

Agents & Distributors

Key differences

What is an agent?

An agent is an intermediary appointed by a business to negotiate and possibly conclude contracts with customers on its behalf. Agents are paid commission on the sales they make, usually on a percentage basis.

What is a distributor?

A distributor is essentially an independent contractor. In a distributorship arrangement, a business sells its products to a distributor, who then sells the products on to the customer, adding a margin to cover the distributor's own costs and profit.

Why appoint an agent or distributor?

- In appointing a selling agent or distributor, a business is effectively sub-contracting its selling function. The business may want to do this for a number of reasons, for example:
 - to take advantage of an agent's or distributor's local knowledge and established trade connections; or
 - to save the cost of having to establish its own sales operation.
- Always be clear about which arrangement is being used, as it is possible for a party to be both agent and distributor of different products under the same arrangements (for example, a distributor in selling products but an agent for software relating to those products).

Why appoint an agent rather than a distributor?

There a number of situations where an agency arrangement may be preferable to a distributorship:

- If the business wants to retain greater control of the terms of sale of its products, in particular the price. Imposing resale price maintenance on a distributor is unlawful in most countries, but by selling through an agent the business can retain the freedom to fix its own prices for sale.
- If the business wants to restrict the agent's freedom to choose the customers which it deals with. In most countries, there are restrictions on the extent to which a supplier can restrict a distributor's choice of customer. However, by using an agent, a business retains the freedom to choose who to deal with and with whom the agent deals. Generally, fewer competition law issues arise with agency rather than distributorship.
- Where the business wants to retain direct contact with its customer. For example, because of bespoke design work or highly specialised after-sales service that can only be effectively provided by the business.
- Where close control over marketing methods is important (for example, because brand image is a crucial factor for the business).
- If the business wants to retain the financial risk of stock (consignment stock with an agent would normally remain the business' property).

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

Agents & Distributors

Key differences (continued)

- Typically, the commission paid to an agent is lower than the margin which a distributor will earn (since the distributor is taking a greater financial risk). Agency will therefore, in everyday terms, probably cost the business less than a distributorship.

What are the risks when appointing an agent?

Commercial Agents (Council Directive) Regulations 1993

Businesses must always consider whether the Commercial Agents (Council Directive) Regulations 1993 apply to the arrangement. If they do apply, certain terms will automatically apply to the agency. In particular, the business may have to pay the agent compensation/indemnity payments on termination or expiry of the agency.

In view of this, we would recommend that a principal take account of the estimated cost of the indemnity/compensation payments in the agent's commission structure.

Bribery Act 2010

- Under the Bribery Act 2010, a business will be criminally liable for acts of bribery committed by its agents intending to obtain or retain business or a business advantage for the business.
- A business should carry out background checks on the proposed transaction, jurisdiction and the agent's reputation.
- The business should also consider putting in place adequate procedures to mitigate the risk, for example, by:
 - creating an anti-bribery policy that agents must comply with; and

- monitoring and auditing agents on a regular basis.

Why appoint a distributor rather than an agent?

The advantages include:

- In selling to a distributor, the supplier may be able to pass on a large degree of the risk associated with the products.
- Distributors should be more motivated to sell the stock that they purchase from the supplier, since they take on greater risk of failing to sell.
- A supplier will not generally be liable for any liability incurred as a result of the distributor's activities, whereas a principal is liable for the acts of his 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 reduce the supplier's administrative costs, and may also be beneficial for tax reasons.
- The supplier will not need to monitor accounts with a number of customers, but only with the distributor.
- In the UK, no compensation or indemnity is payable to a distributor on termination of the distribution agreement. However, some EU countries give certain distributors equivalent rights to agents and so local legal advice should be taken.

Agents & Distributors

Key differences (continued)

What are the drawbacks of appointing a distributor over an agent?

- Suppliers have less control over the activities of a distributor than they would over their own agent. A distributorship may not be suitable for products where the supplier or manufacturer requires contact with the ultimate customer (for example, tailor-made products), or where the supplier wishes to maintain tight control over the marketing and pricing of the products.
- Where the supplier appoints an exclusive distributor for a territory, his entire credit risk in respect of sales into that territory is concentrated on the distributor, rather than with each customer, as would be the case with an agency arrangement.
- A distributorship agreement is far more likely to be at risk from competition law problems than an agency agreement.

Other options

Other possibilities for a business include making sales itself (i.e. over the internet) or entering into joint ventures with businesses that are already established overseas. This may be preferable if agents refuse to agree reasonable provisions relating to commercial agency and/or the estimated cost of termination is considered to be too high.

Please refer to your usual contact at Thomson Snell & Passmore for further information. Alternatively, please contact Joanne Gallagher on 01322 623708 or email at:

joanne.gallagher@ts-p.co.uk

© Thomson Snell & Passmore LLP All Rights Reserved