

Top 5 Things to Consider: When Appointing a Distributor

1 – DISTRIBUTOR OR AGENT: Is appointing a distributor right in the circumstances? An alternative could be to appoint an agent, who would be appointed by you to negotiate and/or conclude contracts with customers on your behalf. The agent would have no liability for the products and would have no contractual relationship with the customer- unlike a distributor.

There are advantages and disadvantages to both and some of the deciding factors will come down to a commercial decision on how much control over the product, marketing and customers you would want to give. Perhaps the greatest drawback of appointing an agent is that the agent would have rights to compensation or indemnity on termination of the agreement with you, even if they were in breach!

It should be clear in an agreement whether you are appointing a distributor or an agent and the terms of the relationship should clear- it could be that you intend to appoint a distributor but unclear terms mean that by the nature of the contractual relationship, they are deemed an agent- resulting in your being liable to pay them compensation or indemnity on termination.

2 – EXCLUSIVE, NON-EXCLUSIVE, SOLE OR SELECTIVE DISTRIBUTOR: There are generally four types of arrangements with distributors:

Exclusive distributor - where you appoint only that distributor in a defined area or country, and you agree not to sell your products in that territory yourself or appoint any other distributor in that territory.

Non-Exclusive distributor - this type of arrangement allows you to appoint a distributor in a defined area or country but also allows you to sell your products in that territory yourself or appoint any other distributor.

Sole distributor - this is where you appoint only that distributor in a defined area or country and you agree not to appoint any other distributor in that territory. However, you do keep the right to sell your products in that territory yourself.

Selective distributor - this arrangement is where distributors are appointed based on certain criteria, so, not giving exclusivity but limiting the number of distributors that could be appointed.

The type of arrangement that you chose to use depends upon many considerations including, if you would want to be able to sell products yourself in that territory, if the distributor is willing to be appointed other an exclusively, your knowledge of that territory, the nature of the product and the negotiations of the terms of the agreement with the distributor. The arrangement would be set out clearly in your agreement with the distributor and within this, it is also possible to include other options, such as reserving particularly customers for yourself.

3 – BEWARE OF COMPETITION LAW ISSUES WITH EU AND UK: It is important that the agreement put in place with the distributor that governs the terms of their appointment complies with EU and UK competition laws and regulations. The consequences of infringing competition law can be significant, with any infringing restrictions being void any unenforceable and facing possible claims from third parties, but usually the most significant is that there can be substantial fines imposed for a breach.

4 – KEY TERMS: One of the advantages of appointing a distributor is that it can be low-risk for you, as the distributor should assume liability for the products. As such, it is important to make sure that this is adequately covered in your agreement. This is one of many key commercial and legal provisions that should be captured within an agreement with a distributor.

Other key provisions to consider are: the territory the distributor will be limited too, the type of appointment as mentioned above, the term of the appointment, the products and any minimum purchase obligations, the price and payment terms of the products, delivery, termination of the agreement, confidentiality and other general legal clauses.

5 – DISTRIBUTOR DUTIES: As well as ensuring that the agreement with the distributor contains key legal and commercial terms, it is also important to specifically set out all the distributor's duties to ensure that they are bound by these and are liable to you for any breach. The nature of these duties will depend on the circumstances, but they could include things like, minimum purchase obligations, restrictions on selling competing products, marketing of the products, insurance, quality standards and sales forecasting.

These 5 pointers featuring Appointing a Distributor have been prepared by **Howes Percival**, a leading commercial law firm with clients ranging from individuals and families to global businesses and government departments. Howes Percival has offices in Cambridge, Leicester, Manchester, Milton Keynes, Northampton and Norwich, UK. If you would like to know more about Howes Percival please contact **Edward Lee** Edward.Lee@howespercival.com.

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