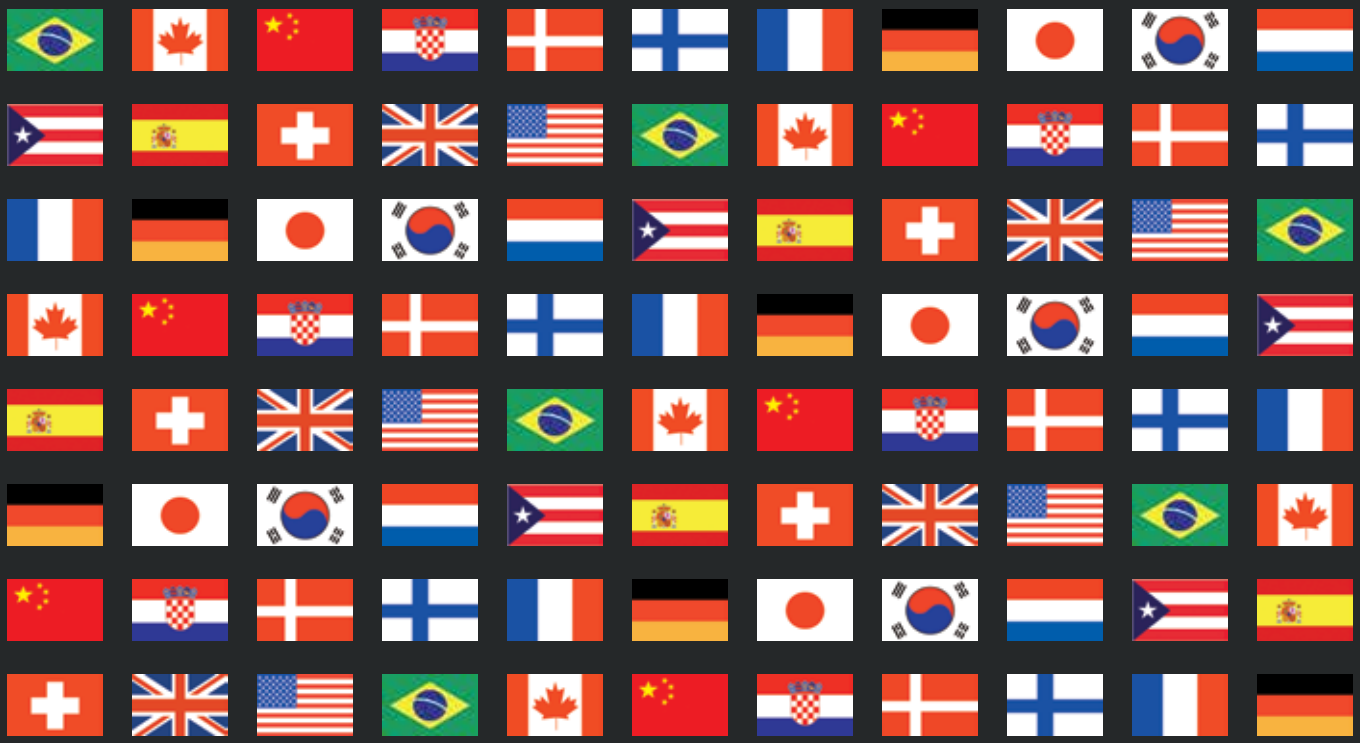
Distribution & Agency

Contributing editor
Andre R Jaglom



2017

GETTING THE DEAL THROUGH

© Law Business Research 2017

GETTING THE DEAL THROUGH

Distribution & Agency 2017

Contributing editor

Andre R Jaglom

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2015
Third edition
ISSN 2058-5608

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

© Law Business Research 2017

CONTENTS

© Law Business Research 2017

Canada

Bruno Floriani and Marissa Carnevale

Lapointe Rosenstein Marchand Melançon LLP

Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Generally, yes. Other than as described in question 4, there is no specific filing or regulatory review process applicable to foreign suppliers looking to establish a business entity or joint venture in Canada. However, it is important to note that, if a subsidiary is established in Canada, certain corporate statutes set out requirements as to the residency of directors pursuant to which at least one director (or 25 per cent of the directors if there are more than four) must be a Canadian resident.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

Generally, yes. Please refer to question 1 above, subject to the restrictions described in question 4.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

There are several different vehicles available to foreign suppliers who wish to carry on business in Canada, each with varying tax and corporate consequences. A foreign supplier may:

- choose to contract directly with a Canadian distributor without carrying on business in Canada directly;
- opt to appoint a local agent or representative to sell its products in Canada;
- opt to carry on business in Canada using a Canadian branch or division; or
- choose to carry on business in Canada through a federally or provincially incorporated subsidiary or other affiliate.

The preferred choice of vehicle used for an importer owned by a foreign supplier to enter the Canadian market is the incorporation of a Canadian subsidiary or other affiliate. Corporations may be incorporated under Canadian federal law; provinces have also enacted statutes regulating the formation of corporate and other non-corporate entities including corporations, unlimited liability companies and partnerships. Business entities must usually register with the relevant corporate or business registry of each province in which they wish to conduct business, pay the prescribed fees and file corporate or business registry forms containing basic information about the business and its ownership and management.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

No substantive restrictions on investment exist, except with respect to very large transactions or investments. Pursuant to the Investment Canada Act, foreign business entities seeking to acquire or establish a Canadian business are required to notify Industry Canada no later than 30 days following such acquisition or establishment. An onerous and thorough review process applies to non-World Trade Organization investors where the asset value of the acquired Canadian business in 2017 is at least C$5 million for direct acquisitions or C$50 million for indirect acquisitions.

In addition, Canada is a federal system of parliamentary government, and the regulation and administration of certain trans-provincial industries fall within the sphere of federal legislative powers. As for those under provincial jurisdiction, various provinces have regulated certain industries viewed as having particular importance or significance. Thus, several federal and provincial statutes place restrictions on foreign ownership in specific industries, such as aviation, collections, engineering, farming, fisheries, banking, trusts and loans, securities, broadcasting, telecommunications, insurance, liquor sales and industries that involve the exploitation of Canada's natural resources. Depending on the products being distributed, these restrictions may affect international distribution arrangements where the foreign supplier has a direct or indirect presence in Canada.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

Generally, yes. Please refer to questions 1 and 3, subject to the restrictions described in question 4.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Depending on the business structure selected by a foreign supplier wishing to sell goods in Canada, different taxes may apply on its income.

Canadian residents are taxed on their worldwide income, whereas non-residents may be taxed in Canada when they sell taxable property or earn employment income in Canada. If the supplier carries on business in Canada through a fixed place of business or permanent establishment, any income derived in respect thereof will generally qualify as 'business income' that is taxable in Canada on a net income basis.

Canada has entered into taxation recognition treaties with a large number of countries; if the foreign supplier is from a treaty country, it will generally be exempt as long as it does not carry on its activities through a 'permanent establishment' in Canada.

The income of a non-resident supplier carrying on business through a 'branch'-type of operation in Canada will typically be subject to a 'branch tax', which is the income tax that applies when a non-resident corporation carries on a business in Canada through a 'branch' (ie, by itself having offices, employees, files or other aspects of a permanent establishment in Canada) as opposed to a Canadian subsidiary. The base rate for branch tax is 25 per cent of Canadian taxable income earned through the branch in Canada, but may be reduced by tax treaties, if applicable.

If a foreign supplier appoints a local agent or representative to sell its products in Canada, income earned by the supplier through sales originating from the agent may, depending on the agent's commission or fee structure, be characterised as passive income and subject in Canada to a withholding tax. If so, the agent would be responsible for withholding the tax and remitting amounts to Canadian tax authorities. The standard withholding tax rate of 25 per cent under Canadian income tax legislation is often reduced to 10 per cent by tax treaties, if applicable.

© Law Business Research 2017

Canadian withholding tax on passive income would not be payable if a subsidiary or other affiliate is established in Canada. Nonetheless, dividends paid to its parent would be subject to a withholding tax of 25 per cent – this rate can be reduced to as low as 5 per cent by tax treaties, if applicable.

In conclusion, a thorough review of all relevant Canadian legislation pertaining to each structure and a careful evaluation of the effect of tax treaties entered into and ratified by Canada with the foreign supplier's jurisdiction, on a case-by-case basis, is strongly advised.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

There are several options available to suppliers for establishing a distribution structure. The most common structures and their principal features are outlined below:

- direct distribution, where the foreign supplier uses a Canadian subsidiary or its own employees to sell goods in Canada – see questions 1 to 6;
- independent agents and representatives, where the supplier relies on an agent or representative to originate sales of goods in Canada, and pays them a commission on the goods sold to customers in Canada;
- trademark licensing, where the supplier gives a Canadian entity a licence entitling it to use its intellectual property rights to manufacture and distribute goods for the Canadian market;
- franchises, which give rise to special considerations given that several Canadian provinces (namely, Ontario, British Columbia, Alberta, Prince Edward Island, New Brunswick and Manitoba) have enacted Franchise-specific legislation (the Franchise Acts), under which the term 'franchise' is broadly defined – as a result, a variety of other contractual relationships, including distribution, agency and trademark licensing agreements, may possibly be encompassed;
- prior to formalising any particular distribution, agency or trademark licensing arrangement for Canada, parties should carefully examine provincial legislation and consider whether they would be subject to franchise legislation, which entails a duty of disclosure and fair dealing and may give rise to additional requirements for a supplier that are not generally intended in the context of a distribution, agency or trademark licensing arrangement;
- private label, where a Canadian distributor sells the foreign supplier's products under its own name and trademark. This allows the foreign supplier to sell products in Canada while having the benefit of being recognised under local brand name, but generally provides very little control by the supplier; and
- joint ventures, where the supplier relies on a local distribution partner which is owned in part by the supplier.

Each of the above can be established by a contractual arrangement and the parties are generally free to determine their respective rights and obligations under the agreement, subject to certain restrictions discussed in question 8.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

In general, parties to a distribution or agency agreement are free to establish the terms of their relationship by contract, subject to the expansive definition of a 'franchise' under the Franchise Acts. In addition, as mentioned in question 4, certain industries are specifically regulated by federal or provincial law.

As a result, care should be exercised when structuring an arrangement that may fall within the ambit of the Franchise Acts or that, by its nature, may be subject to restrictions in a regulated industry.

Additional restrictions arise as a result of competition laws, as discussed in greater detail in questions 14 to 21.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

The parties to a distribution or agency agreement can provide for termination without cause in the contract. If the contract stipulates that such a termination can occur without notice and with immediate effect, such a stipulation will generally be enforced as long as it is provided for in express and unequivocal terms. If the contract is silent as to the requirement to provide notice in the event of a termination without cause, the length of the notice period will vary according to the factors described in question 10 below.

No specific cause is required to terminate a distribution or agency contract. If the contract is silent as to the possibility of terminating without cause, it is generally possible to terminate the arrangement upon reasonable notice. (The factors for determining what constitutes reasonable notice are discussed in question 10.)

As for termination with cause, the parties may establish, by contract, occurrences that constitute events of default giving rise to termination. Where the contract is silent, Canadian courts have generally required evidence of a fundamental breach (or, in Quebec, a serious or material breach), in order to find cause for termination; short of establishing a cause, the provision of reasonable notice would be necessary in order to lawfully terminate the relationship. In addition, Quebec law requires that termination rights always be exercised in good faith – refer to question 32 for a more fulsome discussion on good faith in Canadian contracts.

If the contract is for a fixed term, it would naturally expire at the end of the term and there would not generally be any compensation payable at that time. However, if the parties choose to continue their relationship after the end of the term, it may constitute an implicit renewal or an extension of the contract for an indeterminate term.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

There are no statutory provisions governing compensation upon termination for distribution or agency agreements. In general, courts have found that no compensation is due if reasonable notice has been given, and compensation equivalent to reasonable notice is typically granted where a contract is terminated without notice. The amount of the indemnity, which effectively replaces the notice period, would be estimated based on past profits, and would take into account factors such as the length of the relationship, the nature of the relationship (including whether it was exclusive), industry practice, investments made by the distributor for purposes of the agreement, and the time it would take the distributor to obtain a similar source of income from an alternate supplier.

Parties can agree to pre-establish a liquidated damages clause or, under the civil law of Quebec, a termination penalty, and such a contractual provision will be enforceable unless it is deemed unreasonable by the courts.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Generally, yes. If the contract is silent with respect to transfers or changes of control, then it is generally assumed that such an operation is permitted without the supplier's consent unless the arrangement constitutes an intuitu personae contract.

However, in Quebec, if the contract does not provide whether an assignment or transfer may occur without the other party's consent, their consent would generally be required.

© Law Business Research 2017

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Confidentiality agreements are normally enforceable under Canadian law, subject to certain exceptions such as being compelled to disclose under law or in the course of legal proceedings. Under Quebec law, disclosure of confidential information is also permitted for public health or safety reasons.

Information that is publicly available or generic cannot be regarded as confidential. Trade secrets that meet the jurisprudential criteria of being known by only a few people within a given business and are treated as such within said business would be protected irrespective of contractual provisions. However, it is generally prudent to include a contractual provision regarding restrictions on the use of information acquired in the course of the distribution or agency agreement, especially where it could be used by one party to the detriment of the other.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

In general, yes, subject to restrictions established by the Competition Act (Canada), which are outlined in further detail in questions 14 et seq.

Restrictions on distributing competing products during the term of the relationship are generally enforceable. However, restrictions on competition that extend beyond the term of the agreement must be reasonable and coherent with the contract's purpose, and are read restrictively by Canadian courts. Non-competition clauses must be limited with regards to term, geographic area and activities restricted, the whole in accordance with what is necessary to protect the supplier's or principal's legitimate interests, failing which the provision risks not being enforced in any aspect. Moreover, a supplier or principal would not generally be able to rely on such a restriction if the agreement is terminated without cause by them or as a result of their conduct.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Price maintenance is a reviewable trade practice under Canada's Competition Act. The threshold for enforcement authorities to apply sanctions on the basis of price maintenance requires that the supplier's conduct be likely to adversely affect competition. It is common for suppliers to provide suggested retail prices on packaging and labels.

The Competition Tribunal may make orders for a reviewable trade practice to cease, or compel a business to accept a given customer or order on reasonable trade terms. Fines may also be applicable if conduct is found to lessen competition, and compensation may be payable to private parties who have been granted leave by the Tribunal to bring a claim.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Minimum advertised price policies are common and, while they constitute reviewable trade practices under the Competition Act, they are only viewed as problematic where there is an adverse effect on competition.

Minimum advertised price policies must be established unilaterally by the supplier and must be uniformly enforced. They should also specifically allow products to be sold at prices lower than the minimum advertised price as this provides distributors and agents with the requisite flexibility to offer on-location discounts, coupons and other rebates.

Please see question 19 for a discussion on the rules applicable to refusals to deal.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Generally, yes. The parties are free to establish their agreed terms of sale in their agreement, including pricing preferences, subject to certain restrictions outlined in question 17.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Price discrimination and promotional allowances (whether through discounts, rebates, allowances, price concessions or other advantages), are reviewable trade practices under the Competition Act but would generally only be problematic if they significantly lessen competition.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Providing for an exclusive territory or other market restrictions in a distribution or agency agreement would not be prohibited, but would be subject to oversight by competition authorities. Unless the restrictions substantially lessen competition, they would not be enjoined. For details with respect to the consequences of failing to comply with restrictions in respect of such practices, please refer to question 14.

It is generally permissible for a supplier to reserve the rights to distribute products in certain territories or through certain channels or to specific types of customers (for example, by reserving the rights for online selling), as long as the arrangement does not substantially lessen competition.

The distinction between active and passive sales efforts, as it is understood in Europe, is generally not applicable under Canadian law.

19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Refusal to deal is a reviewable trade practice under the Competition Act and would give rise to enforcement only where the practice substantially lessens competition. A supplier is otherwise free to decide who it chooses to do business with; restrictions on a distributor's resale rights are generally permissible, as discussed in question 18.

20 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

In practice, absent significant market power or concentration, it is unlikely that a typical distribution arrangement would trigger oversight of this nature.

Mergers and other transactions may be subject to review where they 'prevent or lessen competition substantially' within a given industry. Indicators for reaching this threshold include considering whether an entity holds significant market share, whether there are significant barriers to entry in a given market, the availability of acceptable substitutes, effective remaining competition, and the extent of foreign competition. Competition authorities also consider whether the operation generates efficiencies that offset the anticompetitive effect in order to ascertain the overall effect on competition.

Certain types of joint ventures or strategic alliances may be subject to review if they are likely to substantially lessen or prevent competition. Vertical arrangements between suppliers and their customers are assessed on the same basis.

21 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

In addition to the restrictions discussed in questions 14 to 19, exclusive dealing is a reviewable trade practice under the Competition Act, but conduct of this nature would not generally be subject to sanctions unless requiring a distributor to purchase its products exclusively from a given supplier is likely to have a significant adverse impact on competition.

Enforcement and remedies are also discussed in questions 14 to 19.

© Law Business Research 2017

22 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

The sale of grey market products will not generally constitute trademark infringement under Canadian law. However, where a Canadian company is the registered owner of a Canadian trademark, and is distinct from its international supplier or manufacturer, it would be in a position to rely on the provisions of the Trade-marks Act (Canada) in order to contest parallel imports and the distribution of grey goods.

A distributor or agent would not have any recourse where the trademark is owned by a foreign entity from which originates both the legitimately imported 'grey market' goods and the goods destined to be sold by the distributor or agent. A passing off action may occasionally be successful where the grey market goods do not meet Canadian safety or labelling requirements.

As a practical matter, suppliers who sell goods to a wholly-owned subsidiary or other affiliate for distribution in Canada should ensure that the local subsidiary or affiliate is the owner of the trademark in Canada. Ensuring that the product is specifically designed and labelled for the Canadian market will also facilitate the preservation of rights against parallel imports.

Holders of a copyright (for example, in a brand logo) are also afforded a certain level of protection against parallel imports under the Copyright Act (Canada). In order to qualify for this supplemental protection, it is recommended that the Canadian distributor be assigned the copyright in Canada rather than being given an exclusive licence to use it; if the distributor is not an affiliate of the supplier, it may be preferable to allow for the copyright assignment to be reversed at the end of the contract.

23 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

In Canada, the federal government generally regulates advertisement through the Competition Act, which prohibits any advertisement that is false or misleading in a material respect. The materiality of the representation is considered in light of whether it may influence a consumer to buy or use the product or service advertised, based on the general impression conveyed by an advertisement, in addition to its literal meaning.

Advertising Standards Canada administers the Canadian Code of Advertising Standards, which sets out criteria for acceptable advertising and guidance on inaccurate, deceptive or otherwise misleading claims, statements or representations, as well as price claims, comparative advertising and testimonials.

Most Canadian provinces also have legislation regarding consumer protection and/or business practices, many of which include prohibitions on false, misleading or deceptive representations made to consumers. Certain such legislation also contains specific prohibitions, such as restrictions on using representations that products confer any particular benefit or standard of quality, and restrictions on inaccurately advertising price advantages. Certain provincial legislation provides for more serious protections with respect to the unfair practice of making unconscionable representations.

As for the responsibility for marketing and advertising in a distribution or agency relationship, the supplier and its contractual counterpart may determine their respective contributions by contract.

24 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

The types of protections available depend largely on the nature of the intellectual property rights in question, but most types of intellectual property benefit from the same types of safeguards as are commonly recognised internationally, and may be exercised by a supplier against both distribution partners and third parties.

Trademarks

Trademarks are protected under the Trade-marks Act. Distinctiveness is central to the definition and a trademark need not be registered to be valid, or even licensed, in Canada. Registration with the Canadian Intellectual Property Office has the advantage of providing nationwide protection of the registered trademark, as opposed to limited protection in geographical areas where a common law mark (ie, an unregistered mark) is known.

In the distribution and agency context, remedies available to a supplier in respect of its distribution partner (for example, following a breach of exclusive use clauses or the use of a confusing trademark) range from injunctive remedies to passing-off actions. These remedies are also available for infringement or other recognised violations by third parties.

Patents

Innovations that are new, useful and inventive can be protected under the Patent Act (Canada). Patented innovations must be registered with the Canadian Intellectual Property Office in order to be afforded protection.

Unless otherwise contractually stipulated, the Patent Act provides that a person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for acts of infringement. Injunctive relief and damage claims would be available, and may be instituted against distribution partners and third parties who engage in prohibited practices in respect of patented concepts.

Copyright

Copyright is protected under the Copyright Act. Protection is extended, irrespective of registration, for all original works produced in any country that is a signatory of the Berne Convention. However, registration with the Canadian Intellectual Property Office is possible.

Remedies for copyright infringement under the Copyright Act include damages, lost profits, and injunctions prohibiting distribution or ordering the destruction of infringing goods. Actions can be brought by the copyright owner against distribution partners or any third parties.

Know-how and trade secrets

There is no statutory protection of know-how or trade secrets in Canada.

Common law affords protection to trade secrets that are known by only a few people within a given business and are treated as such within said business. Parties must also rely on common law tort and contractual undertakings to protect know-how from unauthorised disclosure or use.

Accordingly, the nature of the confidential information that a supplier wishes to protect, as well as the legal consequences arising as a result of its dissemination, should be clearly identified by the contracting parties in their agreement. In the event that this tort occurs, injunctive relief and damages may be sought by a supplier against a distributor or any third party before the provincial courts with competent authority.

Technology transfer agreements

Technology transfer agreements are not generally used in the distribution and agency context.

25 What consumer protection laws are relevant to a supplier or distributor?

In addition to the advertising rules provided in the Competition Act (described in question 23) and the requirements of the Consumer Product Safety Act (discussed in question 26), most Canadian provinces have legislation regarding consumer protection or business practices or both, as discussed in question 23.

Additionally, rules relating to warranties and vendor liability may be relevant in the consumer context, as discussed in question 27.

26 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

The Consumer Product Safety Act (Canada) (CCPSA) grants Health Canada, the federal ministry charged with public health matters, sweeping powers to issue mandatory product recalls and require product safety tests. The CCPSA applies where products are usually obtained by an individual for non-commercial purposes and imposes

© Law Business Research 2017

a general threshold of 'danger for human health and safety', which is evaluated on the basis of whether an existing or potential hazard is posed by a product during its normal use and can cause death or have an adverse effect on an individual's health in the short or long term.

In case of an incident, a manufacturer or distributor can either voluntarily issue a product recall, or the recall may be ordered by Health Canada. Incidents include: occurrences that caused or could have caused death or injury; situations where a dangerous defect is noticed; situations where an incorrect, insufficient or non-existent label creates a risk of death or injury; and situations where another domestic or foreign public body initiates a recall. If a product is subject to a recall, the manufacturer (or, if the manufacturer is foreign, the importer) must provide Health Canada with information regarding the incident and file a mandatory incident report.

Specific risks relating to particular classes of products, such as candles, glass items, mattresses, children's jewellery, toys, food, drugs, cosmetics, medical devices, tyres, carriages and strollers, helmets, car seats, residential smoke detectors, firearms and ammunition, are further dealt with in detailed regulations.

The parties to a distribution or agency arrangement may determine contractually who is responsible for the costs associated with recalls and for carrying out any applicable formalities. However, it should be noted that Health Canada also has the power to initiate a recall under the CCPSA; as a result, the allocation of responsibility established by the parties may be overridden in practice, though contractual indemnities would still apply between the parties.

27 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

The supplier and distributor may contractually allocate amongst themselves the risks relating to products, including with respect to warranties. Products may usually be sold by a supplier to a distributor without any warranty at all. However, the extent to which implied warranties may be disclaimed varies by province and certain exceptions apply. For example, in Quebec, a seller may not be able to disclaim damages if it has knowledge pertaining to deficiencies relating to the quality of its products, if it commits gross fault or negligence, or where bodily or moral harm occur. In addition, downstream customers other than a first-hand purchaser could have recourse against the manufacturer and other members of the distribution chain if a product suffers from a safety defect.

With respect to consumer warranties, most Canadian provinces have 'sales of goods' legislation that regulate them and prohibit limiting such warranties contractually. In Quebec, strict liability applies to product defects under consumer protection law, and neither the distributor nor the supplier may limit consumer warranties; moreover, the benefit of a consumer warranty cannot be waived by a consumer.

28 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

In Canada, the federal Personal Information Protection and Electronic Documents Act (PIPEDA) contains significant protections for individuals whose personal information may be collected, used and shared by people or entities with which they have dealings. PIPEDA requires that individuals provide informed consent before their personal information is processed and shared and the individual concerned must be informed of the projected uses of the data in advance. In Canada, the law also requires disclosure where data may be processed or stored in other countries or by entities other than the one collecting the data, whether domestically or abroad, even if such processing or storage is done on behalf of the entity collecting the data.

One of the purposes of PIPEDA's adoption was to align Canadian legislation with the European Union's strict privacy requirements. However, the federal government has since passed the Anti-terrorism Act, 2015, which grants the government broad access to personal information for national security reasons. As such, in the aftermath of the *Maximillian Shrems v Data Commissioner* (C-362/14, 2015) decision, it may be unwise to assume that Canadian legislation continues to satisfy the EU's highly protective privacy standards, and the transfer of data between the EU and Canada remains unaffected. The same attitude should be adopted in light of the new Privacy Shield regime between the EU and the US. While Canadian privacy legislation has not been directly affected by its implementation, Canadian businesses that store or process personal information about EU citizens should be mindful of how the principles in the Privacy Shield agreement may affect their practices.

The Provinces of Quebec, Alberta and British Columbia have enacted privacy legislation that extends similar protections to individuals and applies to private-sector entities under provincial jurisdiction. Under Quebec law, persons who collect personal information must refrain from transferring this information to jurisdictions where it would not be afforded the same protections as those required under Quebec privacy law.

The parties to a distribution or agency agreement may determine who 'owns' the information collected from customers and end users (although Canadian privacy law does not consider that data is in fact owned by those who collect, transmit or use it), but the restrictions described above will apply to all of those who collect, use, share and store such information.

29 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

In general, the parties are free to govern their relationship by contract, including granting the supplier approval rights over the individuals who manage the distribution partner's business or termination rights as a result of reasonably objective management failures to comply with the stated objectives or obligations of the distribution relationship. However, this may not be the case with distribution arrangements subject to Franchise Acts or in industries that are subject to certain specific regulations and legislation – see questions 7 and 8.

Absent specific contractual provisions producing the desired effect, a supplier's dissatisfaction with the distributor's management would generally not be considered sufficient cause to terminate a distribution relationship without notice.

30 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Each Canadian province has enacted its own health and safety, employment standards and labour relations legislation. Accordingly, provincial laws and regulations govern most matters relating to labour law.

Depending on the nature of the relationship, there is a risk that a distributor or agent may be considered an employee, in which case the supplier would be subject to mandatory rules applicable to minimum wage rates, overtime wages, vacation and leave compensation, hours of work, severance and notice periods, as well as union certification and collective bargaining laws, all of which vary greatly by province and industry.

In order to mitigate these risks, the parties may specify by contract that they are independent contractors and cannot be responsible for each other's actions, including in connection with labour and employment matters.

In order to avoid any unintended characterisations, care must be taken in order to ensure that each distribution partner operates as a distinct and truly independent entity from a supplier (ie, no common control or direction emanating from the supplier that is greater than that which typically characterises the distribution or principal–agent relationship) so as to be considered a separate employer for labour union certification and collective bargaining purposes.

31 Is the payment of commission to a commercial agent regulated?

The parties are generally free to establish the agent's compensation by contract. As noted in question 6, to the extent that commissions attract withholding tax, the agent will be responsible for withholding the applicable amounts and remitting them to the tax authorities in Canada on behalf of the principal.

© Law Business Research 2017

Update and trends

While subjecting the resolution of contractual disputes to arbitration may appear to be advantageous in certain circumstances, it should be noted that an arbitral tribunal may have a narrower jurisdiction with respect to granting relief than our courts. For example, it is unclear whether arbitral tribunals have jurisdiction to award security for costs. While the award of security for costs has been recognised in Canada, such a grant often has a fact-specific justification, is considered to be part of the arbitral tribunal's inherent authority to control its process or, alternatively, must be expressly provided for in the contract or in the arbitral tribunal's applicable procedural law. However, in light of the Canadian courts' and legislature's current endorsement of the arbitration process, demands for security for costs in arbitration may have better chances of being successful. Nevertheless, given the uncertainty of such awards, it remains advisable for parties to an agreement to expressly provide in the dispute resolution clause for the possibility of an arbitrator to grant security for costs, and for the parties to attorn to a jurisdiction of arbitration where applicable procedural laws provide the arbitral tribunal with the power to issue such awards.

32 What good faith and fair dealing requirements apply to distribution relationships?

The Supreme Court of Canada has recently found that there is an inherent duty for parties to honestly perform their contractual obligations, and many common law courts have historically held that an implicit obligation of good faith exists in contractual dealings. A perhaps more fulsome obligation exists under articles 6, 7 and 1375 of the Civil Code of Quebec, which imposes a duty on all parties to conduct themselves in good faith in all contractual dealings, including at the precontractual stage.

Additionally, the Franchise Acts, which may apply to certain types of distribution agreements (see question 7), include an explicit duty of good faith and fair dealing during the term of the contractual relationship.

33 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No legislation directly governs international distribution agreements or expressly requires the registration of a distribution agreement with a foreign national with any authorities in Canada, subject to the observations in question 7.

There is no requirement to register a trademark licence and there is no clear adverse effect of failing to do so in a timely manner.

Under the Copyright Act, a copyright licence must be granted in writing and must be signed by the owner of the right in respect of which the licence is granted, or by its duly authorised agent. The grant of a copyright licence may be registered, and the rights of any registered licensee will take priority, without notice, over any prior unregistered licensees.

34 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Bribery and corruption of public officials are crimes in Canada under the Criminal Code (Canada), for both the corruptor and the corrupted official. In addition, the Corruption of Foreign Public Officials Act (Canada) applies to acts of corruption or bribery committed by Canadian persons outside of Canada. Charges may also extend to those who aid or abet offenders.

35 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Most of the restrictions and prohibited practices in respect of distribution and agency relationships have been addressed in specific questions above. There are no mandatory provisions or automatic inclusions in contracts and the parties are generally free to set out the terms of their agreement by contract.

In certain cases, courts enforcing an agreement in Canada will be required to apply mandatory provisions of local law. Overriding a contract by reason of mandatory local law would generally apply only where either the contract or the parties' conduct is inconsistent with public policy, for which the threshold is no lower in Canada than in other jurisdictions with sophisticated legal systems. Many of the rules that could be considered mandatory in Canada have been discussed in detail previously, such as limitations on restrictive covenants, competition issues, limitations of liability, privacy laws and criminal matters.

Governing law and choice of forum

36 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

The parties are free to choose the laws that will govern their relationship. All Canadian provinces permit the selection of a foreign governing law as long as doing so is not considered to be in fraud of the domestic law, subject to the application of laws or provisions of public order in Canada as mentioned in question 35.

Canada is party to numerous international treaties such as the Vienna Convention on the International Sale of Goods; where the selected or applicable law is that of Canada, the foregoing Convention finds automatic application unless expressly set aside by the parties in their contract.

37 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

The parties may elect to submit to the courts or arbitration tribunals of any jurisdiction, subject to the observations in question 7.

Choice of forum clauses are generally enforced by Canadian courts, thus making it possible for the parties to select a non-Canadian court to resolve disputes or claims arising from their agreement, even where they are related to occurrences in Canada. In addition, mediation and arbitration are viable and recognised mechanisms of dispute resolution across Canada.

A final monetary and conclusive judgment on the merits from a foreign court is usually enforced by Canadian courts. Certain provinces, such as British Columbia and Ontario, have enacted legislation that provides a simplified procedure for registering and enforcing foreign judgments and arbitration awards. Arbitration awards are readily recognised throughout the country as Canada is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

38 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

In civil matters, provincial courts generally have jurisdiction except for those matters that are specifically reserved to the federal judiciary (such as intellectual property, bankruptcy, trade and commerce). Injunctive relief is available in all provinces and may be granted on an interim, interlocutory or permanent basis. The right to seek such relief is always within the discretion of the court and cannot be waived.

There is no legal discrimination or heightened level of legal requirements for foreign businesses to adjudicate disputes before courts in Canada. Nevertheless, foreign businesses may be subject to different mandatory costs than would domestic businesses.

The discovery process is an integral part of litigation in Canada and is subject to comprehensive rules of procedure that generally require disclosure of documents and provide for compulsory verbal testimony, each to the extent required to establish the allegations and defences put forth in a given case. There are certain exceptions, such as documents or other information that is subject to attorney-client privilege; however, judicial authorities tend to otherwise allow and encourage submissions and fulsome disclosures with a view to seeking transparency and avoiding any loss of rights to the parties involved in a dispute.

© Law Business Research 2017

39 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

The parties may expressly and contractually agree to arbitrate their disputes in the venue of their choosing to the exclusion of Canadian courts. Even in the presence of an unequivocal arbitration clause, certain remedies (such as injunctive relief and other extraordinary recourses) may nonetheless be sought before the courts.

The principal advantages and disadvantages of arbitration for foreign suppliers in Canada are essentially the same as for local suppliers. Arbitration has the main advantage of being confidential. Disputes between suppliers and distributors, or agents, do not become a matter of public record as would be the case with litigation in the judicial system. In addition, arbitration gives the parties a level of control that they may not otherwise have over some aspects of the dispute, such as choice of venue and forum and the selection of an arbitrator with expertise in distribution and agency issues or the relevant technical or specialised fields. Arbitration agreements are final, reliable and not open to appeal; Canadian courts have generally refrained from intervening in such decisions. Finally, arbitration tends to be faster and cheaper than litigation, at least in theory.

As for its disadvantages, arbitration, like litigation, can become bogged down procedurally, diminishing the cost and time savings which often motivate its use. The lack of ability to appeal heightens risk for the parties that have no recourse against an unfavourable decision. Some also argue that arbitration clauses that preclude access to the judicial system will prevent the use of proceedings such as injunctive or other equitable relief that can be obtained quickly to effectively end a breach of contract.

LAPOINTE ROSENSTEIN
MARCHAND MELANÇON

Bruno Floriani **bruno.floriani@lrmm.com**
Marissa Carnevale **marissa.carnevale@lrmm.com**

1 Place Ville Marie
Suite 1300
Montreal
Quebec H3B 0E6
Canada

Tel: +1 514 925 6300
Fax: +1 514 925 9001
www.lrmm.com

© Law Business Research 2017

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Distribution & Agency
ISSN 2058-5608

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law

© Law Business Research 2017