how we do it in America."
- Try melatonin to help adjust to different time zones without jet lag. A natural supplement allows your body to acclimate more easily. Take for a week or so before traveling.

(Tips for Going Abroad, cont.)

- Don't go directly from the airport to a negotiating session! Don't underestimate the benefit of sleep.
- Scheduling some down time up front provides opportunity to see surroundings; ingratiate yourself with the other side.
- Business class travel can exacerbate your travel fatigue, so you don't arrive "spring time fresh."
- On the plane, relax, take off your shoes, put on the little "sockies" and drink plenty of water, especially if you are mixing it with the single malt.

A Final Tip for Going Abroad . . .

- Lastly, and perhaps most importantly, **know your counterparty.**
 - Some countries have a high reputation for corruption. Check them out on Transparency International's website.
 - If the country has a bad reputation, then you need to be more careful in your selection of agents and the people you do business with.
 - You can also have the US government help. Their website is: www.usatrade.gov

Buyer's Strategy Session

- Identify product requirements
- Critical timing issues for completion of deal and delivery of equipment
- Want to be a distributor of Seller's products throughout Europe

Initial Meeting

- Seller wants to “get the deal done”
- Buyer wants to socialize and “get to know” the business partner
 - Besides: nobody at the meeting has any authority anyway
- Lots of food and drink!
 - But no business discussions

The Negotiation

- Product ID and Development
- Distribution
- Pricing – MFN (“many fine notions”)
- Currency
- Payment/Credit Terms
- Warranties/Penalties
- Governing Law
- Dispute Resolution

Diversion - Definition

- Diversion - when a manufacturer sells goods to a customer for resale within a particular country, but the customer diverts the product sales to a different market. (generally the manufacturer's home market, but sometimes a third country in which the manufacturer already has an exclusive/other distribution arrangements.)
- "gray market" goods – the goods which were diverted.

Best Practices to Avoid Diversion

- 1. Include contract provision identifying specific territories.
- 2. Include contract provision regarding quotas for sales within the Territory.
- 3. Perform a thorough background check to confirm no prior history as a divortor.
- 4. Schedule a face-to-face meeting with potential customers and distributors.
- 5. Review business plan regarding distributor's ability to reach quotas in Territory.
- 6. Imprint a unique customer code on each batch of goods.
- 7. Avoid pricing that enable distributor to profitably resell in another region.

(EC-Compliant Version)

- 1A. Exclusive Distribution Arrangement; No Solicitation of Orders from Outside Territory.

During the term of this agreement, Manufacturer hereby grants to Distributor the exclusive right to distribute the Products to any customers situated within the Territory. Distributor will not, either directly or indirectly, advertise the Products to or otherwise solicit orders for the Products from customers located outside the Territory. In addition, Distributor will not, directly or indirectly, maintain distribution depots or branches outside the Territory with the intention of selling or delivering the Products to customers located outside the Territory.

Currency and Payment

16.1 Seller will quote all prices in U.S. Dollars which shall be exchanged into Euros at a rate fixed at the time of order based on the formula set forth in Article 16.2.

16.2 Immediately following the date of acceptance of the initial purchase order from Buyer, the U.S. dollar to Euro exchange rate shall be fixed for all Orders placed with Seller and received during the remainder of the calendar year, even though certain of these orders will not be Delivered until the following calendar year. Such exchange rate shall be based upon the conversion rate published in the New York version of *The Wall Street Journal* on that date; *provided, however, that:*

(Currency and Payment, cont.)

- (i) Buyer is in compliance with each of the forecasting and ordering obligations set forth in Sections 9 and 12;
- (ii) BUYER takes physical possession of the volumes of Products set forth in such firm Orders, except if such Products are unavailable at that time;
- (iii) The U.S. Dollar to Euro conversion rate, as published in the New York version of the *Wall Street Journal* does not vary by more than ten percent (10%) of the fixed rate as set forth above. In the event of a currency fluctuation of more than ten percent (10%) that continues for a period of thirty (30) consecutive days, the Parties will readjust the currency exchange conversion rate in accordance with the same methodology as set forth in this Article 16.2 for the remainder of the existing twelve (12) month period.

(Currency and Payment, cont.)

16.3 Upon the conclusion of the initial calendar year as described in Article 16.2, the price for Products will be revised and the U.S. Dollar to Euro conversion ratio shall be re-established and will be based upon the conversion rate published in the New York version of *The Wall Street Journal* on the first business day of the subsequent calendar year.

16.4 Payment will be due and payable by BUYER within one hundred eighty (180) days after Acceptance of the Products or after invoicing, whichever is the last to occur. In case of late payment, any outstanding amount will bear interest to be assessed automatically and without prior notice, at a monthly rate of one and one half percent (1.5%).

Meeting Competition

ARTICLE #+1 - COMPETITIVENESS

SELLER shall, throughout the term of this Agreement, use its best efforts to provide BUYER with Contract Products that are overall competitive with products of like kind and quality supplied to the _____ industry by suppliers assuming similar system responsibility. Such competitive comparison shall take into account relevant factors including but not limited to design, features, technology, performance, quality, reliability, service, delivery, ability to continue to incorporate advanced technology and price. If, in BUYER's reasonably exercised opinion such relevant factors, considered individually or in tandem with other factors, place MACK/RENAULT VI at a significant competitive disadvantage compared with the supply of similar Contract Products from other suppliers to other _____ industry competitors, then BUYER shall furnish SELLER with information, including but not limited to price disparity, showing reasonable evidence for any competitive gap, including any pricing gap. Thereafter, BUYER and SELLER shall discuss, in good faith, the competitive disadvantage situation and appropriate responses thereto. If the parties acknowledge an actual and reasonably significant competitive disadvantage and are unable to arrive at a mutually acceptable solution (provided SELLER shall not have less than 6 months to match the competition solely on a technological or manufacturing practice or process basis and not pricing basis), then BUYER shall have the right to delete from its purchasing commitment any or all of the Contract Products considered noncompetitive due to price or other factor (hereinafter "Non-competitive Products") and seek alternative sources for those Non-competitive Products, free from any binding obligations set forth herein. BUYER's seeking of or buying from alternative sources of Non-competitive Products under this Article #+1 shall not be considered a breach of this Agreement.

(Meeting Competition, cont.)

15.3 If, at any time during the term of this Agreement a significant technological change should occur which would, in BUYER's judgment, make a component similar to Contract Products purchased from another supplier more attractive or suitable to their needs, then BUYER may delete one or more of the Contract Products, components or Service Parts from this Agreement by giving written notice thereof to SELLER, effective six (6) months (or such shorter time as may be mutually agree upon by the parties) after date of that notice, BUYER will provide to SELLER, at its request, evidence of such significant technological change offered by another supplier which authorizes BUYER to invoke this Article.

(Meeting Competition, cont.)

EXAMPLE 2

ARTICLE # - PRICING

The initial prices for the Contract Products are listed below in the pricing chart, made a part of this Agreement. All prices are F.O.B., SELLER'S plant in Rockville, Maryland. Title to the Contract Products and risk of loss shall transfer to BUYER at the F.O.B. point.

These net prices shall remain firm for the first 12 months from the Effective Date of this Agreement. Thereafter, the net prices may be increased or decreased, effective the first day of the first month following the anniversary date of this Agreement. Prices do not include, and BUYER is responsible for, any sales, use, inventory, value added and like taxes, levies or charges, including property tax for the Contract Products in its possession but as to which title has not passed. In no case shall the prices to SELLER for Contract Products be higher than prices charged by SELLER to any other bona fide original equipment manufacturer for Contract Products of like grade and quality, provided such purchases are made under the same terms and conditions of sale, including quantity.

BUYER and SELLER shall annually review the increases or decreases in the cost of materials incorporated into the Contract Products. The parties may, as a result of that review, mutually agree to adjust the Net Prices then in effect. The Net Price adjustment, if any, shall be based solely upon justified actual costs of material, and shall be effective on each successive anniversary date of this Agreement. In no event, however, shall the total Net Price adjustment for all Contract Products exceed three percent (3%) for any year. In other words, the price of a particular Contract Product or Contract Products may be increased by more than 3%, but the total price increase for all Contract Products shall not exceed 3% on an annual basis.

Product and Software Warranties

18.1 Seller represents and warrants, that the Products, when installed in accordance with reasonable and usual industry standards and practice or in accordance with the Parties' agreed upon Specifications:

- (a) will function in accordance with and conform to the Specifications; and
- (b) shall be free from defects in materials and workmanship under normal use and service.

for thirty-six (36) months from date of Acceptance by BUYER (the "Warranty Period").

(Product and Software Warranties, cont.)

18.2 Seller's warranties shall not extend: (i) to any items subjected to accident, acts of God, misuse, neglect, alteration (other than alterations by Seller and excluding necessary authorized maintenance and repair), improper handling, improper installation, improper testing, unauthorized repair, connection to improper voltage supply or electrical surges caused by lightning, other than by Seller or while under the charge or in the control of Seller or by Seller authorized personnel or in accordance with Seller approved procedures or (ii) cosmetic problems or defects which result from normal wear and tear under ordinary use of the Products or media other than prior to Delivery as a consequence of improper packaging and labeling. Seller makes no warranty as to experimental or developmental equipment or equipment not manufactured by Seller other than with respect to equipment incorporated by Seller within one of their Products.

(Product and Software Warranties, cont.)

For the avoidance of doubt, all hardware and firmware included in the Products shall be considered to be comprised entirely of Seller's equipment and devices. As to equipment not manufactured by Seller, Seller shall assign all of Seller's rights in warranties provided by the manufactures of such equipment to the extent permitted under Seller's agreements with its suppliers. If any such warranty is not assignable by Seller to BUYER, Seller shall provide to BUYER the benefit of all of Seller's rights under such non-assignable warranties.

18.3 The warranties contained in this Agreement are in lieu of all other warranties, whether expressed or implied but not limited to any implied warranty of merchantability or fitness for a particular purpose and any other warranty obligation on the part of Seller.

Choice of Law

- Poland and US - Vienna Convention
- CISG will apply unless excluded
- Polish law allows:
 - Recovery of penalties
 - Exclusion of consequential damages, except for gross negligence or willful misconduct

(Choice of Law, cont.)

- Parties agree on Swedish law, without giving effect to its principles of conflicts of laws.
- Parties specifically exclude Convention for International Sale of Goods (CISG).

Governing Law

ARTICLE 30 - GOVERNING LAW AND ARBITRATION

The parties will attempt to settle any claim or controversy arising out of this Agreement through consultation and negotiation in good faith and a spirit of mutual cooperation. If those attempts fail, then the dispute will be mediated by a mutually-acceptable mediator to be chosen by the parties within forty-five (45) days after written notice by either to the other demanding mediation. No party may unreasonably withhold consent to the selection of a mediator, and the disputing parties will share the costs of the mediation equally. By mutual agreement, however, the parties may postpone mediation until some specified but limited discovery about the dispute has been completed. The parties may also agree to replace mediation with some other form of alternative dispute resolution (ADR).

(Governing Law, cont.)

Unless otherwise agreed upon and as set forth above in this Article, any disputes relating to this Agreement, its breach or alleged breach, termination or validity shall be governed by the laws of Switzerland, except for its choice of law rules and any international convention concerning the international sale of goods, and shall be subject to binding arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, except that each party may seek injunctive relief from a court where appropriate while the arbitration procedure is being followed. The place of arbitration shall be Zurich, Switzerland, and the arbitration proceedings shall be held in the English language. The arbitration panel shall consist of 3 arbitrators, one to be appointed by each party within 15 days from either party's request for arbitration, and the 2 arbitrators so appointed shall within another 30 days appoint the third arbitrator. The award rendered by the arbitrators shall be in writing containing finding of facts and conclusions of law, shall be final and binding and may be entered in any court of competent jurisdiction. The costs of the arbitration proceeding including the prevailing party's reasonable expenses and attorney's fees shall be borne by the other party.

Dispute Resolution

14 DISPUTE RESOLUTION

14.1 In the event of any dispute or difference arising between the Parties in connection with this Framework Agreement (a "Dispute"), representatives to be appointed by each Party shall, within fifteen (15) business days of a written request from either Party to the other, meet in a good faith effort to resolve the Dispute without recourse to legal proceedings.

14.2 If the Dispute is not resolved as a result of such meeting, either Party may (at such meeting or within fifteen (15) business days from its conclusion) propose to the other in writing that structured negotiations be entered into with the assistance of one mediator to be jointly selected by them (the "**Mediator**").

14.3 If the Parties are unable to agree on the identity of a Mediator or if the Mediator agreed upon is unable or unwilling to act, either Party shall, within fifteen (15) business days from the date of the proposal to appoint a Mediator or within fifteen (15) business days of notice by such Mediator to either Party that he or she is unable to or unwilling to act, apply to the ADR Center for Business (Stichting ADR - Centrum voor het Bedrijfsleven) ("**ACB**") in Amsterdam to appoint a Mediator.

(Dispute Resolution, cont.)

14.4 The Parties shall, within fifteen (15) business days of the appointment of the Mediator, meet with him/her in order to agree on a program for the exchange of any relevant information and the structure to be adopted for the negotiations. If considered appropriate, the Parties may at any stage seek assistance from the ACB to provide guidance on a suitable procedure.

14.5 All negotiations connected with the Dispute shall be conducted by the Parties and their professional advisors, if any, in confidence and without prejudice to the rights of the Parties in any future proceedings.

14.6 If the Parties accept the Mediator's recommendations or otherwise reach agreement on the resolution of the Dispute, such agreement shall be reduced to writing and, once it is signed by their duly authorized representatives, shall be binding on the Parties.

14.7 If the Parties fail to reach agreement in the structured negotiations within sixty (60) business days of the Mediator being appointed, then the Dispute may be referred to the competent courts.

14.8 Nothing contained in this Article 14 will restrict either Party's freedom to commence legal proceedings before the courts of Amsterdam, The Netherlands to preserve any legal right or remedy to enforce any result of a Dispute under this Article or protect any Intellectual Property Rights or trade secret rights.

(Dispute Resolution, cont.)

15. GOVERNING LAW

This Framework Agreement shall be governed by the laws of The Netherlands, without reference to its choice of law rules that may require the use of another country's substantive or procedural laws. Any Dispute not resolved pursuant to Article 14 shall be submitted to the exclusive jurisdiction of the courts of Amsterdam, The Netherlands.

17.7 Both Parties' performance under this Framework Agreement, as well as all Products and services provided hereunder by Motorola, shall comply with all applicable U.S. federal, state and local laws and ordinances, and all orders, rules, regulations and requirements thereunder. Each Party agrees that it will not export or re-export, directly or indirectly, any of the other Party's proprietary information or any products or materials of the other Party's to any country for which the United States of America, at the time of export or re-export, requires an export license or other governmental approval, without first obtaining such license or approval.