



# **USING AGENCY ARRANGEMENTS AS A TOOL FOR BUSINESS EXPANSION INTO MULTIPLE BUSINESS TERRITORIES AND JURISDICTIONS.**

One of the fastest and cheapest mechanisms to expand your business or products into other territories is by appointing an agent within the territory or properties that you seek to launch into. Through well-thought-out agency arrangements, there is no limit to the number of territories you can cover and the amount of opportunities you can unlock.

By appointing an agent to market and sell your products on your behalf in the territories, you can, by stroke of contract, avoid significant capital expenses and delays associated with registering and setting up a business entity within such territories, and the costs associated with complying with the various legislations that may be applicable to business.

For example, if you are a car manufacturer, mobile solar-powered food storage maker, or footwear maker, and you seek to sell your products in other markets outside of the country of origin of your product, with little or no hassle, you can simply appoint an agent who is familiar with your preferred territory of sales to promote and sell your product in that market.

## Who is an Agent?

In the Black's Law Dictionary, 8th edition, page 68, an agent is defined as "one who is authorized to act for or in place of another; a representative". In other words, an agent is a person who has been legally empowered to act on behalf of another person or entity (known as the "Principal").

In an agency arrangement, the agent typically promotes the goods of the principal and seeks out a steady market of buyers for the principal's goods in return for a commission and or a salary. In certain instances, the agent may conclude and sign contracts on behalf of the principal, and such contracts will be valid and binding on the principal, provided that the agent acts within the scope of his/its authority under the Agency Agreement. Otherwise, the agent will be personally liable for all such unauthorized acts undertaken on behalf of the principal. In determining when the acts of an agent will bind the principal, the Court of Appeal in the case of **John Davids Construction Co. Ltd V. Riacus Co. Ltd & Anor (2019) LPELR-47588(CA)** held as follows: "In legal domain, an agency is a fiduciary relationship in which one party (the agent) may act on behalf of another party (the principal) and the lawful acts of the former bind the latter in relation to a third party, provided the act was done within the scope of authority of the agent and ratified by the principal"

## Duties of an Agent

Generally, the agency agreement between the Principal and Agent will outline the duties and responsibilities of the Agent within the territory. However, because of the trust and confidence inherent in an agency relationship, equity imposes a very high standard of conduct (known as fiduciary duties) on Agents.<sup>[1]</sup> These duties include:

- **Duty of Loyalty** - which requires the agent to always act solely in the best interests of the principal, to the exclusion of their own personal interests or the interests of any third party. Implied in this duty is the obligation not to engage in conflict-of-interest actions or make secret profit.
- **Duty of Confidentiality** – which requires the agent to keep confidential all information acquired during the agency relationship that could weaken the principal's bargaining position or otherwise harm the principal if revealed;
- **Duty to Account** - which requires the agent to keep accurate and complete records of all monies, properties, and transactions handled on behalf of the principal and must be prepared to render a full account of these to the principal upon request. Implied in this duty is the obligation to keep the money and property of the principal separate from the agent's and from that of any other person. In the case of **Godwin V. C.A.C (1998) LPELR-1327(SC)**, the Supreme Court explained the fiduciary duty of an agent to keep the principal's money as follows:

*“It is the duty of every agent to keep the money and property of his principal separate from his own and from that of any other person. The right of the principal to have such an account rest upon the fiduciary relationship existing between him and his agent which term includes any person who acts for another.”*

- **Duty to disclose material information** – which requires the agent to disclose to the principal all material facts known to the agent that are relevant to the subject matter of the agency and could reasonably influence the principal's decisions.

## Common safeguards in Agency Arrangements

### Understand local Agency Rules

In some territories, there are specific rules that guide the engagement of agents within them. For example, in the European Union<sup>[2]</sup>, commercial agents are entitled to specific termination notice and compensation for termination of the agency relationship. These requirements are mandatory and override any agreement between the principal and the agent. As such, when appointing an agent in any territory, it is important to understand what the agency rules and practices are in that territory.

[1] NASR & ANOR v. ROSSEK (1973) LPELR-1946(SC)

[2] See Council Directive (86/653/EEC) of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents.

## **Precision of terms**

Even when an Agency Agreement is in writing, imprecise language can prove costly and or burdensome for one or both Parties. For example, consider a situation where the agency agreement simply states that ***“the Agent shall be paid a commission for any goods sold.”***

Where the goods have been sold and delivered to the customer, but the customer is yet to pay, the Agent can argue that he is entitled to the payment of his commission for that sale irrespective of the fact that the principal is yet to receive payment for the goods.

Consequently, the agency agreement should amongst others: (a) clearly define the scope of the agent's authority, (b) specify the duration of and the basis for termination of the agency arrangement, (c) define the circumstances under which each party will indemnify the other for losses, and any caps on liability (d) specify the jurisdiction whose laws will govern the agreement and the preferred method for resolving disputes (i.e. negotiation, mediation, arbitration, litigation); (e) include provisions for unforeseen events that might prevent performance of obligations, and (f) clarify if the agent is the sole agent for a particular purpose or territory, or if the principal can appoint other agents.

## **Data Privacy**

With increasing data privacy requirements and protection for data subjects, it is imperative for a principal to ensure that its agent(s) do not misuse customer data collected on its behalf. This is because, even if the principal succeeds in escaping direct liability for such misuse, the products may suffer patronage due to reputational damage associated with his business.

## **Intellectual Property**

If the agent needs to use the principal's trademarks, copyrights, or other intellectual property to promote the sale of the products, it is imperative that the principal grant a specific, limited, and revocable license for that purpose to the agent. To avoid any dispute in respect of the intellectual property rights of parties, it is advisable to state that all intellectual property developed by the agent during the agency relationship with the principal belongs to the principal.



## AUTHORS

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**Theokalus Asotie**  
Managing Partner  
Head of the Firm's Corporate  
and Commercial Practice.

**For further inquiries and guidance, please  
book a consultation with Abe & Asotie LP**

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✉ [info@abeandasotie.com](mailto:info@abeandasotie.com)

☎ +234 706 525 5012, +2348036033651

📍 Lagos Court of Arbitration Building,  
1a Remi Olowude Street, Okunde Bluewater Scheme,  
Maruwa, Lekki Phase 1, Lagos State.