

CHECKLIST FOR A DISTRIBUTORSHIP CONTRACT

Most legal systems do not provide in specific legal provisions regarding the distributorship contract ('unnamed contract'). In order to fill this legal void, parties are well advised to negotiate a detailed and balanced contract.

They might, for instance, take into account the following topics:

1. Introduction – identification of the parties

- specify the nature of the contract (sole/exclusive distributorship – concession de vente exclusive - Vertragshändler – alleenverkoop - ...) in order to differentiate this contract from other types of distribution
- specify the legal status, name and place of business of the contracting parties
- specify the n° under which the parties have been registered (commercial registry, companies registry, VAT-registry, ...)
- if applicable, indicate who represents the parties and in what quality

In contracts with common law partners, agreements are often initiated by a consideration:

'Whereas the Supplier wishes [...],

Now therefore, in consideration of [...]

The Parties agree as follows [...]'

2. Products

- specify the products; does the distributorship cover
 - o all the products sold by the supplier?
 - o all the products manufactured by the supplier?
 - o only a limited range, specified in an annex?
 - o only a specific trade mark, packaging ... (private label - own brand - bulk ...)?
- do new or improved products automatically resort under the contract?
- what about products no longer manufactured by the supplier? How to notify, notice periods, ...

3. Territory

- Clearly specify the territory assigned to the distributor
 - o geographical territorial (by country, county ...)
 - o type of customers within that territory (wholesale, retail, public, supermarkets, ...)
- what happens if the territory changes (e.g. EU expansion, restructuring of clients ...)
- what about previously existing clients? ?
- the criteria to allocate a customer in a market segment
 - o registered office - delivery address - billing address - address signing contract / order ...

4. Exclusivity

- is the distributor granted an exclusive right to sell suppliers' products in the contractual territory (= absolute exclusivity - 'exclusive distributor')?
- does the supplier reserve the right to contact and/or reply to potential customers in the contractual territory directly without however appointing other distributors (or agents) for that territory or opening an office in the territory (= relative exclusivity - 'sole Distributor')?
- what about costumers located in one contract area, but with selling points in other contractual territories ?

5. Scope of the authority of the distributor

- to what extend is the distributor allowed to use the trademark of the principal?
- is the distributor allowed to appoint (independent) sub-distributors, or is the consent of the supplier required?
- competition clauses
 - even if there is no objection to the distributor representing complementary products, it might be important to register in writing which ones;
 - prohibition on selling or representing directly competing products
- may the agreement be assigned to another entity within the group? What if a party merges with a competitor? What happens in case of a change of management;

6. Obligations of the distributor

- common general obligations of the distributor:
 - selling in his own name and for his own account and risks
 - development of a joint marketing and promotion plan;
 - determine in which cases and under which conditions some expenses of the distributor may be reimbursed (trade fairs, ...)
 - training, sufficient staff, participation in sales meetings, ...;
 - visiting the customers (frequency ...), trade fairs, exhibitions, ...
 - periodic activity report (structure - frequency ... ?)
 - market research (competition, opportunities ...) and follow up of market requirements (product standards, duties, ...)
 - confidentiality (during negotiations - during contract - after contract)
- monitoring of the industrial property rights of the supplier
 - trademarks: usually remain the property of the supplier who may grant a license to the distributor for the duration of the agreement;
 - should the distributor use the supplier's trade mark or may he use his own trade mark?
 - who registers the trade mark? (who is the holder of the trademark)
 - should the distributor notify his supplier of infringements of his intellectual property rights (patents, trademarks, ...) and assist the supplier in combating these infringements in court proceedings?
- are minimum turnover requirements applicable?
 - how is the requirement calculated (volume - turnover - market penetration - evolution ...) ?
 - what consequences are related to a breach of this obligation (loss of exclusivity, downsizing territory ...) ?
- after sale service by the distributor; determine what quality standards need to be respected by the distributor and to which degree an additional fee is to be awarded;

- stock obligations of the distributor;
 - o ownership of the distributor or supply in consignment stock? Size?
 - o what happens at the end of the contract; right to liquidate stock or the obligation of take back the stock at the end of the contract, whether or not at a predetermined price;

7. Obligations of the supplier

- guarantee of supply (lead times, ...)
 - o specify the conditions that allow the supplier to reject an order;
 - o information duty in case of insufficient capacity of supply;
- support of the distributor by means of samples, brochures and advertising material, training, sufficient advance notice of changes in products, price lists and conditions of sale, ...
- transfer of relevant communication received from/regarding customers in the territory.

8. Conditions of sale (this may be in the form of a “Specific Purchasing Agreement”)

- which delivery terms (Incoterms)?
- which conditions of payment (currency, time, method)?
- are any payment guarantees imposed?
- purchase price
 - o specific price lists?
 - o discount on advised retail price?
 - o procedure for adjusting prices, currency of payment, ...?
- is a price for resale imposed?
 - o most countries prohibit a minimum resale price (price setting); recommended resale prices are usually allowed;
 - o maximum resale prices are authorized under most competition laws;
- bonuses - premiums ...

Include your general conditions of sale (as an annex) into the contract and have them explicitly accepted by the distributor!

9. Warranties and limitation of liability

A reseller/distributor will usually try to pass on the warranties imposed by consumer protection laws to his supplier. The latter will often be better placed to manage and insure these liabilities as he controls the manufacturing process.

- o how is the risks of product liability to be assessed?
- o What with consumer protection laws?

10. Electronic commerce

- is the distributor allowed to use the Internet to promote his sales?
 - o for all contract products – only for certain products ?
- level of control the supplier may exert on the website of the distributor?
 - o is the distributor allowed to use the supplier’s brand name as a (part of) the domain name, as a meta tag ...
 - o access (e.g. only access to the (relevant page on the) website of the distributor via a link from the website of the supplier)

- structure of the website (obligatory link to the site of the supplier, prohibition of / control over other links, layout, web design, transmission of information that the distributor collects through its website ...)
- is the distributor allowed to advertise on other sites?
- what about orders from outside the territory of the distributor made via the internet?
- to what extent should sales made by the supplier through his website fall under the exclusivity?
 - may the supplier target through Internet the same customers that are contacted by the distributor?
 - must the supplier's webshop restrain from targeting customers belonging to the distributor's territory?
 - Indirect commission?

11. Duration and termination of the agreement

- fixed term or indefinite term
 - may a fixed-term contract be extended after the deadline
 - with express approval of the contracting parties
 - tacitly
 - is termination possible before completion of the fixed term or may the agreement only be terminated at the end of the agreed term?
- duration of the notice period taking into account the applicable law
 - mode of termination, beginning of the notice period , end date ...
- describe the circumstances that might allow for a unilateral termination of the agreement,
 - how to notify the termination (formalities - delays ...) ?
- what about a "client indemnity" or "compensation"
- other provisions in the event of termination
 - indemnity in case of termination: most countries do not impose legal obligations but many distributors might be reluctant to invest in the contract if the supplier has the right to terminate the contract at any given moment without compensation;
 - settlement of pending transactions ;
 - what happens to stocks, samples, spare parts, price lists, brochures, ... the distributor still has in his possession ?
 - end the right of the distributor to use the trade names, trademarks and designs of the supplier
 - striking the registration (who takes initiative, cost ... ?)

12. Applicable law

- national law of one of the parties
- 'intermediate' national law of a third country
- principles of law generally recognised in international trade as applicable to the distributorship contract (also called «lex mercatoria»)

Check whether the choice of the applicable law clause is effective in the countries involved.

13. Dispute settlement (competent jurisdiction - arbitration)

- national court of one of the parties
- (optional) amicable method of dispute resolution (ADR)
- arbitration

Check whether the choice of forum clause is effective in the countries involved.

14. Miscellaneous (“Boilerplate” Clauses)

- date and place of signature
- what about other pre-contractual arrangements?
 - are they cancelled? (“Entire contract clause” – “four-corners-clause”)
- what happens in the event of invalidity of certain clauses
 - do or do they not entail the invalidity of the entire contract ('Severance clause')
- force majeure and hardship
- assignability (permitted or not – consequences)
- entry into force of the contract
- how to make changes to the contract?
- language of the contract, number of originals, number of attachments
- procedural and tax requirements