



5 Key Points You Must Cover in Your Distribution Agreements

BTN gets insights from Bahaneh Hobel, Senior Alcohol Beverage Attorney from Dickenson, Peatman & Fogarty, Napa, CA on points you need to cover in your agreements.



Distribution agreements come in all shapes and sizes. And sometimes, to the horror of us lawyers, parties enter into distribution agreements without a written contract at all!

While in some circumstances, foregoing a written agreement may be to the advantage of one of the parties, in most cases, entering into a written distribution agreement is advisable and provides both parties with a road map to their obligations and rights in the relationship.

Distribution agreements will vary greatly depending on the laws of the territory in which the distribution is occurring, and of course depending on whether the state in question is a franchise state, but in any agreement, the following five key points should be covered:

1) Scope of Distributorship:

- a. Territory:** The agreement should specifically define the area in which the distributor is permitted to sell and promote the products.
- b. Products:** The agreement should specify what products, product lines, or brands are included under the agreement. The agreement should also address whether and to what extent any new brands developed or acquired by the supplier would be included, or specifically, excluded from the agreement.
- c. Exclusivity:** The agreement should specifically state whether the distributor is given the exclusive right to sell the products within the defined territory, or whether other distributors will also be permitted to promote and sell the same products, or other products produced by supplier, in the territory (subject to state and local rules regarding exclusive distributorships).
- d. Term:** The agreement should set forth an initial term for the agreement and also define any renewal terms that may be either elected by the parties or that may occur automatically.

2) Pricing & Terms of Payment:

- a. Pricing:** The supplier must set the price for the products being sold to the distributor, but the agreement should also include provisions governing resale pricing. The distributor may have the sole right to set the resale price or the parties may agree on, or at least discuss, the resale pricing for the products.
- b. Payments:** The agreement should clearly set forth the terms for payment, including timing and location for payments and any penalties in the event of any late or missed payments.

3) Rights and Obligations of Parties

The agreement should clearly set forth the **rights and obligations of both parties** to the agreement. In franchise states, for example, where termination can often only occur for good cause or just cause, a supplier may elect to include a detailed list of distributor obligations to help support its arguments for termination of a distributor in the event of a breach. Some of the most important points to detail in the agreement include:

a. Scope of Advertising, Marketing and Sales Efforts: The parties should consider and include in the agreement the extent to which the distributor will be responsible for advertising and marketing. The agreement could include defined marketing and/or sales goals, refer to a marketing plan to be agreed on between the parties or simply require the distributor to use reasonable efforts to sell and market the product. The costs and oversight for advertising and marketing should also be addressed as well as any consequences for failing to satisfy specified sales or marketing goals.

b. Reporting requirements: To the extent required by a supplier, the agreement should include details regarding the format and timing of sales, inventory, marketing or other reports to be generated and provided by the distributor.

c. Delivery, Inventory or Quality Control Requirements: The agreement should specify delivery parameters for both supplier and distributor, minimum inventory requirements, and any quality control measures that a distributor or supplier would be expected to undertake. If agreed to by the parties, the agreement could also include minimum purchase requirements.



4) Intellectual Property:

While **brand-related intellectual property** is typically held by the supplier, a thorough distribution agreement will always include an intellectual property clause that will give the distributor the legal right to use the supplier's intellectual property, including brand names and trademarks, for purposes of its sales and marketing efforts. This provision will also protect the supplier's rights in the intellectual property.

5) Termination:

a. When Is Termination Permitted: The termination provision in a distribution agreement should always include a provision allowing for termination "for cause" by the parties. This means that if one party breaches the agreement, the other party can terminate. However, these provisions should also include notice

requirements and provide the breaching party the opportunity to "cure" any breaches before the agreement is actually terminated. Termination provisions also typically include a laundry list of items, such as bankruptcy or loss of alcoholic beverage licenses that can result in immediate termination of the agreement. In franchise states, some suppliers may request a provision stating that any breach of the agreement is just cause or good cause for termination. However, the enforceability of this type of provision varies from state to state.

b. Post-Termination Obligations: One of the most important provisions to include in the distribution agreement concerns the parties dealings once the relationship is terminated. The agreement should always include a detailed post-termination section that sets forth the obligations of both the supplier and distributor. This provision should address the status of open or outstanding orders after termination, the return, buy-back or transfer of remaining inventory, and any ongoing marketing or other obligations that would continue beyond the termination date of the agreement.

For more information or for assistance in drafting or negotiating your distribution agreements, please contact Bahaneh Hobel at bhobel@dpf-law.com or at 707-261-7070.

About the Author: Bahaneh Hobel is the senior alcohol beverage attorney at Dickenson Peatman & Fogarty. Bahaneh's practice focuses exclusively on all aspects of alcohol beverage law and regulation, including state and federal licensing for wineries, breweries, distilled spirits plants, importers, wholesalers and retailers including hotels and restaurants. Bahaneh's areas of expertise include state and federal labeling regulations and approvals, franchise laws, distribution agreements, celebrity brands, trade practices including advertising, sponsorships and special events, third party marketing agreements, contests and sweepstakes and direct shipping laws. Bahaneh represents both domestic and international alcohol beverage industry members and works extensively with, and represents clients in front of, local, state and federal alcoholic beverage agencies throughout the United States, including the California Department of Alcoholic Beverage Control and the Alcohol & Tobacco Tax and Trade Bureau. Bahaneh has practiced in the alcohol beverage field for the past decade.

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