



# Welcome to the sixth export webinar in the series: Top Tips for Negotiating Agreements with Overseas Distributors

---

## Upcoming Webinar: US-Mexico-Canada Agreement (USMCA) Practicalities/Mechanics of Obtaining the Lowest Tariff Rate

- Thursday, October 1<sup>st</sup> at 10am PDT/1pm EDT
- To register, visit [www.sema.org/international](http://www.sema.org/international) or contact Linda Spencer at [lindas@sema.org](mailto:lindas@sema.org)

## Overseas Business Development Trips

- SEMA Middle East (Abu Dhabi, United Arab Emirates/Riyadh, Saudi Arabia): *March/April 2021*
- SEMA Australia (Melbourne, Australia): *2021*
- SEMA Nordic (Stockholm, Sweden): *September 2-6, 2021*

**SEMA360:** An opportunity to connect with International Buyers and Media. If you haven't signed up yet, check out the Industry's New Online eMarketplace, SEMA360 taking place November 2-6, 2020 at [www.sema360.com](http://www.sema360.com).

- Five reasons to participate:
  - Early pre-registration particularly strong among international buyers
  - Plug into SEMA's worldwide network of media contacts to amplify news, brands, products and innovations.
  - Post images, descriptions and videos of your newest, most popular and specially priced products on your Manufacturer Showcase page.
  - Supercharge your page by adding optional products to the News Products Showcase and Feature Vehicles that hotlink back to your Manufacturer Showcase page.
  - Connect your staff with qualified international buyers and media for one-on-one and group roundtable discussions and demonstrations.



## Doing Business Through Distributors in Australia--Issues and Key Considerations



**Patrick Fazzino**  
No 1 BLIGH STREET LEVEL 15  
SYDNEY nsw 2000  
1701 PENNSYLVANIA ASVENUE NW SUITE 200  
WASHINGTON DC 20006  
Email: [pfazzino@WASHGLOBAL-LAW.COM](mailto:pfazzino@WASHGLOBAL-LAW.COM)

## Distribution Arrangements—Key Elements

- Selling via a Distributor (D) a very common approach for U.S. exporters
- Australian law permits considerable flexibility in terms
- D purchases goods, then resells them to its customers—who might be dealers or end users.  
=D mark ups
- D agreements have terms that are very similar to what U.S. companies would see in the U.S.
- Distributors typically want large territories given the limited population.  
=Key considerations
- D may be reluctant to make much of an initial financial investment.
- Managing your sales expectations—a common concern is lower than expected sales from Australian distributors. Minimum purchase requirements, etc. should take the market size into consideration,

## Important Contractual Issues

- Territory—where and in what sectors will the D be allowed to sell the goods?
  - =Grant D exclusivity?
  - =Size of the territory granted/Considerations?
  - =Parallel/Grey Market imports
  - =Quid pro quo for exclusivity?/ Require “mutual exclusivity”?
- Pricing
  - =Commercial issues but also legal ones
  - =E.g., restrictions on resale price maintenance
  - =Other Australian trade practices restrictions
  - =Antidumping Laws
  - =Transfer pricing issues among affiliated entities
- D Sales Efforts—performance requirements
  - =Advertising
  - =Minimum purchases
  - =Installation and after sales service
  - =D’s financial condition

## Contract Provisions (Cont'd)

- IP Protection
  - =Agreement should contain a license for the D to use the Seller's IP.
- Payment terms and passage of title and risk of loss
  - =Parties can stipulate when title passes to the D. If they do not do so, the CISG may dictate when—when goods are transferred to the first transportation carrier
- Term and Termination
  - =Trial basis or longer term?
  - =Grounds for termination/contract modification
- Warranty terms and any limits on damages
  - =Goods sold “as is” or with warranty terms and if so what terms?
  - =If the parties don't specify certain terms, the CISG may supply them.
  - =E.g., unless Seller limits its warranty in the agreement, Seller will be responsible and liable for all foreseeable consequential damages which result to the Buyer from a defective product

# Issues Commonly Encountered by U.S. Companies Doing Business in Australia

## **Australian Corporate Income Tax/Australia-US tax treaty**

### **Goods and Services Tax**

GST is the equivalent of a sales tax. There is only one, federal GST and no equivalent state taxes.

- Straight 10% applicable to most product purchases.
- GST applies to imported goods

### **Other laws, regulations applicable to imports:**

- Customs duties on certain products. Valuation and origin rules apply;
- Some types of imports are subject to restrictions, including quarantine requirements.
- Labelling requirements.

### **Consumer Protection Laws**

- Laws against unfair competitive practices, including laws protecting small companies against unconscionable dealing by larger companies.
- Products liability laws, food and drug laws, environmental laws. Laws such as the products liability and labelling laws are a direct responsibility of the exporter and cannot be “offloaded” onto the local distributor.

# Issues Commonly Encountered by U.S. Companies Doing Business in Australia – Cont'd

## **Intellectual Property Laws**

Similar types of IP protection as in the U.S. such as patent protection, protection of designs, trademark and copyright.

- Some areas of U.S. IP protection that do not have an equivalent in Australia, notably protection of trade secrets, protection against grey market sales and laws enabling local industry to stop all imports of patent infringing articles (i.e., no Section 337 remedy).
- Exporters to Australia should always consider whether to register their trademark, design and/or patent as you would in the U.S.

## **Identifying the right local partner and optimal arrangement is key.**

- For exporters, selecting the wrong local distributor can lead to disappointment, disputes about payments issues, and wasting of time. Collections can be very difficult.
- There are plenty of examples of companies owed money and encountering difficulty in collecting; insufficient amount at stake to file legal action.
- The wrong local partner in a JV can result in litigation and other serious problems

## Conclusions

Australia is an attractive export and investment destination for a variety of reasons.

There is something for almost every type of U.S. company.

For SMEs, niche products offer great opportunities in a sophisticated consumer market.

Companies in the U.S. typically find Australia a very hospitable and relatively easy market to operate in.

But, the usual cautionary comment is worth stressing—despite the similarities with the U.S., Australia is a different country with a different culture, law, background and heritage.

In fact, Americans and Australians often are lured into thinking that the usual precautionary measures in dealing in a foreign market are not necessary because it seems so familiar—especially compared to other countries in the region.

As in every overseas market, you still need to do your homework, avoid assumptions based on your U.S. experience, and seek appropriate advice on how best to do business there.



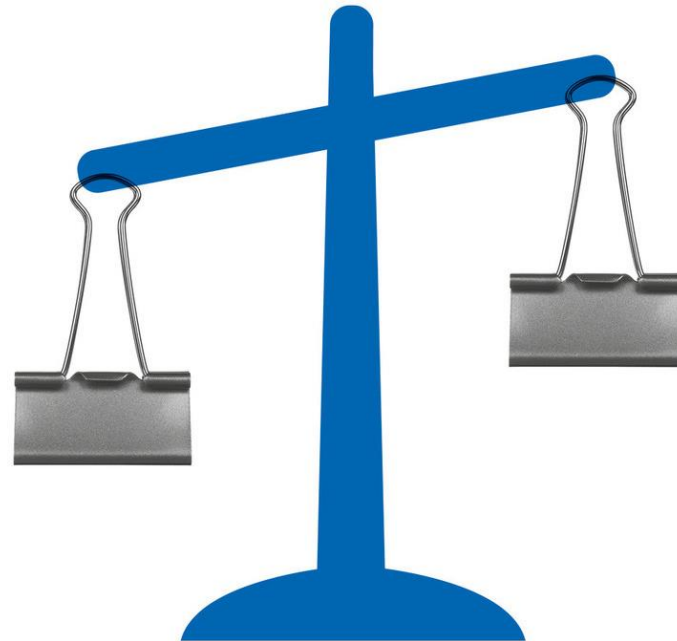
# Sweden - Top Tips for Negotiating Agreements with Overseas Distributors

*considerations to take into account when negotiating  
agreements with overseas distributors*

**September 2020**

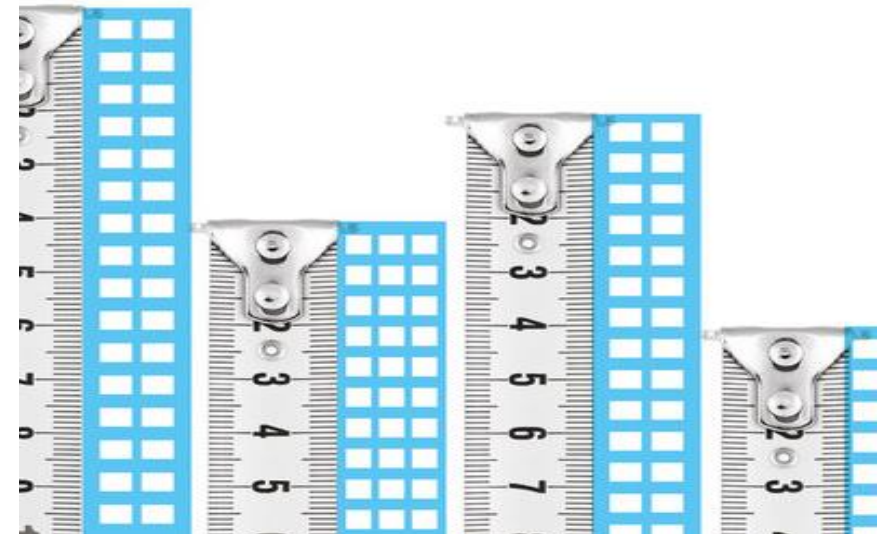
Richard Jacobsson

*Partner at Eversheds Sutherland Advokatbyrå AB in  
Stockholm, Sweden. Swedish lawyer with 25 year  
experience from working with international contracts  
regarding sale of goods and services.*



# Key Legal Features for Sweden:

- Part of EU Regulatory System
- Extremely open & international economy (Free Trade !) with basically no restrictions against foreign investment and no legal discrimination against foreign companies
- High level of regulation for sales to consumers
- Low level of regulation for sales to commercial entities



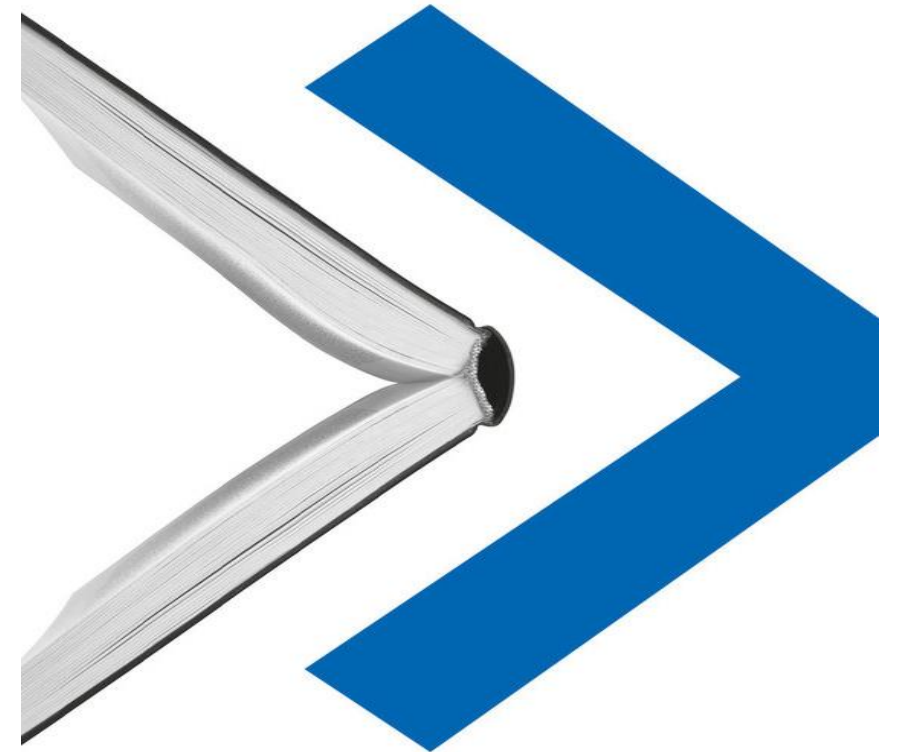
# Relevant Swedish law for a US Exporter selling goods to non-consumer customers in Sweden:

- Swedish law will fully respect the “freedom of contract” principle, including also freedom for contractual parties to agree on jurisdiction and applicable law
- If parties agree on Swedish law there is still full “freedom of contract”, with one important exception being the Act on Commercial Agents (Based on a EU Directive).
- Distribution alternatives: Subsidiary, Commercial Agent, Exclusive Distributor; Non-Exclusive Distributor, Direct Sales



# Act on Commercial Agents:

- Mandatory regulations protecting the interests of the commercial agent
- Minimum termination notice period
- Statutory Termination Compensation
- Does NOT apply for distribution agreements outside the scope of a strict legal definition



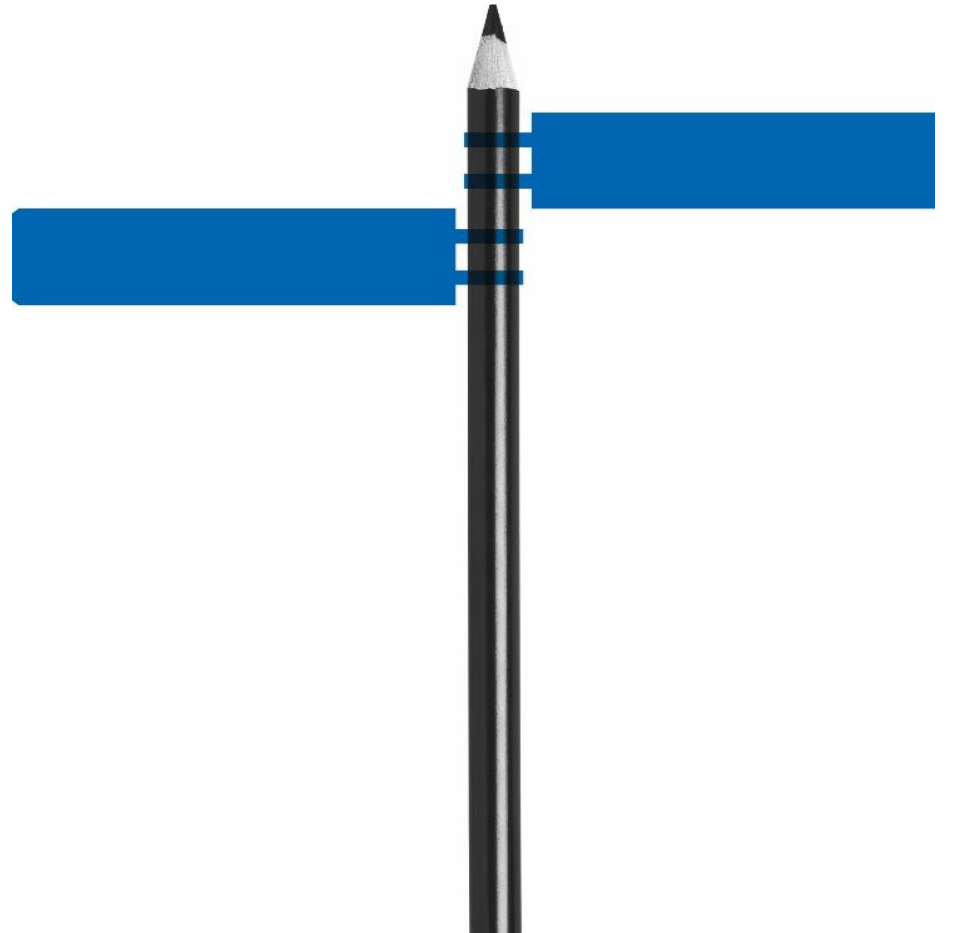
# EU/Sweden competition law (antitrust laws):

- Generally very strict regulations as to distribution agreements, but focus for enforcement action of EU & Sweden competition authorities are not vertical relations but horizontal relations (arrangements between competitors)
- Prohibited to limit the right of the distributor to set its own prices (but “recommended” price may be ok)
- Prohibited to create strict geographical division within the EU (but prohibiting distributor from “actively” selling in certain area may be OK)
- Regulations on exclusivity should always be time limited, never longer than 5 years



# Summary & Conclusion

- You can [almost] agree on whatever you want to
- The contract is important, Swedish law less important
- Carefully assess the issues of Applicable Law and Jurisdiction (Not only what country but also court procedure or commercial arbitration)
- Be careful as regards Antitrust and Mandatory Commercial Agency Law



**Thanks!**

**Richard Jacobsson**

T: +46 8 545 322 16

M: +46 704 41 89 15

[richardjacobsson@eversheds-sutherland.se](mailto:richardjacobsson@eversheds-sutherland.se)

**[eversheds-sutherland.com](https://eversheds-sutherland.com)**

This information pack is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for appropriate legal advice. Eversheds Sutherland (International) LLP can take no responsibility for actions taken based on the information contained in this pack.

© Eversheds Sutherland 2018. All rights reserved.



# Welcome to the sixth export webinar in the series: Top Tips for Negotiating Agreements with Overseas Distributors

---

## **Upcoming Webinar: US-Mexico-Canada Agreement (USMCA) Practicalities/Mechanics of Obtaining the Lowest Tariff Rate**

- Thursday, October 1<sup>st</sup> at 10am PDT/1pm EDT
- To register, visit [www.sema.org/international](http://www.sema.org/international) or contact Linda Spencer at [lindas@sema.org](mailto:lindas@sema.org)

## **Overseas Business Development Trips**

- SEMA Middle East (Abu Dhabi, United Arab Emirates/Riyadh, Saudi Arabia): *March/April 2021*
- SEMA Australia (Melbourne, Australia): *2021*
- SEMA Nordic (Stockholm, Sweden): *September 2-6, 2021*

**SEMA360:** An opportunity to connect with International Buyers and Media. If you haven't signed up yet, check out the Industry's New Online eMarketplace, SEMA360 taking place November 2-6, 2020 at [www.sema360.com](http://www.sema360.com).

- Five reasons to participate:
  - Early pre-registration particularly strong among international buyers
  - Plug into SEMA's worldwide network of media contacts to amplify news, brands, products and innovations.
  - Post images, descriptions and videos of your newest, most popular and specially priced products on your Manufacturer Showcase page.
  - Supercharge your page by adding optional products to the News Products Showcase and Feature Vehicles that hotlink back to your Manufacturer Showcase page.
  - Connect your staff with qualified international buyers and media for one-on-one and group roundtable discussions and demonstrations.