



December 2010

Agencies and Distributorships

The titles "agent" and "distributor" are often used interchangeably, causing considerable confusion, so it is essential to carefully define the legal relationship between supplier and intermediary and look beyond these titles to consider the substance of any existing agreement and the manner in which the agreement is actually operated by the parties. Typically the law on agency and distributorship becomes an issue for business when faced with the termination of an existing distributorship or agency agreement.

Agency

An agent is appointed by the principal (a company or individual) and granted authority to deal on the principal's behalf. It may introduce customers to the principal or conclude contracts with customers directly on behalf of, or in the name of the principal. Title in the goods passes from the principal directly to the customer. The agent does not assume ownership of the goods at any stage and will generally have no liability to the customer but the principal is liable for the acts of his agent.

The Commercial Agents (Council Directive 86/653/EEC) as implemented in Ireland by the Commercial Agents Regulations (SI 33/1994 and SI 31/1997) govern the appointment of certain commercial agents. They only apply to agents that are selling goods not services. The agency agreement must be evidenced in writing.

A commercial agent is defined in the regulations as;

"A self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person, hereinafter called the 'principal' or to negotiate and conclude such transactions on behalf of and in the name of the principal" (Reg (2)(1)(SI 33/1994))

There are a number of exclusions to this definition. The definition in essence means that there are three tests to be satisfied in order for an agent to be a 'commercial agent'.

1. Self-employed
2. Continuing authority to act on behalf of the principal
3. Can negotiate and can negotiate and conclude a transaction on behalf of the principal.

In the case of *Michael Kenny v Ireland ROC Limited*, the High Court held that active bargaining is not required to qualify as 'negotiate'. The test is to ascertain whether the agent 'brought a material level of skill or consideration to conducting, managing or otherwise dealing with the sale or purchase of products on behalf of the principal'.

Patrick G Flynn

Alan O'Driscoll

Ian Knight

James D Duggan

Consultants

Mary Swords

Julian Cunningham

An agent usually receives commission as a percentage of sales or introductions. The Agents Regulations set out how an agent's commission should be calculated and when it should be paid.



Distributorship

A distributor is an independent business trading on its own behalf. It buys goods from a supplier on an exclusive, selective or sole basis and sells them on to customers at a margin to cover its own sales costs and also to make a profit. The distributor contracts separately with the supplier and with customers and title in the products will pass to and from the distributor together with product liability. This may raise insurance issues. The supplier might have liability under general legal principles such as negligence and duties of care to the consumer, or under product liability legislation.

A distributor simply recovers his sales costs and profit from transactions to customers. Generally, a distributor's profit will be greater than the commission paid to an agent for similar products.

While an agent has limited financial risk, a distributor is responsible for recovering the price from end-customers (and also carrying out credit checks) and assumes the greater financial risk of any failure to pay. The higher level of risk assumed by the distributor is reflected by his level of remuneration or margin as compared with the commission earned by an agent or goods are sold on a "sale or return" basis.

Distributor agreements with no stated term are assumed to be indefinite and are terminable by reasonable notice from either party. Recent case law has indicated that this notice can be very long and occasionally up to 12 months.

A distributor has no right to compensation on proper termination of a distributor agreement.

Taxation

In each case, careful consideration should be given to both Irish and foreign (if applicable) tax implications of the particular arrangements in place. A principal may be regarded as trading in a territory if it has an agent there, which may have tax implications. Broadly speaking an agent will not have to account for VAT in its own right, provided it makes the supplies in the name of the principal. A supplier appointing a distributor in a certain territory will not be regarded as trading there which may be beneficial for tax purposes. In most cases a distributor will be treated as a principal for VAT purposes and will therefore be required to account for VAT itself.

As a Supplier you should consider a Distribution Agreement when you wish to:

1. to stay relatively liability-free;
2. to penetrate a market with better local knowledge, distribution channels and reduced costs;
3. to guarantee certain levels of stock are held and purchased by its distributor in a certain period of time;
4. to keep its distributor at arm's length and not be fettered by onerous obligations such as a requirement to pay compensation to a distributor on termination of the distribution agreement; and
5. a simpler tax position.



As a Principal you should consider an Agency Agreement when you wish to:

1. require more control over the pricing of the product and its customers;
2. want to keep the price competitive and distribute the product itself;
3. want to pay lower commission or sales costs;
4. want to avoid concerns over competition law issues; and
5. place more trust the third party.

This summary is intended to be general in nature and specific legal advice should be taken on each particular situation.

If you have any questions in relation to the above or would like advice on a related matter please contact Alan O'Driscoll or any member of the firm.