

### Agent or Distributor? The need to be clear

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Getting products to customers is vital for many businesses. Some exporters use distributors, others agents. For some the distinction is blurred. In business this is not a problem. In law it can be a different story.

In 1999 the Appeal Court ruled between two packaging companies. The Italian claimant was a manufacturer. The English defendant acted as a manufacturer, but also imported the claimant's goods into the UK. The defendant failed to pay for some goods. The claimant sued. In return the defendant claimed it was the claimant's agent (not a distributor). Accordingly, under the Commercial Agents Regulations it was entitled to unpaid commission *and* compensation following termination of the agency agreement between the parties.

The court decided for the claimant. Whilst the claimant was happy for the defendant to act either as a distributor or as an agent, the defendant had chosen to act as a distributor. Its actions were inconsistent with those of an agent.

If a person acts as both a distributor and an agent for the same supplier/principal, there is likely to be uncertainty and, if the Regulations apply, a great cost to the supplier. This is because the Regulations protect agents.

It is therefore important to make clear if someone is acting as a distributor (with few rights) or as an agent (with many rights). This can be achieved by using a written contract. A distributorship agreement should specify the duration of the agreement and as to how (if at all) it may be extended. It is also important to determine the status of the distributor.

If the distributor is appointed on an exclusive basis then the parties usually intended that only he will be able to sell the goods in a particular territory or to specific customers. In the absence of a contractual provision to the contrary, the exporter cannot seek orders in that territory or from such customers. Nor can the exporter appoint another distributor.

This changes where the appointment is made on a sole basis. Here the goods can be sold either by the manufacturer or the distributor in the territory or to particular customers. But the manufacturer cannot appoint another distributor unless there is an indication to the contrary. If the appointment is non-exclusive, the supplier can seek orders and appoint any number of distributors.

Of critical importance will be the terms on which the goods are sold by the exporter to the distributor. Often the exporter will not have standard terms and conditions of sale on which it can rely. Even where standard terms exist, they are rarely properly incorporated into the agreement.

It is also useful for the supplier if the agreement sets out the obligations of the distributor to promote the products in the market. In particular will there be a minimum performance obligation on the distributor?

One subject that is often overlooked is the possibility of the goodwill associated with the product shifting to the distributor during the lifetime of the agreement. This was the subject of a recent High Court decision which went against the US manufacturer of Snorenz.

If the distributor is to create packaging, the agreement needs to provide for copyright in the packaging to be owned by the supplier. At the same time the distributorship agreement should require the packaging to carry the supplier's own name. The agreement should also prohibit the distributor from obliterating the supplier's name on the packaging.

Taking these steps should assist a supplier in retaining ownership of the goodwill in the territory where a distributor has been appointed. As nothing lasts forever, the agreement needs to state on what grounds the manufacturer can terminate the agreement and deal with the consequences of termination.

When the distributor is in the UK and the agreement is subject to English law, then following termination no-fault compensation will not be payable on termination (unlike the case of an agent). If the distributor is outside the UK or the law of another European country applies, care may be needed. For example, German law protects distributors in a similar way to agents following termination of the agreement. As a result a distributor can claim no-fault compensation.

Whatever the situation - agent and distributor *or* agent or distributor - the need to be clear is vital.

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