

Robust distribution agreements

Practical strategies for negotiating and drafting key contracts

For many businesses in the supply chain, success depends on the efficient distribution of the products/goods or services, and on a clear, well-drafted, and enforceable distribution agreement.

Negotiating and drafting an enforceable agreement relating to the distribution of products/goods or services from a supplier to market can be complicated. Each clause in the agreement must contribute to a clear, fair and comprehensive contract. Mistakes can be costly, wasting valuable time, financial resources, and requiring the involvement of lawyers, mediators, arbitrators, and courts. Every effort must therefore be made to strengthen business relationships and to avoid disputes and potential litigation. This necessarily involves creating a robust distribution agreement.

The distribution agreement

A distribution or distributor agreement is a contract usually between a manufacturer or vendor and a distributor, such as a retailer, a value-added reseller, or a system integrator in the distribution channel or supply chain.

The distribution agreement is critically important to the establishment and maintenance of the relationship between a distributor and a supplier. The words and phrases used in the distribution agreement should be so clear and unambiguous that its plain meaning and effect can be discovered within "the four corners" of the document.

A distribution agreement commonly contains terms and conditions pertaining to: the appointment of the distributor, the territory and markets, the term of the agreement (including pricing, payment, condition of sale, shipping and delivery terms), obligations of the distributor and the supplier, intellectual property (trademark, copyright and confidential information) rights, obligations and remedies, procedures to terminate the agreement, non-competition and non-solicitation agreements, risk allocation, limitations of liability, indemnification, choice of legal jurisdictions, dispute resolution options, and general/standard contractual provisions.

When relationships breakdown and disputes arise, they often involve complex issues such as whether:

- There was a breach of the distribution agreement, and if so, was it a technical breach only, which was waived or cured in good faith by the defaulting party on the demand of the other party to the agreement.
- There was a breach of the express or implied contractual terms of the distribution agreement.
- There was a breach of the duty of good faith and

fair dealing at common law or under the Ontario Arthur Wishart (Franchise Disclosure), 2000, Act or the Canadian Competition Act.

- The manufacturer wrongfully terminated the exclusive distribution agreement without reasonable notice and was therefore liable to pay the distributor damages, including lost profits, for breach of the agreement.
- The damages claimed are subject to common law or equitable set-off or are precluded by the exculpatory clauses in the distribution agreement
- The lawsuit should be stayed by the court based on a forum selection provision in the distribution agreement that stipulates an alternative forum that should be preferred and considered to be a more appropriate jurisdiction for the litigation.

The court action should be stayed on the grounds that the claim is subject to a binding arbitration clause in the distribution agreement.

Recommended strategies

Do not sign a distribution agreement until you have:

- Carefully read and understood all of its terms and conditions;
- Compared the terms and conditions of the negotiated distribution agreement with proven industry model agreements, including from your industry's distribution association
- Assessed and understood the risks;
- Received professional legal and other appropriate advice on the meaning and effect of the distribution agreement, and are comfortable with all of its provisions, including any additional terms of service attached to the distribution agreement or implied in it as a matter of law or industry custom;
- Consulted a competent lawyer and other appropriate professional advisors, so that a distribution agreement may be custom-tailored to fit the specific circumstances of your situation.

In this way, a robust distribution agreement can be created which will help you strengthen your business relationship with the other contracting party to that agreement and will assist in avoiding costly mistakes that may result in harmful disputes and potential litigation.

For a comprehensive checklist of items that should be included in a distribution agreement, see <http://tinyurl.com/DistributionChecklist>. MM&D

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