

Guide to: Distribution Agreements and Agency Agreements

Businesses may look to appoint an agent or a distributor to take advantage of their market knowledge, trade connections and territory familiarity. Such a relationship could potentially reduce the appointing principal's risk and liabilities in setting up in a new market or territory.

However, there are key distinct differences between an agent and a distributor which a business should consider and look to formalise in a written agreement prior to beginning the relationship. Failure to do so can create uncertainty and, if the relationship breaks down, may result in litigation.

Agency Agreements

An agent is an intermediary granted specific authority to either introduce customers (i.e. a referral arrangement) or enter into a contract with a customer on behalf of the appointing principal.

Who has the contract with the end customer?

It is the appointing principal which has the contract with the end customer and usually the agent is not a party to it. Therefore, the agent may not have any liability to the end customer. The agent will not usually acquire title to the products.

The appointing principal will likely require some control protections in relation to the contracts to be entered into for which it will be liable. An agency relationship may be more suitable if the appointing principal wants to exert greater control over the activities of its intermediary.

How are agents paid?

Agents generally operate on a commission relationship typically with reference to a percentage or volume of sales made.

Compensation or indemnity on termination

In the UK, under the Commercial Agents Regulations 1993, commercial agents dealing with the sale or purchase of goods may be entitled to compensation or indemnity from the appointing principal on termination of the relationship.

If these Regulations do apply then they cannot be contracted out of to the agent's detriment. It is important to consider the minimum conditions set out in the Regulations and formalise the relationship in writing.

Distribution Agreement

A distributor purchases goods or services from its appointing principal. The distributor then resells the purchased goods or services adding a margin to make profit.

Who has the contract with the end customer?

It is the distributor which has the direct contract with the end customer. Such people are not the appointing principal's customers. Distributors generally assume liability for the products sold to its customers. Subject to effective retention of title clauses, title to goods will pass to a distributor for it to resell the goods on to the end customer.

How are distributors paid?

Distributors make sales to their own customers from goods or services they have purchased in the first instance. Therefore, there may be a greater incentive to sell the appointing principal's products given the initial outlay. Also, the distributor will have the financial responsibility of managing their own customer's invoices.

Compensation or indemnity on termination

In the UK, distributors are not generally entitled under the Commercial Agents Regulations 1993 to compensation or indemnity on termination of the distribution arrangement.

Agent or Distributor – Key considerations

Other important considerations when appointing an agent or distributor

- The extent of the authority of an agent.
- The term of the contract and the notice required to bring it to an end.
- Exclusivity – whether the agent or distributor has the right to operate on an exclusive basis (i.e. another person cannot be appointed to do the same thing).
- Duties/guidelines to be complied with to protect the principal's brand/goodwill.
- Intellectual property – the extent to which the use of the principal's intellectual property rights is allowed.
- Restrictive covenants – whether the agent/distributor can be restricted from working with the principal's competitors.
- Competition – a distribution arrangement is more likely to be complicated by competition law implications (i.e. the rules surrounding imposing anti-competitive restrictions on sale, such as resale price maintenance or restricting locations of sale).
- Data Protection in light of the introduction of the General Data Protection Regulation.
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) may be relevant if activities are being outsourced.
- Potential implications of Brexit.

This guide is provided for general information purposes only and does not constitute legal or other professional advice.

BHW Solicitors is the leading specialist commercial law firm in Leicester and the East Midlands.

We provide the best legal, commercial and strategic advice to businesses of all types and sizes, from start-ups to household names.

T: 0116 289 7000 E: info@bhwsolicitors.com W: www.bhwsolicitors.com

1 Smith Way, Grove Park, Enderby, Leicestershire, LE19 1SX