Oury Clark Quick Guides:

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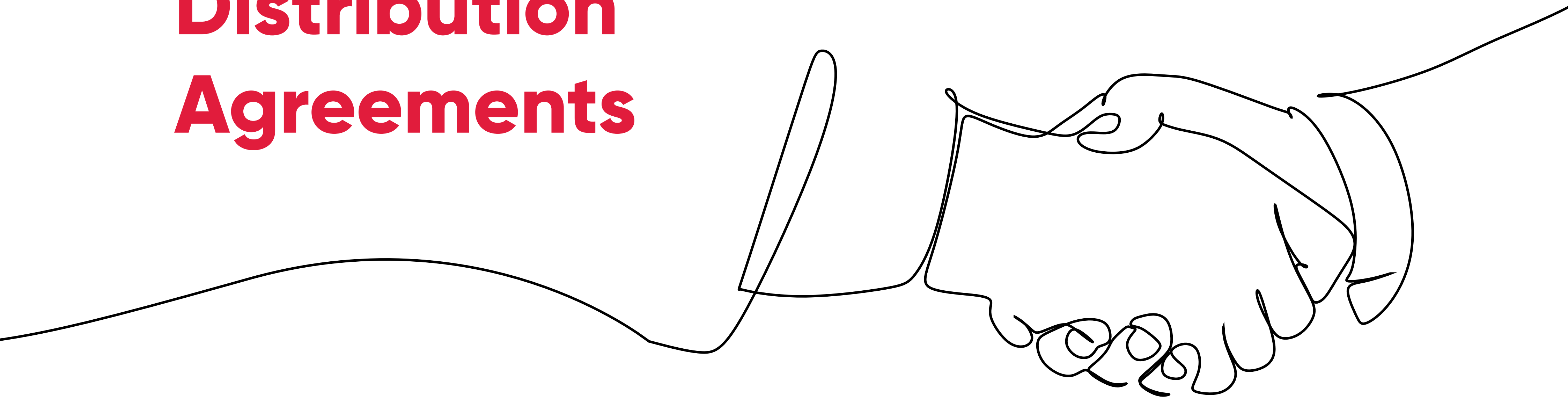
Agency & Distribution Agreements



Commercial: A19

A supplier, when considering the distribution of goods, will need to decide whether to appoint an agent or a distributor. There are many factors that need to be considered when making this decision.

What is an agent?

An agent is an intermediary involved in making a contract between the principal (supplier) and the principal's customer. Where goods are being sold, there are two kinds of agent; a sales agent and a marketing agent.

A sales agent has the authority to enter into agreements with the customer on the supplier's behalf. The agent can therefore bind the supplier to a contractual agreement.

A marketing agent, unlike a sales agent, does not have authority to bind the supplier, but can market and promote the supplier's product to prospective customers. When a customer wishes to make a purchase it is the supplier who completes the contract.

What is a distributor?

Unlike agents, distributors purchase products from the supplier and then resell them to customers in a particular territory on their own account, thereby taking control of pricing and the ensuing profit.

What type of agency agreements exist?

An agency may be described as exclusive, non-exclusive or sole. These terms need to be determined between the parties in their agreement, but generally the following definitions apply:

Exclusive rights prevent the supplier from actively seeking sales in the agents' territory and from appointing other agents or distributors in the territory.

Sole rights prevent the supplier from appointing other agents/distributors/resellers in the territory, but will not prevent the supplier themselves from seeking sales there.

Non-exclusive rights leave the supplier free to appoint further agents and resellers and to also actively seek direct sales in the territory.

What type of distribution agreements exist?

As with agencies, there are different kinds of distribution agreement.

Exclusive rights prevent the supplier actively seeking sale in the distributors' territory and from appointing other distributors in the territory.

Sole rights prevent the supplier from appointing another distributor in the territory, but will not prevent the supplier seeking sales there.

Non-exclusive rights allow the supplier to appoint further distributors and to actively seek direct sales in the territory.

Selective distributorship is where a supplier will only appoint additional distributors if they meet certain criteria. Please note that this kind of agreement can cause competition law problems, and so advice should be sought prior to pursuing this option.

Differences between agency and distribution

- An agent is appointed to negotiate or conclude contracts on the supplier's behalf. A distributor effectively becomes the supplier and contracts are made directly between the distributor and the customer.
- An agent is paid commission on a percentage basis. A distributor sells the product to the customers and will usually add a margin to cover costs and profit.
- The agent does not own the products. A distributor owns the goods, and takes the risk of the goods not selling.

Advantages of Agency

- The supplier can retain control of the terms of sale of the product, particularly price, and marketing methods.
- There will be direct contact between a supplier and customer for after sales services.
- There are typically fewer competition law issues.
- Typically the commission paid to an agent is lower than the margin which a distributor will earn.

Disadvantages of Agency

- The Commercial Agents (Council Directive) Regulations 1993(the "Commercial Agents Regulations") are likely to apply and impart certain legal requirements to the relationship for the benefit of the agent that cannot be excluded by the parties.
- Under the Commercial Agents Regulations, the agent will be entitled to commission during the agency contract, and under certain circumstances, after its termination. For more information on this topic please see our separate Quick Guide found here.
- The supplier retains all of the financial risk of the product not selling.
- Tax – sometimes a supplier can be regarded as trading in a territory if an agent based there, which can leads to tax liabilities. Operating a distributorship model will avoid this issue.

Advantages of distribution

- A supplier can pass on a large degree of risk associated with the goods.
- A distributor may be more motivated to sell stock purchased from the supplier, as the distributor assumes the risk of failing to make sales.
- A supplier will not usually suffer any liability incurred as a result of the distributor's activities, whereas under an agency relationship, the principal is liable for the acts of its agent.
- The appointment of a distributor will avoid the need for a supplier to have an established place of business within the distributor's territory, which will often reduce the supplier's administrative costs, and avoid potential tax liability in the territory.
- The supplier will not need to establish and monitor accounts with various customers, but only with the distributor.
- There is no compensation or indemnity payable to a distributor by application of the law on termination of the distribution agreement.

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Disadvantages of distribution

- A supplier has less control over the activities of a distributor than it would an agent.
- Where the supplier appoints an exclusive distributor for a territory, the entire credit risk for that territory is placed on the distributor, rather than each customer, as would be the case with an agency arrangement.
- A distribution agreement is much more likely to be at risk for breaching competition law than agency relationships.