



Agency and distribution agreements

This booklet has been prepared for general information and does not constitute legal advice. It is not an exhaustive statement of the law. For advice in applying this general information to your specific circumstances please contact Stephen Sidkin at Fox Williams LLP.

© Fox Williams LLP 2017

AGENCY AND DISTRIBUTORSHIP AGREEMENTS OVERVIEW

This booklet has been prepared for general information. It is not an exhaustive statement of the law. For advice in applying this general information to your specific circumstances, and details of the specialist legal services Fox Williams LLP provides, please contact Stephen Sidkin or Nigel Miller at Fox Williams LLP.

1. INTRODUCTION

This publication summarises the main points to consider when negotiating an agency or distributorship agreement. It is a guide to the principal items to be dealt with in an agreement between a supplier and his local agent or distributor.

Not every point in this booklet will be relevant in all circumstances, nor are the checklists an exhaustive list of all matters that may apply in a particular case. As such, this booklet is not a substitute for specialist legal advice on a specific transaction or on the drafting of the agreement itself.

2. AGENT VERSUS DISTRIBUTOR

Although the terms "agent" and "distributor" are used interchangeably in the commercial world, there is a distinct legal difference between the two.

In strict legal terms, an agent is simply someone who acts on behalf of another in assuming contractual obligations on that other's behalf. Whilst the function of a distributor is to re-sell goods bought from a supplier, an agent's function is to provide a service to the supplier, either introducing customers to the supplier, or concluding contracts on the supplier's behalf. Depending on the circumstances of the particular case:

1. the agent may have authority to enter into contracts on behalf of the supplier;
2. the contract for the sale of the products or supply of services will be between the supplier and the customer, with the agent acting as intermediary, the supplier controlling the price and other terms of supply to the customer;
3. the agent will generally have no liability under the contract made on the supplier's behalf;
4. the supplier, not the agent, will bear the risk of bad debts; and
5. the agent will usually be remunerated by commission paid by the supplier.

Under a distributorship agreement, on the other hand, the distributor purchases goods from the supplier and resells them on his own account. Accordingly:

1. the distributor has no authority to incur contractual obligations on behalf of the supplier;
2. the supplier has no direct contractual link with the customer (instead there are two separate contracts for the sale of the products, one from the supplier to the distributor, and another from the distributor to the customer);
3. (depending on the territory concerned) the supplier may be prohibited from controlling the distributor's resale prices;
4. the distributor bears the risk of customers' bad debts (and the supplier's risk of bad debts is channelled into one debtor, i.e. the distributor); and
5. the distributor is remunerated from the profit on the supply of the products to the customer.

The supplier should decide at the outset what form of legal relationship would best suit their business.

Generally, where the supplier is exporting, he will prefer to have a distributor in close touch with the market and the credit-worthiness of customers. The supplier may find it easier to deal with one known entity (the distributor) rather than perhaps many unknowns (customers). It may also be that the law of the place of performance of the agreement or of the agent's residence would entitle an agent (but not a distributor) to compensation for termination of the agreement even if the parties try to exclude this right.

In other circumstances, there may be commercial reasons why the supplier would prefer to appoint an agent.

The Commercial Agents (Council Directive) Regulations 1993 (as amended) ("the Regulations") attempted to harmonise the laws of EU member states relating to self-employed commercial agents.

The terms of the Regulations are implied into commercial agency agreements, whether written or oral, formal or informal.

For an in depth analysis of the commercial agents regulations please return to our Fashion Law site.

Whether agency or distribution is adopted, competition law is likely to be one of the most important legal considerations underlying the agreement.

3. COMPETITION LAW

3.1. UK Competition Law

The UK's Competition Act 1998 prohibits all agreements between undertakings, decisions by associations of undertakings or concerted parties, which may affect trade within the UK or which have as their object or effect the prevention, restriction or distortion of competition within the UK.

Anti-competitive behaviour or arrangements in whatever form - written, unwritten, formal or informal – are caught. Moreover, whether an agreement is deemed anticompetitive, is judged on its effect, not its wording or form.

An agreement falls under the prohibition only if it has an "appreciable" effect on competition within the UK. In general an agreement has no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25%. Exceptions to this are agreements which directly or indirectly fix prices, impose minimum resale prices, or share markets. Such agreements will be judged by the Office of Fair Trading (OFT) as having an appreciable effect on competition (even where the parties' combined market share is less than 25%).

Certain categories of agreement are specifically excluded from this prohibition. These categories include vertical agreements – agreements between businesses operating at different levels of the chain, for example supplier and distributor, principal and agent.

3.2. EU Competition Law

In addition, close attention will have to be given to European Union competition rules when considering an arrangement that covers all or any part of the common market.

Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements between independent undertakings which may affect trade between Member States of the EU and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Agreements which contravene Article 101(1) are automatically void - at least in respect of their "anti-competitive" provisions - unless they have been "notified" to and "exempted" by the European Commission in Brussels. Notification is a cumbersome process and the Commission adopts very few formal decisions of exemption each year. Broadly speaking, the criterion for exemption is that the economic benefits of an agreement outweigh its restrictive effects.

In 2010, the Commission made a new Regulation exempting from Article 101(1) various categories of agreements between businesses operating at different levels of the production or distribution chain. For example, supplier and distributor. This is an automatic exemption; it is not necessary to notify the agreement in order to obtain an individual exemption.

The Regulation sets out a list of "hardcore" restrictions which exclude the whole agreement from the scope of application of the exemption. However, a restriction is not classified as hardcore if it is on active sales into the exclusive territory or to an exclusive customer group reserved by the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer.

Attempts by manufacturers of goods to protect their distributors against competition from parallel imports have been repeatedly condemned by the European Commission and can lead to the imposition of heavy fines. A further point to bear in mind is that whilst in certain cases the imposition of restrictions against competition on an exclusive distributor can be regarded as an acceptable quid pro quo for the grant of exclusive rights it is more difficult to justify such restrictions where the distributor is simply given non-exclusive rights.

Special rules apply where a manufacturer proposes to set up a network of distributors.

4. THE AGREEMENT

Whether the appointment is of an agent or a distributor, the form of agreement between the supplier and the agent or distributor defines the parties' relationship and sets out the ground rules for the future.

The agreement should also determine the rights and obligations of both sides if the relationship goes wrong.

The following checklists are tailored to the specific issues to be considered in agency and distribution agreements. The issues are similar, to a large extent, although they reflect different legal relationships.

5. AGENCY AGREEMENTS CHECKLIST

Who are the parties?

1. Clearly state the identity of the parties including the place of incorporation, registered/principal office and any registered number.
2. Are the obligations of the agent to be guaranteed? If so, add the guarantor as a party.

Clear definitions will be needed of at least:

1. the Territory
2. the products/services which are the subject of the agreement
3. minimum targets to be attained

What is the scope of the appointment?

Is the agent exclusive/sole/non-exclusive?

How long will the agreement last?

For example:

1. fixed period

2. initial minimum period
3. right to renew/automatic renewal
4. right to terminate by notice
5. length of notice period

What are the agent's responsibilities?

For example:

1. promote sales
2. not actively market outside the "Territory"
3. not dealing in/being concerned with competing products/services
4. selling at specified prices
5. not giving unauthorised warranties or representations
6. not binding the supplier to give credit
7. maintaining offices and other facilities (for sales, service, repair, parts, etc.)
8. data gathering and reporting
9. keep accounts and records, and allow the supplier to inspect and audit
10. separate accounts
11. enquiries from outside the "Territory" referred to supplier
12. inform the supplier of disputes with customers
13. assignment
14. not sub-contract/delegate fulfilment of contractual obligations
15. incurring liability
16. clarity in dealings that acting as an agent for the supplier
17. expenses
18. confidentiality
19. using standard terms and conditions.

What are the supplier's responsibilities?

For example:

1. supply promotional literature and/or samples
2. provide advice and assistance
3. to refer to the agent enquiries from within the "Territory", where practicable

How will products/services be supplied?

For example:

1. how are orders are to be transmitted to supplier
2. is supplier not obliged to accept any order
3. will agent only offer products/services on supplier's conditions of sale
4. should agent carry out credit risk evaluation of customers

What about commission?

For example:

1. basis of commission/remuneration
2. time, manner and place of payment
3. currency of payment
4. any withholding tax

Intellectual property rights (including trade marks, copyright, designs, patents, databases, confidential information)

1. agent not to use the supplier's intellectual property rights without consent
2. agent to notify supplier of unauthorised third party use of intellectual property rights and assist in infringement proceedings
3. on termination of the agreement, agent to cease to use any intellectual property rights for which consent was given

Reservations of the Supplier

The Supplier's right to terminate the Agreement

1. on breach by the agent
2. on insolvency of the agent
3. on change in control of the agent
4. on agent being prevented from performing its duty
5. on failure to achieve sales targets
6. on purported assignment by the agent
7. if the agreement becomes illegal

Consequences of Termination

1. commission entitlements of agent on termination
2. obligations of agent on termination

3. rights and liabilities of the parties to survive termination
4. no compensation for the agent on termination
5. return of promotional literature, samples and any stocks
6. indemnity or compensation under the Regulations

Other issues

1. Choice of Law, Submission to the Jurisdiction and Address for Service
2. Whole Agreement Provision
3. No Joint Venture or Partnership
4. General Provisions

DISTRIBUTORSHIP AGREEMENTS CHECKLIST

Who are the parties?

1. Clearly state the identity of the parties including the place of incorporation, registered/principal office and any registered number.
2. Are the obligations of the distributorship to be guaranteed? If so, add the guarantor as a party.

Clear definitions will be needed of at least:

1. the Territory
2. the products which are the subject of the agreement
3. minimum targets to be attained
4. any trade marks or other intellectual property rights involved

What is the scope of the appointment?

Is the distributorship exclusive/sole/non-exclusive?

How long will the agreement last?

For example:

1. initial minimum period
2. right to renew/automatic renewal
3. right to terminate by notice
4. length of notice period

Terms of Sale of Products from Supplier to Distributor

1. supplier's right to refuse orders
2. prices, provisions for fixing prices, provisions in the event of failure to fix prices

3. pricing provisions on resale (subject to local law)
4. terms of payment/means of payment (e.g. letter of credit)
5. distributor to purchase "products" only from the supplier
6. supplier's conditions of sale to apply
7. delivery terms (ex works, CIF, FOB, etc.)
8. reservation of title
9. warranties
10. limitation of liability
11. supplier's right to improve or modify the "products"
12. distributor's obligation to purchase annual minimum quantities of "products" and consequences of failure (termination/change of scope of appointment)

General Obligations on Distributor:

1. to promote sales
2. not to deal in competing products during the Agreement
3. not outside the "Territory" and in relation to "products" to seek purchasers, establish any branch or maintain any distribution depot
4. to maintain offices and other facilities (for sales, service, repair, parts, etc.)
5. to pass back to the supplier market information and provide reports and returns
6. to keep accounts and records, and allow the supplier to inspect and audit
7. to comply with local laws
8. not to alter or change "products" or packaging
9. to conform to the supplier's marketing policies
10. to keep sufficient stocks of the "products" and of parts
11. to maintain sufficient qualified staff
12. qualifications for appointment of local dealers

Advertising

1. minimum advertising commitment on distributor
2. form and content of advertising to be approved by supplier
3. supplier to provide certain promotional literature free of charge

Intellectual Property Rights

1. all rights to trade marks remain with supplier

2. ownership of goodwill generated by distributor
3. distributor not to endanger applications/ registration of Trade Marks
4. control of prosecution/defence of infringement proceedings and sharing of damages/liabilities

Technical Support and Confidentiality

1. supplier to provide know-how, technical support and training
2. obligation of confidentiality upon distributor in respect of know-how disclosed
3. confidentiality obligation to continue after the termination of the Agreement

Reservations of the Supplier

The Supplier's Right to terminate the Agreement

For example:

1. on breach by the distributor
2. on failure by the distributor to achieve sales targets
3. on insolvency of the distributor
4. on change in control of distributor
5. on distributor's being prevented from performing its duty
6. on distributor's failing to purchase minimum quantities
7. on purported assignment by distributor
8. if the agreement becomes illegal

Consequences of Termination

For example:

1. rights and liabilities of the parties to survive the termination
2. resale of merchantable stocks to supplier
3. destruction of all other stocks
4. distributor to cease use of Trade Marks
5. distributor to supply customer lists

Other issues

1. Choice of Law, Submission to the Jurisdiction and Address for Service
2. Whole Agreement Provision
3. No Joint Venture or Partnership
4. General Provisions