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# Doing Business in the **USA** : Commercial and Corporate Considerations

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# Conduct Business in the ?

- Doing business in the United States offers many opportunities and there are a number of ways of entering the market. This presentation will focus on some commercial and corporate considerations that you need to address before deciding to enter the U.S. market.



# CONSIDERATIONS

- Import laws-Customs and International Trade
- Permits and licenses
- Regulatory Requirements, registrations, submissions (i.e. drugs, cosmetics, supplements, food, wine, spirits, toys, machinery)
- Labeling and Packaging
- Testing
- Promotions, Advertising
- Intellectual Property Rights
- Taxation
- Banking
- Corporation or LLC?
- Distributors or Sales Agents
- Consultants or Employees
- Insurance
- Safety
- Contracts
- Visas and Immigration

# Trademarks and Other Intellectual Property

- Is your trademark registered in the U.S.?
- If not, can you even use the name/trademark in the U.S.? Does it make sense? (i.e. Chevrolet Nova, Mazda La Puta), Traficante, The Italian Fairy
- Protect your brand, trademark, trade secrets

# Ways to Do Business in the U.S. Market



# 1) Direct Export

Direct export to the  without the use of any intermediaries is a common way Italian companies introduce their products to the U.S.A market.

# Challenges of this Approach

- Exporter reaches a limited number of customers
- Exporter may not know that there are rules and regulations that directly or indirectly affect the import and sale of these products in the U.S.A, i.e. instructions and safety information may need to be revised to comply with U.S.A requirements, regulatory requirements of the Occupational Safety & Health Administration (“OSHA”), Environmental Protection Agency (“EPA”) Consumer Products Safety Commission (“CPSC”)
- Exporter cannot control the promotion or advertising the product

## 2)

# Use Local Intermediaries to Bring Products to Market

- Distributor: Company sells products to a Distributor, who would then resells products at a profit to consumers

-or-

- Sales Agent: Markets the products and represents the Company in the U.S.A market

# Distributor

- Independent person or entity; operates in its own business name
- Stores products in its own warehouse-facility
- Distributor is a customer of the Company
- Engages in its own advertising-marketing campaigns
- Distributors buy the product directly from the Company, distribute it in the market and provide after-sale services and technical support
- Company is not liable for the actions of the Distributor but it is liable for the quality of the products
- Distributor is not a representative of the Company

# Contracts with Distributors

## Partial list of points that need to be addressed in contracts with Distributors:

- Define Products
- Define Territory
- Sales Outside Territory
- Internet Sales
- Exclusive vs non-exclusive
- Define customers
- Use of Sub-distributors and sub-agents
- Duration of Contract
- Termination
- Delivery Terms
- Payment Terms
- Security of Payment
- Minimum Quotas
- Promotions
- Use of Trademark
- Adequate Stock
- Jurisdiction and Courts for Disputes
- Tax Aspects
- **Look at state law and requirements**

# Issues to Consider Regarding Distributors

- **In return for taking on trade-related risks and burdens, Distributors will expect heavy discounts and generous credit terms.**
- **Company loses control of the way products are marketed and priced.**
- **With Sales Agents, the commission structure can be used to motivate them - there's no similar mechanism with a Distributor.**
- **Distributors often demand a long period of exclusivity, so it is important to choose one that has experience selling your type of products and has a large number of customers for the kind of products you sell.**
- **A Distributor's business practices or lack of expertise will hurt your business, i.e. there are complex state and federal requirements, a license or permit is required in each state in order to sell certain products**
- **Due diligence is very important as you may end up with a Distributor that does not have the type of experience and contacts needed to move your business forward**

# Distributors vs Franchises

**Franchises are very complex, highly regulated at the state and federal levels and there are severe penalties for failure to comply.**

Avoid the following in Distribution Agreements:

- Do not allow Distributor to use trademarks and brand name as part of its everyday business practices;
- Do not mandate specific guidelines in the marketing and selling of the products;
- Do not require Distributor any type of fee to do business with Company

# Sales Agent

- Markets the products and represents the Company in the marketplace
- Introduces buyers to sellers and negotiates sales
- Company has contact with Customers and controls the pricing
- The sales contract is between Company/ Producer and Customer
- Agent is given authority to act by the Company that has engaged him. The Company may be liable for the representations and actions of the Agent with respect to products and sales
- Agent is paid by commission

# Contracts with Sales Agents

A number of points made with respect to contracts with Distributors also apply to contracts with Sales Agents. The following need to be added:

- Commission, Rate and Basis
- Sales Agents should not have the power to accept orders for products as there may be legal and tax consequences. Company should be the only one to accept/decline orders
- Will there be advances against Commissions? How much?
- Be careful that the Sales Agent is not considered an employee as there are serious tax and legal implications

# Issues to Consider Regarding Sales Agents

- Sales Agents can locate and sell to Customers but can offer little additional after- sales services and technical support. In the U.S.A. a consumer friendly jurisdiction, it is very important to have after-sales support (repair, returns, warranty/safety issues)
- Company is shipping to each customer (instead of to one Distributor) which may be an expensive option.
- There are a high number of potential credit risks.

# 3) Establish A Company in the U.S.A.

Why?

- Increase presence in the U.S.A. to satisfy existing customers and prospects
- Control the branding, promotion and advertising of products
- Address regulatory requirements, i.e. labeling, packaging, safety warnings locally
- Manufacture, process or assemble products in the U.S.A.
- Protect Italian company against liability claims
- Minimize certain tax or customs duty-related costs
- Gain easier access to capital. Banks in the United States lend money to small businesses more readily than many of their foreign counterparts. Once a non-U.S. business has been operating in the United States for at least two years, this business has the same access to capital through U.S. banks as wholly-U.S. companies
- Monitor local consultants or employees

# Types of Entities

- The primary business formation structures are:
  - Sole Proprietorships
  - Partnerships
  - Corporations
  - LLCs (Limited Liability Companies)

# There are no “” companies

- Each of the fifty (50) states has its own laws governing the creation of legal entities with benefits and disadvantages
- Some states are considered more business-friendly, i.e. Delaware
- A business constitutes a company in a state, not in the U.S.A.

# Corporation or LLC?

- The decision to form an LLC or a corporation is a common debate among business owners that deserves careful consideration.
- While both are excellent choices for personal liability protection, each entity offers its own set of distinct advantages from a legal and tax point of view.
- In deciding which type of structure to form, **it is important to consult with an attorney and an international tax professional.**

# C Corporations

- The standard corporation, or [C corporation](#), is a separate legal entity owned by shareholders. The corporation is formed by filing incorporation documents with a state and paying the related filing fees. The corporate structure limits each owner's (shareholder's) personal liability for the corporation's business debts to the amount invested in the company by the shareholder.
- **Tax Treatment:** Corporations first pay corporate taxes on the company profit then, when that profit is distributed to the shareholders in the form of Dividends, the shareholders are then also taxed. In other words, the corporation is paying corporate taxes on the profits at the corporate level, then the shareholders are paying personal taxes on those same profits at the individual level. Unless you plan on keeping the profits in the company, they will be taxed twice as they flow through to the shareholders.

# LLC's

## What is a limited liability company?

- The [limited liability company \(LLC\)](#) offers an alternative to corporations and partnerships by combining the corporate advantage of limited liability protection with the partnership advantage of pass-through taxation. With this tax status, the LLC's income is not taxed at the entity level; however, the LLC typically completes a partnership return if the LLC has more than one owner. The LLC's income or loss is passed through the LLC and reported on owners' individual tax returns. Tax is then paid at the individual level.
- You form an LLC by filing incorporation (organizational) documents with a state and paying the related filing fees. LLCs also have fewer ongoing formalities and obligations than corporations.
- The LLC structure has only been in existence for about 25 years.

# Who May Want to Consider an LLC

An LLC might be the right type of business for you if:

- Your startup company anticipates losses for at least two years and you want to be able to pass the losses through to yourself and the other owners
- Flexibility for accounting methods is desired, because LLCs are not required to use the accrual method of accounting as C corporations typically are
- Your business may own real estate
- You want management flexibility, since LLCs offer more flexibility than corporations in terms of how the management of the business is structured
- You wish to minimize ongoing formalities. Unlike corporations, which are required to hold annual meetings of directors and shareholders and keep detailed documents and records for all corporate meetings and major business decisions, LLCs do not face strict ongoing meeting and documentation requirements.
- You want flexibility for sharing profits among owners.

# Paese Che Vai Usanza Che Trovi

**The American Business Culture Is Quite Different From the Italian**

## **Corporate Culture**

- **In the United States, business relationships are formed between companies rather than between people.**
- **Americans do business where they get the best deal and the best service. It is not important to develop a personal relationship in order to establish a long and successful business relationship.**

- **Americans prefer directness in communication.**
- **When Americans say "yes" or "no," they mean precisely that.**
- **"Maybe" really does mean "it might happen"; it does not mean "no."**

## Goal: A Deal

- **The goal of most negotiations in the U.S.A. is to arrive at a signed contract.**
- **Long-term relationships and benefits may not be the main objective.**
- **The immediate deal may be the only important issue.**

# Negotiations

- **Negotiations may seem rushed to you.**
- **“Time is money” to Americans and that they may not think that building a relationship with potential business partners is necessary.**

# No Written Contract-No Deal

- **Americans put a great deal of value on the written word.**
- **American law almost always requires contracts to be written out.**
- **Verbal contracts are rarely legally binding.**
- **Make sure you read the fine print.**

# Attorneys and Accountants

- **Do not enter into any contract without hiring a lawyer.**
- **No savvy American businessperson would sign a contract before consulting a lawyer for legal advice and an accountant for fiscal advice**

# Americans Conduct Business With People They Have Never Met

- **Americans are very comfortable picking up the telephone and immediately conducting business with someone they have never met and perhaps never will meet.**

# Entering the Market

- Offers many rewards but the legal and fiscal foundations must be strong





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# Remember...

- Intellectuals solve problems, geniuses prevent them.” Albert Einstein