Agency and Distributorship

This newsletter highlights the circumstances in which a business may want to engage the services of an agent or a distributor.

What is an agent?

An agent is an intermediary appointed by a business to negotiate and possibly conclude contracts with customers on its behalf. An agent is 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 their customer, adding a margin to cover its own costs and profit. Distributors are sometimes referred to as resellers, where particular marketing strategies require a distinction between various kinds of reseller.

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 agreements (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

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This newsletter outlines the law as it stands at the date of writing in January 2016.

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 that they deal 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 than with distributorship.

- Where the business wants to retain direct contact with its customer. For example, where it offers bespoke design work or highly specialised after-sales service that can only be effectively provided by the business itself.

- Where close control over marketing methods are important (for example, because brand image is a crucial factor for the business, although a similar result can be achieved with a comprehensively drafted distribution agreement and schedules).

- If the business wants to retain the financial risk of stock (consignment stock with an agent would normally remain the business' property).

- 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 general 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 on termination or expiry of the agency.

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. Agencies provide an opportunity for bribery, with some of the agency commission being paid on to a person who can determine the purchasing decision.

- 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.

Modern Slavery Act 2015

- The Modern Slavery Act requires commercial organisations carrying on business in the UK with a turnover of £36 million or more to complete a slavery and human trafficking statement for each financial year, setting out the steps they have taken to ensure that there is no slavery or human trafficking in its business or in its supply chains.

- Although an agent is probably not within a "supply chain", a UK business might find it prudent to impose obligations on its agent to take reasonable steps to ensure that there is no slavery or human trafficking in the supply chain which culiminates in the UK business.

- A UK distributor will wish to impose compliance and assistance obligations on its suppliers, which might include the principal making the appointment under a distribution agreement.