



## AGENTS, DISTRIBUTORS AND FRANCHISEES

The term "agent" is often used loosely, in situations where the "agent" is not in fact considered an agent under the law. This frequently occurs where persons enter into distributorship or franchise arrangements. Many believe that the role of the distributor or franchisee is the same as that of an agent. This is in law, not so.

### Agency

Agency is the relationship which arises where one person (the agent) has authority, express or implied, to act on behalf of another (the principal) and consents so to act.

The effect in law of this relationship is that the agent may contract with third parties on behalf of the principal without itself incurring any liability. In other words, although an agent may negotiate an agreement with a third party, it does so, on behalf of its principal, and it is the principal that becomes liable for the acts, omissions and defaults of the agent. Thus, where Company X contracts with Company Y to sell the goods of Company Y, the contract that is made with the ultimate purchaser of those goods is really between Company Y and the purchaser.

### Distributors

The key distinction between an agent and a distributor is that a distributor buys goods on his own behalf and resells on his own behalf. Since the distributor purchases the goods directly from his supplier and sells them to his own customers, no contractual relationship is created between the customer and the supplier. A distributor may have limited agency functions such as the transmission of complaints or faults pertaining to the goods being sold. However, the legal relationship is distinct from that of agency.

### Franchises

Another commonly misunderstood relationship is that created in a franchise. An entrepreneur with a product, may instead of selling directly to the public, authorise other businesses to supply the product under a franchise agreement. A standard franchise entails a franchisor licensing the use of a package of intellectual property rights (such as trade secrets, copyright, trademarks and logos), to a franchisee, under terms which require the franchisee to follow the franchisor's technique and manner of doing business. Many popular food chains such as Burger King, McDonalds, Wendy's and KFC are operated under franchise agreements.

One of the primary differences between an ordinary distributorship and a franchise, is that a much greater degree of control is exercised by the franchisor over a franchisee. Distributorships usually operate under fewer controls as to how the distributor runs its business, whereas most, if not all, aspects of a franchisee's business are controlled by the franchisor. A franchise agreement may for example:

- include an extensive procedural and operational manual which the franchisee must abide by;
- require the franchisee to hire and properly train suitable staff to the standards dictated by the franchisor; and
- stipulate that the franchisee is to advertise and promote the franchise in accordance with the directions, requirements and specifications of the franchisor.

These terms are crucial to protecting the brand and ensuring consistency and quality within the franchise.

Another key distinction between a franchise and a distributorship is the fact that a franchisee will be required to pay royalties to the franchisor, while no such payment would be required of a distributor.

Like the distributor, the franchisor/franchisee relationship is distinct from that of agency. The franchisor normally agrees to supply the franchise with goods to sell as well as other support but the relationship in respect of such goods is that of seller and buyer, and the franchisee deals with the public as seller.

Most franchisors will specify in the franchise agreement that the franchisee is not the agent of the franchisor and should not hold himself out as being one. The fact that the franchisee bears the franchisor's name does not itself make the franchisee an agent of the franchisor.

It is important in commercial dealings to understand the meaning and effect of the terms discussed above. You may for example be a party to an agreement in which you are described as an agent, or even an exclusive agent of a principal and assume that you have no exposure to contractual liabilities. However, the relationship established by that agreement could in fact be that of a distributorship, leaving you liable in contract for your own acts and/or omissions. The law relating to agency relationships and agency-type relationships can be complex, and great care should be taken to ensure that commercial relationships and documents are structured in accordance with the intentions of the parties.

Simone Bowie

***Simone Bowie is an Associate at Myers Fletcher & Gordon and is a member of the firm's Commercial Department. Simone may be contacted at [simone.bowie@mfg.com.jm](mailto:simone.bowie@mfg.com.jm) or through [www.myersfletcher.com](http://www.myersfletcher.com)***