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Bircham Dyson Bell

AGENCY AND DISTRIBUTION AGREEMENTS (UK)

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General

There is minimal regulation of agency or distribution agreements under English common law, which differs in material respects from that of other European countries. There is no uniform commercial code in the UK and parties are, therefore, free to contract subject to limited rights and obligations implied by law (*see Freedom of Contract, below*).

As a general rule, a contract does not have to be in writing. Although oral contracts are legally enforceable, it is prudent to have a written contract to record the terms agreed between the parties which can then be used for evidential purposes if necessary.

It is also important to note that terms which have not been expressly agreed by the parties may be implied into the contract. Where in the view of the court the parties must have intended to include a term/terms in order to give the contract business efficacy, the said term/terms may be implied into the contract. A term may also be implied into a contract by adducing evidence of local custom or trade usage with respect to matters which are not referred to in the contract. Also, certain statutes imply terms into particular contracts (*see Sale of Goods Act 1979, below*).

Freedom of Contract

As noted above, under English common law, parties generally have freedom to agree the terms of their agency or distribution contracts and there is no duty to negotiate such terms in good faith.

However, this freedom of contract is subject to the restrictions imposed by, amongst other factors, public policy as well as legislation such as the Unfair Contract Terms Act 1977, Sale of Goods Act 1979, Consumer Protection Act 1987 and Commercial Agents (Council Directive) Regulations 1993, to name a few.

Unfair Contract Terms Act 1977 ("UCTA")

UCTA applies to contractual clauses which seek to exclude or limit liability. For example, any exclusion or limitation of liability for death or personal injury caused by negligence is unlawful. For negligence giving rise to other types of loss, any exclusion or limitation of liability is enforceable only to the extent that it is considered reasonable.

Sale of Goods Act 1979

A distribution contract will be subject to the Sale of Goods Act 1979, which contains provisions that would be implied into any such contract e.g. that the goods will conform to their description, will be reasonably fit for purpose and shall be of satisfactory quality.

Consumer Protection Act 1987 ("CPA")

Under the CPA, liability for the supply of defective products is, in the first instance, imposed – regardless of fault – on manufacturers, suppliers of 'own-label' products and importers into the EC. If these persons are not identified, then the further suppliers of such products (e.g. distributors or agents) have secondary liability and it is not possible to exclude this liability by contract.

Commercial Agents (Council Directive) Regulations 1993 ("the Regulations")

The Regulations, which implement European legislation, came into force on 1 January 1994. They apply to commercial agents in the UK who sell or buy goods on behalf of the principal. They apply to any commercial agent – whether an individual, partnership or a company – and to all agency contracts, irrespective of whether the agreement was entered into before or after 1 January 1994.

It is important to note that the Regulations introduced rights of agents to compensation or indemnity on termination of the agency contract. These are payable to the agents regardless of whether the principal is in breach of contract or not and even if the agent has no right to damages at common law in respect of the termination (damages which the agent may be entitled to at common law include payment in lieu of notice). The Regulations provide for both alternatives – compensation and indemnity – but stipulate that, in the absence of agreement between the parties on this point, the agent would be entitled to compensation and not indemnity. While the indemnity alternative is capped at a sum of one year's commission based on the agent's average annual remuneration over the preceding five years (or the period of the agreement, if shorter), no maximum amount is specified for the compensation alternative.

The Regulations do not apply, however, to a distribution contract or to an agency for the supply of services.

Choice of law

Parties are free to choose the system of law which is to govern their contract. However, mandatory provisions of English law (i.e. provisions which expressly or by implication apply, irrespective of the choice of some other system of law) will override the choice of law clause.

For example, the parties cannot evade the restrictions imposed by UCTA (*see above*) by choosing a system of law outside the UK as the governing law (e.g. US law) if it appears that the choice of law was selected wholly or mainly to enable the party selecting it to evade the operation of UCTA.

In the absence of an express choice of law clause, the applicable law is the law with which the contract is most closely connected (which, if the agent or distributor is based in the UK and performs the contract here, is most likely to be English law).

So far as commercial agents are concerned (*see above*), it is suggested that the starting point should be that the Regulations apply to the activities of commercial agents in the UK. Therefore, if the principal, who is based outside the European Economic Area (EEA) e.g. in the United States, appoints an agent to act on its behalf in the UK, it is fair to assume that the Regulations would apply to the agency relationship. This is because the agent is performing its activities in the UK and the fact that the agency agreement is expressed to be governed by the law of say, California, is immaterial.

Competition law issues

The principal piece of legislation is the Competition Act 1998 ("1998 Act"). The 1998 Act created two basic prohibitions which are closely modelled on the corresponding prohibitions contained in the European Community (EC) Treaty.

Following recent reform of EC and UK law in this area, agency or distribution contracts raise fewer competition issues than was previously the case. Under the competition rules, provided certain conditions are met (such as the supplier's market share is below 30%), most distribution agreements will benefit from a block exemption afforded to vertical agreements and thus fall outside the scope of the prohibition on anti-competitive agreements. (A vertical agreement is one that is entered into between businesses operating at different levels of the economic supply chain and includes, therefore, agency and distribution contracts). Parties may also be able to benefit from the "de minimis" exemption (where the contract is of 'minor importance' and is deemed not to appreciably restrict competition).

Exclusive agency or distribution contracts raise further competition law issues. Exclusive contracts raise the risk of reduced intra-brand competition and market partitioning, which may in particular lead to price discrimination – where most/all of the suppliers in a particular market apply exclusive distribution, this may facilitate collusion both at the suppliers' and distributors' levels.

The above demonstrates that competition law issues are complex and it is strongly recommended that principals (as well as agents) obtain expert advice on the particular arrangements relating to the agency or distribution relationship in question.

Tax

A non-resident company is not in general chargeable to capital gains tax. The possible implications for income tax and corporation tax with regard to the various types of agency contracts are set out below.

Sales agents

A non-resident company (i.e. not incorporated in the UK) is chargeable to income tax on income arising in the UK, subject to certain exceptions relating to bank interest and to the provisions of any applicable double taxation convention. Also, it is important to note that a non-resident principal may be chargeable to corporation tax on the profits attributable to its agent's activities.

Marketing agents

Depending on the nature of the arrangements in the agency contract, it may be that the non-resident principal will not be trading within the UK, which would mean that it will incur no liability to UK tax on sales of its products.

The question to consider is: "where do the operations take place from which the profits in substance arise?". In cases where the non-resident principal uses a marketing agent, this fact alone is unlikely to cause the tax authorities to regard it as trading within the UK, since the agent is unlikely to have authority to enter into contracts on its behalf.

It may also be the case that the non-resident principal is not chargeable to corporation tax in the UK on the contracts concluded by it as a result of the agent's activities.

Distributor

As with a marketing agent (above), the liability of an overseas manufacturer/supplier to UK tax will depend on whether the profits arise inside or outside the UK. Ultimately, the question of liability will be determined by the facts of the case but suffice to say that the use of an independent distributor will not of itself render the overseas manufacturer/supplier chargeable to UK income or corporation tax.

International Conventions

The UK ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 24 September 1975 and enacted the same on 23 December 1975.

The UK is not, however, a party to the United Nations Convention on Contracts for the International Sale of Goods.

UK TRADE LAW WEBSITES

1 Department for Business Enterprise & Regulatory Reform (BERR)

BERR is the UK government department for business enterprise and regulation. The department's website contains information about the government's trade policies and guidance on carrying out business in the European Union.

www.berr.gov.uk

2 The Office of Fair Trading (OFT)

The OFT is the UK's consumer and competition authority. This government website contains advice, guidance and other resource tools for use by various market participants.

www.oft.gov.uk

3 Office of Public Sector Information (OPSI)

OPSI provides a wide range of services in connection with locating and sharing information including details of UK legislation.

www.opsi.gov.uk

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