DISTRIBUTION OPTIONS

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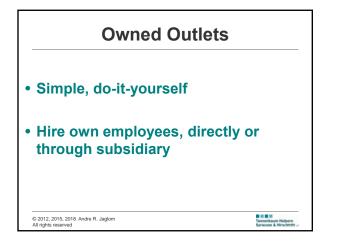
> New York State Bar Association International Section Seasonal Meeting Montreal, October 25, 2018



Summary Outline (continued)

- Advantages and Disadvantages
 - Costs
 - Control over brand image and services (Pre-Sale and Post-Sale)
 - Control over resale pricing
 - Ability to terminate
- Key Contract Provisions See Appendix

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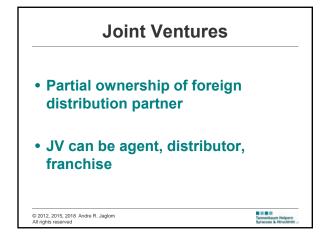




E-Commerce Retailers
 E-Commerce firm (e.g., Amazon) buys from supplier
 Takes title and resells at a profit

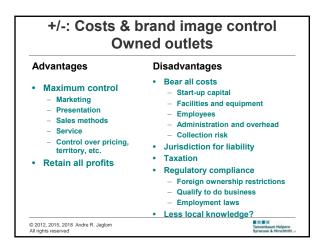


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+/-: Costs & brand image control Sales agents					
Advantages	Disadvantages Regulatory compliance Doing business through agent Taxation? Where is sale made? Employment laws? Cost of commissions Barriers to and costs associated with termination Compensation or indemnity and other rights (in EU)				
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+/-: Costs & brand image control
Independent Distributors

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Advantages

Local knowledge

distributor

•

Market conditions

Customs and culture

· Local costs borne by

Disadvantages

- Give up distribution profit
 - Some nations tax payments . to foreign businesses
- Reduced control, except by • contract Potential liabilities and

costs of termination

Possible protection to

domestic distributors

- Potential to avoid jurisdiction, taxation Option to retain or assign
- advertising and marketing role

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Control over resale price,

territory, maybe illegal

Advantages	Disadvantages
 Similar to sales agency E-Commerce infrastructure costs borne by Intermediary Potential to avoid jurisdiction, taxation Option to retain or assign fulfillment role 	 Give up distribution profit Some nations tax payments to foreign businesses No offline marketing by intermediary Disincentives bricks distributors to educate, service Invasion fees?
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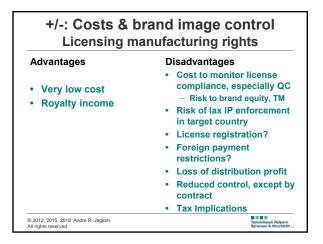
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	nd image control hising					
Advantages Disadvantages						
 Similar to independent distributor advantages Franchise fee may provide working capital/income Control though marketing plan, contract 	 Give up some distribution profit (but franchise fees) Some nations tax payments to foreign businesses Regulatory compliance vs. lack of regulation Administrative costs to monitor franchisees Risk of poor performance 					
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	nd image control /entures
Advantages	Disadvantages
 Same pluses as form used 	 Same minuses as form used
Added control through ownership,	 Potential jurisdictional and tax exposure
management rights	 Some nations restrict foreign ownership
	Beware of minority protection
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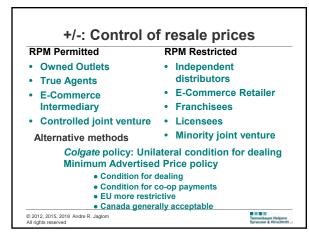
+/-: Costs & brand image control Private Label					
Advantages	Disadvantages				
 Minimal costs Partner's distribution strength and scope 	 No brand equity No control over marketing, sales or service Can have performance standards Potential consumer protection liability 				
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+/-: Control of resale	prices
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- Reasons for control
- Brand image
- Enhance profit margin for services
- Cap profit margin for competiveness
- Regulation of RPM
 - Varies by jurisdiction, even within US
 - Europe prohibits (pressure to comply with suggested resale price)
 - Latin America: Relative monopolistic practice
 - Canada permits (was criminal, now civil), provided supplier conduct does not lead to adverse effect on competition

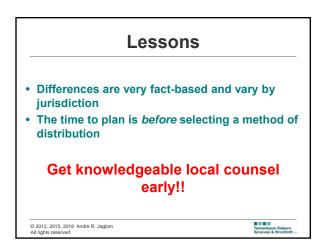
- Leegin: US Supreme Court applies rule of reason
- But anticompetitive in some circumstances
- States may differ: NY, CA, NJ, MD, others
- Generally OK if unilateral supplier makes "resale"
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Owned outlets True agency in US – Some payment requirements Most independent distributors – But Boloium!	Restricted Agents in EU (Mandatory compensation – Dir 86/653/EEC In L.A. by operation of law or old contracts prior to legal amendments Some U.S. franchises – Notably CA, NJ, WI, PR, VI Some industries, some states – Beer, wine, spirits – Auto dealers, gas stations – Farm equipment – Others
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Thank you!

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Key Contract Provisions: Product Definition

- Specified products only
- All products under specified TMs
- All products meeting specifications
- Right of first refusal for new products –Same TM
 - -Other TM
- Single agreement for all products
- <u>"Most favored" provision</u> © 2012, 2015, 2018 Andre R. Jaglom All rights reserved

Key Contract Provisions: Exclusivity

- May supplier sell to others in territory
- May supplier sell directly in territory?
- Protection against gray market imports?
- Profit passover or invasion fees
- Reserved customers or categories
 - -National or regional accounts
- Invasion fees
- Internet sales

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Key Contract Provisions: Exceptions to Exclusivity

- National Accounts
- E-Commerce

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- Duty-Free, Transportation, Military, Diplomatic
- What is effect on pre- and post-sale service?
 - Can invasion fee address?
 - Other incentives?



 Key Contract Provisions: Restrictions on Competition

 9. Competing products restrictions

 - Need to define specifically

 - Need to define specifically

 - Beverages

 - Alcoholic beverages

 - Beer

 - Imported beer

 - German beer

 - Dark beers from Germany

 - Munich Oktoberfest style beers

 - During term v. post-term

Key Contract Provisions: Restrictions on Competition

- · Ancillary to agreement's purpose
- · Reasonable as to:
 - -Duration

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- -Geographic scope
- -Activities restricted

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Key Contract Provisions:
Indemnification and Insurance
Breaches
 Product liability, recalls
 Distributor modification, storage, handling
IP infringement
 Claims of prior distributor
 Proven claims v. alleged claims
Liability insurance
– Amounts
 Additional named insured

 Key Contract Provisions: Demination

 • Without cause where lawful

 • Without cause where lawful

 • Performance standards

 - Sales v. purchases

 - Sales v. purchases

 - Sales v. execution

 - Consistency of enforcement

 • Other breaches

 • Changes in ownership or control

 • Financial condition

Key Contract Provisions: Termination

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- Cure periods
- Inventory repurchase
 - Mandatory
 - One party's option
 - Mutual option
 - As agreed
- Non compete/Non solicitation

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Key Contract Provisions: ECPA Compliance Foreign Corrupt Practices Act prohibits bribery of foreign officials, political parties, candidates Strict liability for acts of controlled joint venture Liability for 3rd party acts – e.g., agents, distributors – if knowledge Constructive knowledge, willful blindness, deliberate ignorance UK Bribery Act - wide jurisdiction if any business in the UK; strict liability; extends to private actors

Key Contract Provisions: FCPA Compliance

- Take steps before, in and after contract
 - Due diligence to vet potential partners
 - Contract provisions
 - Representation that have not violated
 - Agreement to comply spell it out
 - Reporting obligations, audit rights
 Subdistributors require due diligence
 - Subdistributors require due diligence, approval
 - Provisions are material, ground for termination
 - Ongoing training, monitoring, audits

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