

DATED

2016

(1) [NAME OF PRINCIPAL]

(2) [NAME OF DISTRIBUTOR]

DISTRIBUTORSHIP PRECEDENT

WHERE MARKET SHARE DOES NOT EXCEED 30%

**LONG FORM
(PRINCIPAL BIASED)**

NB: If market share exceeds 30%, this precedent is not suitable.
Advice from a competition lawyer should be sought.

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BETWEEN

- (1) [NAME OF COMPANY] (registered number [NUMBER]) whose registered office address is at [ADDRESS] (“the Distributor”); and
- (2) [NAME OF COMPANY] (registered number [NUMBER]) whose registered office address is at [ADDRESS] (“the Principal”).

BACKGROUND

- (A) [The Principal manufactures the Products.]
- (B) The Principal wishes to appoint the Distributor as its [[non-]exclusive] [sole]] distributor [in the Territory] [to customers on the Customer List] for the Products upon the terms and conditions of this Agreement.

OPERATIVE PROVISIONS

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement unless the context otherwise requires the following words shall have the following meanings:

“Affiliate” any person which is, in relation to a company, its parent undertaking or its subsidiary undertaking, or a subsidiary undertaking of its parent undertaking or any other person controlled by or under the same control either directly or indirectly [as at the Commencement Date]. “Parent undertaking” and “subsidiary undertaking” shall have the meanings attributed to them in sections 258 and 259 Companies Act 1985

“Business Day” any day other than Saturday or Sunday or a public or bank holiday in [England] [Wales]

“Commencement Date” [DATE]

“Confidential Information” all information in respect of the business of the parties including, without prejudice to the

generality of the foregoing, any ideas; business methods; finance; prices, business, financial, marketing, development or manpower plans; customer lists or details; computer systems and software; products or services, including but not limited to know-how or other matters connected with the Products manufactured, marketed, provided or obtained by the parties, and information concerning the Principal's or the Distributor's relationships with actual or potential clients, customers or suppliers and the needs and requirements of the parties and of such persons and any other information which, if disclosed, will be liable to cause harm to the party whose information has been disclosed

“Customer”

any person with whom the Distributor enters into a contract for the sale and purchase of the Products

[“Customer List”

“Expert”

a single independent [SPECIFY PROFESSION] appointed in accordance with **clause 25**

“Force Majeure”

any cause preventing either party from performing any or all of its obligations which arises from or is attributable to acts, events, omissions or accidents beyond the reasonable [contemplation and] control of the party so prevented [including, without limitation, [strikes, lockouts or other industrial disputes (whether involving the workforce of the party so prevented or any other party))] act of God, war, [an act of terrorism], riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood[,] [or] storm [or default of suppliers or sub-

contractors]]

“House Accounts”

“Intellectual Property Rights” any and all patents, Trade Marks, trade names, service marks, copyright, moral rights, rights in design, rights in databases, know-how, Confidential Information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the [United Kingdom] [Territory] or any other part of the world together with all or any goodwill relating thereto

“Products” the products listed in **Schedule [1]** and such other products [as [the Principal] determines by notice to the [Distributor]] [as the parties may from time to time agree] [in writing] are to be subject to the terms of this Agreement

“Terms and Conditions” the Standard Terms and Conditions of Sale of the Principal as set out in **Schedule [8]** as the same may be varied from time to time by the Principal by notice in writing to the Distributor

[**“Territory”**

“Trade Marks” the [registered] [marks] [names] specified in **Schedule [7]** together with such other [marks] [names] as the Principal may from time to time specify [in writing] shall be used by the Distributor in relation to the Products.

[Words and phrases, the definitions of which are defined in the [Companies Act 1985] shall be construed as having the meaning attributed to them in that Act [but excluding any statutory modification thereof not in force on the date of this Agreement]. [Where there is any conflict between those meanings and the meanings set out in this Agreement then the provisions of this Agreement shall prevail.]]

1.2 In this Agreement:

- 1.2.1 The masculine includes the feminine and the neuter, and the singular includes the plural and vice versa.
- 1.2.2 The expression “person” means any individual, firm, body corporate, unincorporated association, partnership, government, state or agency of [a] state or joint venture.
- 1.2.3 Any reference in this Agreement to a clause or Schedule is a reference to a clause or Schedule of this Agreement and references in any Schedule to paragraphs relate to the paragraphs in that Schedule.
- 1.2.4 The Schedules form part of this Agreement and shall have full force and effect as if expressly set out in the body of this Agreement and any reference to this Agreement shall include the Schedules.
- 1.2.5 [Save as expressly set out in this Agreement any reference to a statute or statutory provision shall be construed as a reference to the same as from time to time amended, modified, extended, re-enacted, consolidated or replaced [provided that amendments, consolidations, modifications, extensions, re-enactments or replacements made after the date of this Agreement shall not have substantively changed the relevant provision].
- 1.2.6 The [index] and [headings to the clauses] and Schedules of this Agreement are for convenience only and shall not affect its construction or interpretation.

2. **BASIS OF APPOINTMENT**

2.1.1]]¹

3. **DUTIES OF THE DISTRIBUTOR²**

3.1 During the currency of this Agreement the Distributor will:³

3.1.1 act diligently and in good faith in all its dealings with the Principal, Customers and prospective Customers;

3.1.2 [re]sell, promote, market and increase sales of the Products [in the Territory] [to persons on the Customer List];

1)

2 It is important to define precisely the Distributor's authority and duties. There are no implied common law duties as would be found in an agency agreement.

3 Clause 3.1 is a comprehensive list and will need modifying dependent upon the type of Product being supplied.

- 3.1.3 seek to enhance the reputation of the Principal;
- 3.1.4 observe all reasonable directions and instructions given by the Principal in relation to the promotion and marketing of the Products and dealings with Customers and prospective Customers;
- 3.1.5 provide such information as the Principal may reasonably require and, in any event not less than once every [3] months, submit a marketing and sales report giving general information in relation to all matters that may be of interest to the Principal in connection with the promotion, marketing and sale of Products [in the Territory] [to persons on the Customer List] [save that nothing in this clause shall require the Distributor to monitor prices or provide any other information which could be used directly or indirectly to fix the price of the Products];⁴
- 3.1.6 make clear to all Customers and prospective Customers in the course of dealing with them that it is the Distributor for the Products only to the extent set out in this Agreement and not otherwise connected with or agent for the Principal;
- 3.1.7 permit or procure permission for the Principal and its duly authorised agents at all reasonable times to enter upon any premises of the Distributor for the purpose of ascertaining whether the provisions of this Agreement have been and are being complied with by the Distributor and to allow the Principal and its duly authorised agents to inspect and take copies of the Distributor's records (including those kept in accordance with **clause 3.1.8**) and books of account [and these rights shall continue for a period of [NUMBER] months following termination of this Agreement] [save that nothing in this clause shall require the Distributor to monitor prices or provide any other information which could be used directly or indirectly to fix the price of the Products];⁵
- 3.1.8 keep adequate records of Customers and prospective Customers and orders placed for the Products [in the Territory] [by customers on the Customer List] and provide on request details of their names and copies of correspondence with them to the Principal [save that nothing in this clause shall require the Distributor to monitor prices or provide any other

⁴ The exception concerning price monitoring information is to ensure compliance with paragraph 47 of the Guidelines to the Block Exemption.

⁵ The exception concerning price monitoring information is to ensure compliance with paragraph 47 of the Guidelines to the Block Exemption.

information which could be used directly or indirectly to fix the price of the Products];⁶

- 3.1.9 attend such meetings and marketing events as are reasonably required by the Principal [at [the Principal's] [the Distributor's] expense and use such promotional and marketing materials as supplied to it by the Principal];
- 3.1.10 obtain and maintain during the currency of this Agreement all necessary licences, consents and registrations [at the [Distributor's] expense] for the resale of the Products [in the Territory][to customers on the Customer List];
- 3.1.11 comply with all laws in the [United Kingdom][Territory] [relating to the sale and marketing of the Products];⁷
- 3.1.12 in the event of any claim, complaint or dispute being made by or arising with a Customer [in the Territory] in respect of any of the Products, notify the Principal promptly and comply with any reasonable instructions given by the Principal in relation to such claim, complaint or dispute;
- 3.1.13 make itself available to the Principal for the purposes of consultation and advice relating to this Agreement and the Products;
- 3.1.14 attend meetings with representatives of the Principal and such Customers or prospective Customers [in the Territory] [on the Customer List] as may be necessary for its performance of its duties under this Agreement;
- 3.1.15 provide an after-sales maintenance service to Customers as set out in **Schedule 9**;⁸
- 3.1.16 [store the Products in suitable conditions and supply to Customers only those of satisfactory quality (as defined by the Sale and Supply of Goods Act 1994);]⁹

6 The exception concerning price monitoring information is to ensure compliance with paragraph 47 of the Guidelines to the Block Exemption.

7 Clauses 3.1.10 and 3.1.11: These are very wide clauses and it is likely that the Distributor will object to them. However, as the Distributor is actually in the Territory then it is in a better position to ensure that laws/regulations are not being broken which could have a detrimental effect on the reputation of the Principal. The duty in clause 3.1.11 can either relate only to laws concerning the Products or to all laws if the Principal considers that this would help protect its reputation. Please see clause 3.1.22.

8 It may be necessary to impose particular conditions on this after sales maintenance service, dependent on the Product. Reference could be made to a Schedule containing these conditions if appropriate. The Block Exemption specifically permits an obligation on the Distributor to provide "customer and guarantee services".

9 If the Products are perishable then the Principal may wish to impose specific storage conditions. "Satisfactory quality" reflects the Sale and Supply of Goods Act 1994. Whilst the consumer is protected by Sale of Goods legislation in any event, the inclusion of this clause may allow the Principal to terminate the Agreement under clause 13.3.1 if the Distributor was supplying defective products.

- 3.1.17 spend not less than £[AMOUNT] during the first year from the Commencement Date and £[AMOUNT] in each year thereafter on advertising and promotion of the Products [in the Territory] [to customers on the Customer List];
- 3.1.18 maintain adequate stock of the Products to meet reasonably anticipated customer demand at all times;
- 3.1.19 provide to the Principal a forecast of its requirements for Products for the next [calendar month] not less than [14] days prior to the commencement of that period;¹⁰
- 3.1.20 [appoint a nominated person [who shall have a satisfactory command of the English language] to liaise with the Principal regarding all aspects of this Agreement;]¹¹
- 3.1.21 [save as otherwise expressly set out in this Agreement, pay all expenses incurred in the marketing and promotion of the Products]; and
- 3.1.22 comply with all requirements under the Data Protection Act 1998 and any similar or subsequent legislation relating to any information which is processed, collected, maintained, transferred to the Principal or any third party by the Distributor concerning Customers, potential customers or any other aspect of the Distributor's appointment or duties under this Agreement].¹²

10 This clause is to be combined with clause 2.2. See footnote 2.

11 This may be a useful clause in international contacts.

12 As the distributor is already obliged to comply with all relevant laws, this clause is not strictly necessary. However, due to the high profile of data protection issues some principals may prefer to draw the distributor's attention specifically to these issues. The duties can be drafted as either obligations or a duty to use best or reasonable endeavours. When drafting the document for the Principal, the Distributor's duties should be drafted as obligations. The cases of *Packham v Park Foods Limited* [1990] BCLC 989 and *P & O Property Holdings v Norwich Union Life Insurance Society* [1993] EGCS 69 implied that an undertaking to use either best or reasonable endeavours did not mean that the company had then to do something which was not in the company's interest. The time for considering whether an action is in the company's interest is at the date of performance and not the date of the contract. This is a substantial fetter on the ability to rely on an obligation to use best or reasonable endeavours. An obligation to use even best endeavours should not be viewed as "the next best thing" to an actual obligation.

4. PROHIBITIONS ON DISTRIBUTOR¹³

4.1 During the currency of this Agreement the Distributor will not:

4.1.1 do anything which will harm the reputation of the Principal;

4.1.2 [manufacture, purchase, sell or re-sell products which compete directly with the Products for a period of [NUMBER] – THIS MUST NOT EXCEED FIVE UNLESS THE DISTRIBUTORSHIP IS EXCLUSIVE IN WHICH CASE IT MAY BE POSSIBLE TO EXTEND THIS LIMIT] years from the date of this Agreement or until termination of this Agreement, whichever occurs first];¹⁴

4.1.3 pledge the credit of the Principal in any way or bind or attempt to bind it by contract or otherwise;¹⁵

4.1.4 use any marketing or promotional materials or attend any marketing events with respect to the Products which have not been approved by the Principal in writing [(such approval not to be unreasonably withheld or delayed)];

4.1.5 modify or alter the Products or their packaging in any way save as required by law;¹⁶

4.1.6 in the course of performing the services contemplated by this Agreement do any illegal act;

13 The Principal will wish to impose various prohibitions on the Distributor both during and after the currency of the Agreement. The usual prohibitions are set out in clause 4. When imposing prohibitions, these must always be considered in the light of competition rules. Therefore, in particular, any restrictions on prices, territorial restrictions and types of customers to whom the goods can be sold must be carefully considered. Particular care should be taken with any attempt to impose restrictions on passive parallel imports. Previously, the Block Exemption set out the only restrictions which the Principal could impose. The Block Exemption, which applies to all agreements entered into after 1 June 2000, changes the emphasis. The Block Exemption now lists the prohibitions which are not acceptable. If an agreement does not contain any of these clauses then the agreement will benefit from the Block Exemption (subject to market share thresholds), although in theory this can be withdrawn. If other restrictions are included in the Agreement, the advice of a competition lawyer should be sought.

14 Under the Block Exemption, these type of non-compete obligations are only permissible if they are not indefinite and do not exceed 5 years. (Article 5(a)). A non-compete obligation in this context is defined in Article 1(b) of the Block Exemption as 'any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services.' If the non-compete obligation exceeds the boundaries set out in the Block Exemption, it is only that clause and not the whole agreement which will be jeopardised. NB: If the agreement is exclusive, there is some confusion in the Guidelines on this point. Guideline 158 states, 'the combination of non-compete with exclusive distribution may also justify the non-compete obligation lasting the full length of the agreement.' Presumably this would apply equally to an exclusive agency. This is a difficult point as the Guidelines directly contradict the Regulations. If the client wishes to have a non-compete for longer than five years then they must be warned of the risks. Please note that this potential exemption only applies to exclusive agreements. If this clause breaches the Block Exemption then it is only this clause which fails, provided there is an adequate severability clause.

15 This may not necessarily prevent the Principal becoming liable to the ultimate customer due to the doctrine of ostensible agency. However, the Principal may then be able to sue the Distributor for breach of this clause to recover the loss.

16 It must be ensured that this does not breach any provision in the Territory relating to packaging. This can be particularly a problem for food or medicinal products. See for example, Re Goerres ECJ 14 July 1998 C-385/96.

- 4.1.7 [make any representations about the Products save as agreed in writing in advance by the Principal;]¹⁷
- 4.1.8 register any domain name relating to the Products and so nearly resembling the Trade Marks as to be likely to deceive or cause confusion for use on the Internet except with the prior written consent of the Principal;¹⁸
- 4.1.9 send unsolicited e-mails to potential customers outside [the Territory] [the Customer List] [where such person is [in a territory] [on a customer list] reserved to a third party or the Principal as set out in **Schedule 11**].¹⁹

5. **PRINCIPAL'S DUTIES AND RIGHTS**²⁰

5.1 During the currency of this Agreement the Principal will:

- 5.1.1 [use its best endeavours to] act diligently and in good faith in all its dealings with the Distributor;
- 5.1.2 [use its best endeavours to] supply such samples, information and documents about the Products as the Distributor may reasonably require;
- 5.1.3 have the right from time to time to modify the specification of or withdraw any or all of the Products with[out] notice and with[out] the consent of the Distributor [(such consent not to be unreasonably withheld or delayed)];²¹
- 5.1.4 [use its best endeavours to] supply to the Distributor such promotional and marketing materials and training as the Principal considers reasonable [at the [Distributor's] [Principal's] expense].

17 Although the Principal should not be bound by any representations which the Distributor makes, they can affect the Principal's reputation and therefore this clause may allow the Principal to terminate. However, potentially this clause could be construed as an attempt to control the terms and conditions on which Products are sold to the ultimate customer and hence have competition law implications.

18 It must be ensured such a clause does not effectively prevent the Distributor operating a web-site. The Guidelines to the Block Exemption specifically state that a Distributor should be allowed to operate a web-site as this is passive selling. However, see clause 2.7.2 for the reason behind including the words in square brackets. If the second option in clause 2.7.2 is chosen then this clause will need to be adapted.

19 This could constitute active selling. The mere existence of a website would seem to constitute passive selling.

20 There are no implied common law duties on the Principal as would be found in an agency agreement.

21 The Principal will probably wish to retain the right to modify or withdraw the Product from sale. If necessary this could be qualified in some way to restrict major modifications being made without the Distributor's consent. The principal will wish to retain this right in order to comply with changes in legislation, marketing campaigns or simply if the particular Product is not selling well. If the withdrawal of the Product would effectively leave the Distributor with nothing to sell, then this could allow the Distributor to terminate the Agreement. However, if the Distributor is selling a large range then it is unlikely that the Distributor would be permitted to terminate the Agreement on the basis of the withdrawal of one Product, if this clause is in place. If the Distributor did attempt to terminate then no compensation should be payable and the principal could claim normal contractual damages. Without this clause, any alteration of the product range by the Principal could be construed as a breach under clause 13.3.1. Further protection should be ensured by the inclusion in the definition of Products of provision for variation. Many of the Distributor's duties could be redrafted as Principal's rights if required. For example the Distributor's duty to allow the Principal access to the Distributor's premises could be included in clause 5 as a right of the Principal to enter the premises, depending upon the emphasis which is required.

5.2 The Principal agrees to take all such steps as may be reasonably required in the normal course to fulfil its obligations to supply the Products to the Distributor in accordance with this Agreement but shall not be obliged to give the Distributor priority over any other customer of the Principal with regard to the supply or delivery of the Products.

5.3 [The Principal shall have the right to reject any order placed by the Distributor which exceeds by more than [10%] the forecast provided by the Distributor under **clause 3.1.19.**]

6. TERMS AND CONDITIONS OF SALE AND DELIVERY

6.1 The Principal will sell the Products to the Distributor on the Terms and Conditions. If there shall be any conflict between the Terms and Conditions and this Agreement then this Agreement shall prevail.²²

6.2 The [basis of the] method of delivery shall be as set out in **Schedule 4.**²³

6.3 The Principal shall use reasonable endeavours to deliver each of the Distributor's orders for the Products within the time agreed when the Distributor places an order and, if no time is agreed, then within a reasonable time, but the time of delivery shall not be of the essence. If, despite those endeavours, the Principal is unable for any reason to fulfil any delivery of the Products on the specified date, the Principal shall be deemed not to be in breach of this Agreement, nor (for the avoidance of doubt) shall the Principal have any liability to the Distributor for direct, indirect or consequential loss (all three of which terms includes, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and like loss) howsoever caused (including as a result of negligence) by any delay or failure in delivery except as set out in this clause. Any delay in delivery will not entitle the Distributor to cancel the order unless and until the Distributor has given [NUMBER]

²² It is essential to clarify the exact terms and conditions upon which the Products will be supplied to the Distributor. If the Principal does not have any standard terms and conditions then reference should be made to the Eversheds Standard Terms and Conditions of Sale Precedent to ensure that all the relevant areas have been covered. These would then need to be incorporated into this Agreement. However, it must also be made clear that if there is any conflict between the Terms and Conditions and this Agreement then the Distributorship Agreement prevails. The Principal also needs to ensure that it is permitted to vary the standard terms and conditions. The Principal is permitted to do this under the definition of Terms and Conditions in this precedent. The Agreement should be amended as appropriate dependent upon the relative bargaining powers of the parties. If the Principal's Terms and Conditions do contain provisions in this Agreement then this Agreement could be shortened accordingly. It is essential to consider any exclusion clauses in the terms and conditions. See Technical Note [PXDI-2\(2\)](#) "Exclusion Clauses". If standard terms and conditions are used then the implications under UCTA must be carefully considered.

²³ It is essential to set out clearly the exact basis for delivery. For example, please see INCOTERMS 2000 which can be used. It is essential always to state the edition of the INCOTERMS eg. 2000 to which you are referring. If the INCOTERMS are used then it will be necessary to have a clause stating that in the event of a conflict the terms of the Agreement should prevail. The Principal could have liability for transport under certain conventions eg the CMR. It is important to consider when risk will pass although this is dealt with in clause 8 of this precedent. See Technical Note [PXTC-2\(5\)](#) on Incoterms.

days' written notice to the Principal requiring the delivery to be made and the Principal has not fulfilled the delivery within that period. If the Distributor cancels the order in accordance with this **clause 6.3** then:²⁴

6.3.1 the Principal will refund to the Distributor any sums which the Distributor has paid to the Principal in respect of that order [or part of the order] which has been cancelled; and

6.3.2 the Distributor will be under no liability to make any [further] payments under **clause 7.4** in respect of that order [or part of the order] which has been cancelled.

7. **PRICE AND PAYMENT**

7.1 The initial prices for the Products will be as specified in **Schedule 5** ("the Prices").²⁵

7.2 The Prices shall be exclusive of:

7.2.1 any costs of packaging, carriage and insurance of the Products; and

7.2.2 any value added tax or other applicable sales tax or duty which may be chargeable (whether or not required to be paid to enable the Products to be exported from their country of manufacture and imported [to the Territory] [to the country in which Customers are situated]),

which shall be added to the sum in question.

EITHER

7.3 [The Principal will be entitled to vary the Prices from time to time for any reason whatsoever provided that, except in circumstances beyond the Principal's reasonable control, the Principal will give to the Distributor at least [30] days' notice of any such price variation.]

OR

24 This is an essential clause for the Principal. The Principal should try and exclude liability for delay in delivery. However, there should be a cut-off point after which the Distributor can cancel an order if the delay in delivery becomes prolonged. This is an exclusion clause so it must always be ensured that it complies with the Unfair Contract Terms Act - see Technical Note [PXDI-2\(2\)](#) "Exclusion Clauses". See notes to clause 9 for general guidance on exclusion clauses.

25 It is important to set out clearly the price at which the Products will be supplied. There must always be an objective means of ascertaining the price to avoid the contract being void for uncertainty.

- [7.3 The Principal will be entitled to increase the Prices from time to time during the continuance of this Agreement provided always that each increase is fair and reasonable having regard to any increase in the cost of materials, labour, other overheads and fluctuations in taxes and duties [and currency exchange rates]. If the parties shall be in dispute over whether any such price increase is fair or reasonable having regard to the above factors, the dispute will be referred to an Expert.]²⁶
- 7.4 The Distributor will pay for the Products within [NUMBER] days of the date of the Principal's invoice. All payments will be made in sterling in England or in such other currency and place as the Principal shall from time to time specify in writing.
- 7.5 If the Distributor fails to pay on the due date any amount which is payable to the Principal under this Agreement then, without prejudice to any other rights set out in this Agreement:
- 7.5.1 that amount shall bear interest from the due date until payment is made in full, both before and after any judgment, at [4] per cent per annum over [NAME] Bank plc base rate from time to time;
- 7.5.2 the Principal shall be entitled to suspend deliveries of the Products until the outstanding amount has been received by the Principal from the Distributor; and
- 7.5.3 the Principal shall, at any time, be entitled to appropriate any payment made by the Distributor in respect of any goods in settlement of the overdue invoices or accounts as the Principal may in its absolute discretion think fit, notwithstanding any purported appropriation to the contrary by the Distributor.

8. OWNERSHIP OF THE PRODUCTS²⁷

- 8.1 Risk of damage to or loss of the Products shall pass to the Distributor on delivery.

²⁶ Clauses 7.3 and 7.4: The Principal will want to retain the right to vary the price of the Products. The relative bargaining positions of the parties are likely to determine which option out of clause 7.3 and 7.4 is chosen. The Principal would have to be in a particularly strong bargaining position to impose the first option on the Distributor. The other alternative is to increase prices in line with RPI. However, see notes on clause 7.1 concerning the contract being void for uncertainty. Alternative provisions for price variation can be seen in the Long Term Supply Module [PXSU](#)

²⁷ A retention of title clause is essential for a distributorship agreement. This is the boiler plate precedent retention of title clause. Advice should be sought from an insolvency practitioner particularly if the value of the goods is high or they will be stored abroad. However, the dangers of reliance on retention of title clauses' effectiveness, particularly given the protection given to purchasers for value without notice under sections 21-25 and 47 Sale of Goods Act 1979, must be emphasised to the client. Other security for the value of the goods could be considered by the Principal eg. bonds, guarantees.

- 8.2 Ownership of the Products shall not pass to the Distributor until the Principal has received in full (in cash or cleared funds) all sums due to it in respect of:
- 8.2.1 the Products; and
 - 8.2.2 all other sums which are or which become due to the Principal from the Distributor on any account.
- 8.3 Until ownership of the Products has passed to the Distributor, the Distributor must:
- 8.3.1 hold the Products on a fiduciary basis as the Principal's bailee;
 - 8.3.2 store the Products (at no cost to the Principal) separately from all other goods of the Distributor or any third party in such a way that they remain readily identifiable as the Principal's property;
 - 8.3.3 not destroy, deface or obscure any identifying mark or packaging on or relating to the Products; and
 - 8.3.4 maintain the Products in satisfactory condition insured on the Principal's behalf for their full price against all risks to the reasonable satisfaction of the Principal, and shall whenever requested by the Principal produce a copy of the policy of insurance.
- 8.4 The Distributor may resell the Products before ownership has passed to it solely on the condition that:
- 8.4.1 any sale shall be effected in the ordinary course of the Distributor's business at full market value and the Distributor shall account to the Principal accordingly; and
 - 8.4.2 any such sale shall be a sale of the Principal's property on the Distributor's own behalf and the Distributor shall deal as principal when making such a sale.
- 8.5 The Distributor's right to possession of the Products shall terminate immediately on the occurrence to it of one of the events in **clause 13.2**.
- 8.6 The Principal shall be entitled to recover payment for the Products notwithstanding that title in any of the Products has not passed from the Principal.²⁸

28 It should be considered whether the right to recover the goods should only apply where the contract has been terminated for breach or whether the Principal would require wider protection.

8.7 The Distributor grants the Principal, its agents and employees an irrevocable licence at any time to enter any premises where the Products are or may be stored in order to inspect them, or[, where the Distributor's right to possession has terminated,] to recover them.

9. **WARRANTY AND EXCLUSION OF LIABILITY**²⁹

9.1 **Warranty**

9.1.1 The Principal will free of charge, within a period of [12] months from the date of delivery of Products which are proved to the reasonable satisfaction of the [Principal][parties] (or on the application of either party to the satisfaction of an Expert) to [be damaged or defective][not comply with specification] due to defects in material[,] [or] workmanship [or design (other than a design made, furnished or specified by the Distributor)], repair, or at its option replace, such Products. This obligation will not apply where:

²⁹ Clause 9 is an exclusion clause. Without this clause the Principal would be subject to the Sale of Goods Act 1979 and the Sale and Supply of Goods Act 1994 (together with normal contractual and tortious liability). These impose conditions on a contract for sale that the goods will be of satisfactory quality, comply with the description, be fit for the purpose for which they are required and the seller will have good title. The Principal is not entitled to exclude the condition that he has title to the goods which is set out in section 12 of the Sale of Goods Act 1979. If it is intended to exclude or restrict any particular form of liability or remedy, it is usually wise to do so clearly and expressly. The more unusual or onerous the provision, the more clearly it must be expressed before it can be effective. However, the more unusual or onerous the clause, the less likely it is to satisfy the requirements of reasonableness. So excluding and limiting terms should be drafted so as not to operate more widely than is necessary for the reasonable protection of the client. Care must be taken to ensure that such terms do not extend to liabilities that it is not intended to exclude, lest those terms be struck down as unreasonable because of the unintended breadth of their cover. For example, care must be taken to ensure that exclusion clauses does not inadvertently extend to cover liability for a party's own fraud. Each exclusion clause must always be adapted to the facts of the case. It can never be guaranteed that an exclusion clause will work and an appropriate warning must be given. This clause must comply with the Unfair Contract Terms Act 1977. On the assumption that the Distributor is not a consumer then this clause must be reasonable at the time the parties enter into the contract. Care must be taken when using this clause to ensure that it does not breach UCTA. (See Technical Note [PXDI-2\(2\)](#) - "Exemption Clauses"). Particular care must also be taken if this warranty in clause 9.1 is substantially different from any warranty which would normally appear for products of this type or which has been suggested by the appropriate trade association. The time limit for inspection may also need to be varied dependent upon the complexity of the Product. It is essential to read the Technical Briefing on exclusion clauses prior to attempting to impose or agree to any warranty clause such as this. The Principal should always be advised that they may still have liability to the ultimate customer under the Consumer Protection Act and similar consumer protection law. The other alternative to a warranty such as this may be to use a warranty waiver clause whereby the Principal accepts a discount on the price in return for all warranties and liabilities (except those compulsory by law) being excluded. The Principal may wish to consider stating that the Distributor must give a similar warranty to the ultimate customer. However, this must be carefully considered with respect to competition issues and the block exemption as the Principal would not normally be able to control the terms and conditions on which the products are sold by the Distributor. If a warranty is not included then the use of clauses 9.2.1 to 9.2.4 will be a total exclusion of liability. This can be acceptable in very narrow circumstances, but a principal would normally be expected to accept some liability. The case of *British Fermentation Products Ltd -v- Compair Reavell Ltd* (1999) 66 Con LR 1 recently held a similar clause to be reasonable, with one important exception. The clause in this case contained a provision that if the purchaser rejected the goods then he was entitled to buy replacement goods and the seller would pay to the purchaser the difference between the price of those replacement goods and the contract price. Such a provision should be considered in each case as it may not increase the chance of the clause being held to be reasonable. However, such a clause may not be considered commercially acceptable by many principals. This may depend on the nature of the goods and whether the principal would have any control over the replacement goods selected. Each case must be considered on its facts. A capped liability clause could be used. Please see the commercial boilerplates [PXBP-1 clause 14](#).

- 9.1.1.1 the Products have been improperly altered in any way whatsoever, or have been subject to misuse or unauthorised repair;
 - 9.1.1.2 the Products have been improperly installed or connected;
 - 9.1.1.3 any maintenance requirements relating to the Products have not been complied with;
 - 9.1.1.4 any instructions as to storage of the Products have not been complied with in all respects; or
 - 9.1.1.5 the Distributor has failed to notify the Principal of any defect or suspected defect within [14] days of the delivery where the defect should be apparent on reasonable inspection, or within [14] days of the same coming to the knowledge of the Distributor where the defect is not one which should be apparent on reasonable inspection, and in any event no later than [12 months] from the date of delivery.
- 9.1.2 [The Principal will refund to the Distributor the cost of carriage on the return of any such defective or damaged Products, and will deliver any repaired or replacement Product to the Distributor at the Principal's own expense.]
- 9.1.3 Any Products which have been replaced will belong to the Principal. Any repaired or replacement Products will be liable to repair or replacement under the terms specified in **clause 9.1** for the unexpired portion of the [12] month period from the original date of delivery of the replaced Products.

9.2 Exclusion of Liability

- 9.2.1 In the event of any breach of the Principal's express obligations under **clauses 6.3, 9.1.1, [9.1.2]** and **9.1.3** the remedies of the Distributor shall be limited to damages.³⁰
- 9.2.2 The Principal does not exclude its liability (if any) to the Distributor.³¹

30 It is unlikely to ever be reasonable to exclude totally liability for breach of an express term.

31 Liability for death or personal injury caused by negligence and provisions relating to title must not be excluded.

- 9.2.2.1 for breach of the Principal's obligations arising under section 12 Sale of Goods Act 1979 or section 2 Supply of Goods and Services Act 1982;
 - 9.2.2.2 for personal injury or death resulting from the Principal's negligence;
 - 9.2.2.3 under section 2(3) Consumer Protection Act 1987;
 - 9.2.2.4 for any matter which it would be illegal for the Principal to exclude or to attempt to exclude its liability; or
 - 9.2.2.5 for fraud.
- 9.2.3 Except as provided in **clauses 6.3** and **9.1 to 9.2.2**, the Principal will be under no liability to the Distributor whatsoever (whether in contract, tort (including negligence), breach of statutory duty, restitution or otherwise) for any injury, death, damage, or direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and like loss) howsoever caused arising out of or in connection with:³²
- 9.2.3.1 any of the Products, or the manufacture or sale or supply, or failure or delay in supply, of the Products by the Principal or on the part of the Principal's employees, agents or sub-contractors;
 - 9.2.3.2 any breach by the Principal of any of the express or implied terms of this Agreement;
 - 9.2.3.3 any use made or resale by the Distributor of any of the Products, or of any product incorporating any of the Products; or
 - 9.2.3.4 any statement made or not made, or advice given or not given, by or on behalf of the Principal
- [or otherwise under this Agreement].
- 9.2.4 Except as set out in **clauses 6.3** and **9.1 to 9.2.2**, the Principal hereby excludes to the fullest extent permissible in law, all conditions, warranties and stipulations, express (other than those set out in this Agreement) or

implied, statutory, customary or otherwise which, but for such exclusion, would or might subsist in favour of the Distributor.

9.2.5 Each of the Principal's employees, agents and sub-contractors may rely upon and enforce the exclusions and restrictions of liability in **clauses 6.3, 24** and **9.2.1** to **9.2.4** in that person's own name and for that person's own benefit, as if the words "its employees, agents and sub-contractors" followed the word Principal wherever it appears in those clauses [save each reference in **clause 9.2.3**].³³

9.2.6 **EITHER**

The Distributor acknowledges that the above provisions of **clauses 6.3, 24** and this **clause 9** are reasonable and reflected in the price which would be higher without those provisions, and the Distributor shall accept such risk and/or insure according.³⁴

OR

The Principal's charges to the Distributor are determined on the basis of the exclusions from and limitations of liability contained in this Agreement. The Distributor expressly agrees that these exclusions and limitations are reasonable because of (amongst other matters) the likelihood that otherwise the amount of damages awardable to the Distributor for a breach by the Principal of this Agreement may be disproportionately greater than the price of the Products. [The Principal is willing to arrange for additional insurance cover to enable the Principal to take on the burden of additional liability to the Distributor provided that the Distributor pays the Principal a commensurately higher price for the Products. If the Distributor wishes the Principal to obtain a quotation for additional insurance cover accordingly the Distributor shall notify the Principal prior to this Agreement being entered into.]

³³ This is to take advantage of the Contracts (Rights of Third Parties) Act 1999. Care must be taken to ensure that this is consistent with any other clause concerning rights under the Contracts (Rights of Third Parties) Act 1999. (See clause 26). It is essential to ensure that the agreement contains an entire agreement clause stating that the buyer confirms that he has not relied upon any warranty, representation, statement or promise which is not expressly set out in the agreement. (See clause 19).

³⁴ Such a clause must only contain those factors which truthfully apply to the particular situation. The optional words concerning insurance must be realistic, ie such insurance is available and there is enough time to arrange it. This clause must also be brought to the Buyer's attention before he enters into the contract. Overseas Medical Supplies Ltd –v- Orient Transport Services Ltd, Court of Appeal, 20 May 1999, held that an option to take out further insurance must be realistic.

10. **MINIMUM ORDERS**³⁵

10.1 During the currency of this Agreement the Distributor agrees to achieve sales of the Products [in the Territory] [to customers on the Customer List] to certain minimum values in each calendar year as set out in **Schedule 6**.

10.2 The Distributor acknowledges that a failure to obtain such minimum orders will constitute a serious breach of the terms of this Agreement which is not capable of remedy and which shall entitle the Principal to terminate the Agreement with immediate effect in accordance with **clause 13.2.1**.

11. **PAYMENTS FROM CUSTOMERS**³⁶

11.1 The Distributor will keep full records of Customers' names, addresses and orders placed and fulfilled.

11.2 Collection of payments from Customers shall be the sole responsibility of the Distributor.

12. **[INTELLECTUAL PROPERTY]**³⁷

12.1 [The Principal authorises the Distributor to use the Trade Marks [in the Territory] in relation to the Products for the purposes only of exercising its rights and performing its obligations under this Agreement.

12.2 The Distributor shall ensure that each reference to and use of any of the Trade Marks by the Distributor is in a manner from time to time approved by the Principal and accompanied by an acknowledgement in a form approved by the Principal (such approval not to be unreasonably withheld or delayed), that the same is a Trade Mark of the Principal.

35 Distributorship Agreements commonly impose minimum order levels, in order to provide a ground for termination of the contract. The clause is drafted so that the contract can be terminated on this ground for breach under clause 13.3. However, the normal contractual provisions concerning wrongful termination would still apply despite this clause. Alternative sanctions such as the rights to convert an exclusive agreement into a non-exclusive one could be inserted into the Agreement.

36 The Principal does not have any contractual relationship with the Customer and would not normally be expected to become involved in debt collection.

37 Provided the intellectual property rights are ancillary to and not the main object of the agreement, the Block Exemption will continue to apply. The Block Exemption is not available for intellectual property agreements. It is usual for the Principal to control the way in which the Distributor uses the Principal's trade mark in relation to the products and, in particular, to impose an obligation on the distributor to inform the Principal of any infringement of the intellectual property rights of the Principal and to assist the Principal in maintaining the availability and enforceability of its intellectual property rights. In any case where rights over one party's intellectual property are granted by one party to another it is worth considering whether a separate licence should be registered at the appropriate Registry. This is to permit actions to be taken in the parties' own names against third parties and can affect the right to claim damages. It would not be normal to register the whole agreement between the parties as this would make it public which is why a separate licence would be advised. If such a licence is to be registered then a clause to that effect should be inserted in the precedent. This point should always be considered and the appropriate IP precedent consulted. Advice should be sought from an Intellectual Property lawyer.

- 12.3 The Distributor shall not use:
- 12.3.1 any of the Trade Marks in any way which might prejudice their distinctiveness or validity or the goodwill of the Principal;
 - 12.3.2 in relation to the Products any trade marks or names other than the Trade Marks without obtaining the prior written consent of the Principal; or
 - 12.3.3 [in the Territory], any trade marks or names so resembling the Trade Marks as to be likely to cause confusion or deception.
- 12.4 The Distributor shall not apply to register any of the Intellectual Property Rights nor any trade marks or trade names so nearly resembling the Trade Marks as to be likely to deceive or cause confusion.
- 12.5 Except as expressly provided in this Agreement the Distributor shall have no rights in respect of any Intellectual Property Rights however used by the Principal [in relation to the Products] and the Distributor hereby acknowledges that he shall not acquire any rights in respect thereof and that all such Intellectual Property Rights are and shall remain vested in or controlled by the Principal.
- 12.6 The Distributor will immediately inform the Principal in writing of any actual, threatened or suspected infringement of the Intellectual Property Rights of the Principal relating to the Products or of any claim that the Products infringe the Intellectual Property Rights of a third party, but the Distributor shall take no steps or enter into any proceedings with respect to such infringement or claim without the prior written consent of the Principal.
- 12.7 The Distributor shall [at the expense of the Principal] take all such steps as the Principal may [reasonably] require to assist the Principal in maintaining the validity and enforceability of the Intellectual Property Rights of the Principal during the term of this Agreement.
- 12.8 Without prejudice to the right of the Distributor or any third party to challenge the validity of any Intellectual Property Rights of the Principal, the Distributor shall not do or authorise any third party to do any act which would or might invalidate or be inconsistent with any Intellectual Property Rights of the Principal and shall not omit or authorise any third party to omit to do any act which, by its omission, would have that effect.]

13. **TERMINATION**³⁸

EITHER

13.1 [This Agreement shall come into effect on the Commencement Date and shall be for a period of [NUMBER] years unless terminated earlier in accordance with the terms of this Agreement.]

OR

[13.1 This Agreement shall come into effect on the Commencement Date and shall continue until it is terminated by either party giving notice to the other party of not less than:

13.1.1 [1 month's] notice for the first year of this Agreement;

13.1.2 [2 months'] notice for the second year commenced;³⁹

13.1.3 [3 months'] notice for the third year commenced and for subsequent years

with the end of any notice period coinciding with the end of a calendar month.]

13.2 Either party may by written notice served on the other terminate this Agreement immediately if the other:

13.2.1 is in [material] breach of any of the terms of this Agreement and, where the breach is capable of remedy, the other party fails to remedy such breach within [NUMBER] days' service of a written notice from the party not in breach, specifying the breach and requiring it to be remedied [provided any such notice is served within [six months] of the breach occurring or the party not in breach becoming aware of such breach, whichever occurs later].

13.2.2 being a company, summons a meeting of its creditors, makes a proposal for a voluntary arrangement, becomes subject to any voluntary arrangement, is unable to pay its debts within the meaning of section 123 Insolvency

³⁸ See also footnote 23.

³⁹ Clauses 13.1 and 13.2: It must be clearly stated whether the Agreement is for a fixed or indefinite term. If a fixed term agreement continues past that term then the notice provisions for termination must be set out clearly or "reasonable notice" would be implied. If the Agreement is to run for a stated period together with the right of either party to terminate the Agreement at the end of that period or at any time thereafter, by giving a suitable period of notice then careful drafting is required to ensure that it is clear whether the notice can be given prior to the end of the basic period. In *Costigan v. Gray Bovier Engines* (1925) 41 TLR 372, an agreement was specified to run for a period of 12 calendar months from a specified day "and thereafter until determined by three calendar months' notice in writing given by either party at any time to the other". It was held that the 3 months' notice could be given within the initial 12 months period. However, in *Jacks (William & Co) v. Palmer Shipbuilding & Iron Co.* (1928) 928 LJKB 366, where the agreement was to run "for a period of 12 months from April 22nd 1927 with six months' notice thereafter at any time to terminate" it was held that the notice could not be given until after the initial 12 months. See Precedent [PXSU-5\(1\)](#) Clause 11.1 for an example of such a clause.

Act 1986, has a receiver, manager or administrative receiver appointed over any of its assets, undertaking[s] or income, has passed a resolution for its winding-up (save for the purpose of a voluntary reconstruction or amalgamation [previously approved in writing by the party serving notice]), is subject to a petition presented to any Court for its winding-up (save for the purpose of a voluntary reconstruction or amalgamation [previously approved in writing by the party serving notice]), has a provisional liquidator appointed, has a proposal made for a scheme of arrangement under section 425 Companies Act 1985, has an administrator appointed in respect of it or is the subject of an application for administration filed at any court or a notice of appointment of an administrator filed at any court or a notice of intention to appoint an administrator given by any person or is the subject of a notice to strike off the register at Companies House;

- 13.2.3 being an individual, partnership or firm has entered into any composition or arrangement with its creditors, has a petition presented by it or by any other person for its bankruptcy, has a bankruptcy order made against it, has applied to the Court for an interim order under section 253 Insolvency Act 1986, has submitted a proposal for a voluntary arrangement to a nominee under Section 256A Insolvency Act 1986, has a petition presented for an Administration Order under Part III Insolvent Partnerships Order 1994 (“the Order”), has a petition presented for winding up as an unregistered company under Parts IV or V of the Order, has an interim receiver of its property appointed under section 286 Insolvency Act 1986, is unable to pay its debts within the meaning of sections 267 and 268 Insolvency Act 1986, has a receiver or manager appointed over any of its assets, has a receiver appointed under the Mental Health Act 1983, dies or by reason of any illness (including mental disorder or infirmity), accident or injury or any other cause whatsoever becomes unable for a consecutive period of [NUMBER] months or for an aggregate period of [NUMBER] months in any one consecutive period of [NUMBER] months to comply with its obligations under this Agreement;
- 13.2.4 has any distraint, execution or other process levied or enforced on any of its property;
- 13.2.5 ceases or threatens to cease to trade;

- 13.2.6 has a change in its management and/or control involving [25%] of its shares being transferred to a person who is not a shareholder at the Commencement Date unless such shares are transferred to an Affiliate ; or⁴⁰
- 13.2.7 being an individual is subject to a term of imprisonment whether or not suspended.
- 13.3 As from the date of termination the Distributor will cease to hold itself out as Distributor for the Principal and for the sale and marketing of the Products [provided always that for a period of [NUMBER] months immediately following the date of termination of this Agreement [howsoever arising]] the Distributor will be entitled, subject to the provisions of **clause 13.7**, to sell [Products] which are in the Distributor's stock as at the date of termination.]⁴¹
- 13.4 On termination of this Agreement, howsoever arising, the Distributor will forthwith return to the Principal all documents and other materials or things on loan or issued from the Principal and any copies thereof made by the Distributor which are in the Distributor's possession, custody or control as at the date of termination together with a list of all Customers [and prospective Customers], their addresses and telephone numbers, with whom the Distributor has dealt during the [currency of this Agreement] [twelve months prior to termination of this Agreement] [and the Distributor will obtain any necessary consents required under the Data Protection Act 1998 for the transfer of this information].
- 13.5 [For the avoidance of doubt the Distributor shall not be entitled to any compensation or damages on the termination of this Agreement howsoever arising for the loss of its rights hereunder.]
- 13.6 The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either party accrued prior to termination. The

⁴⁰ The point about transfers to an Affiliate must be considered following the case of *Adbruf v Ringway Road Markings Limited*, Official Referee's Court, 22 May 1998.

⁴¹ The Agreement should set out precisely the grounds on which the Distributorship Agreement can be terminated for breach. The notice provisions would not normally apply where the Distributorship Agreement is terminated for breach. It is important to draft this clause as widely as possible when acting for the Principal as contractual damages would not normally be payable when the contract is terminated for breach. Wrongful termination provisions would still apply. In many circumstances it may be appropriate to use the words "continuing or material" in relation to breaches which can give rise to termination. In a Distributorship Agreement there may be many minor breaches which it may be technically impossible to remedy but the aggregate effect of which is major. How a material breach is precisely defined will vary from case to case. The case of *Rice t/a The Garden Guardian –v- Great Yarmouth Borough Council*, Court of Appeal, 30 June 2000, held that a clause in a contract entitling the Council to terminate the contract if Rice committed "a breach of any of its obligations", meant that only a repudiatory breach, or an accumulation of breaches which could be described as repudiatory, would entitle termination. The Court held that the contract to provide leisure management and grounds maintenance services for a four year period contained multi faceted obligations which could be broken in many different ways. A termination clause which visited the same termination consequences upon any breach, however small, flew in the face of commercial common sense. Effectively this could be argued as meaning that the Courts will imply the word "material" into such a termination clause. Therefore, if there is any particular breach which the seller would wish to give rise to the right to terminate this should be stated specifically in the agreement.

clauses in this Agreement which expressly or impliedly have effect after termination shall continue to be enforceable notwithstanding termination.⁴²

- 13.7 On the termination of this Agreement the Principal shall have the option (to be exercised by written notice to the Distributor to be served [on or before] [within seven days of] the date of termination) of buying all or any Products [owned] [paid for] by the Distributor at the date of giving such notice and which the Distributor is not committed by contract as at such date to sell to a third party. [Such Products will be sold to the Principal on the Principal's standard terms and conditions of purchase.] The price for such Products will be the price previously received by the Principal from the Distributor for the [Products] in question and upon the exercise of such option the Distributor will yield up such [Products] to the Principal or to such person as the Principal may appoint.

14. **INDEMNITIES ON BREACHES**

The Distributor agrees to indemnify, keep indemnified and hold harmless the Principal from and against all costs (including the costs of enforcement), expenses, liabilities [(including any tax liability)], injuries, direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and like loss), damages, claims, demands, proceedings or legal costs (on a full indemnity basis) and judgments which the Principal incurs or suffers as a consequence of a direct or indirect breach or negligent performance or failure in performance by the Distributor of the terms of this Agreement.

15. **CONFIDENTIALITY**

- 15.1 The Principal and the Distributor warrant to the other:

15.1.1 to keep confidential all Confidential Information (whether written or oral) of the other which it has obtained or received as a result of the discussions leading up to or the entering into, or obtains or receives in performance of, this Agreement;

⁴² This clause emphasises one of the main differences between agency and distributorship agreements. Assuming that all parties are based in the UK, there is no implied entitlement to compensation on the ending of the Agreement unless the Principal has breached the contract. If this occurs then the usual damages provisions would apply. There may be compensation considerations if a distributor is based outside the UK which may be a situation where this clause should be used. It should always be considered in conjunction with the warranty clauses. Care must be taken over the application of TUPE upon termination of a distributorship agreement. If the principal does not appoint a replacement distributor, but undertakes the role itself, then this may be considered a TUPE transfer. Similarly, a replacement distributor may have obligations to the former distributor's employees under TUPE. This is a complex area and specialist advice should be sought.

- 15.1.2 not to disclose the Confidential Information of the other in whole or in part to any other person without the other's written consent, save to those of its employees, agents and sub-contractors involved in the implementation of this Agreement and who have a need to know the same and are bound to keep it confidential; and
 - 15.1.3 to use the Confidential Information solely in connection with the performance of this Agreement and not otherwise or for the benefit of any third party.
- 15.2 The provisions of **clause 15.1** shall not apply to the whole or any part of the Confidential Information which is:
- 15.2.1 lawfully obtained after the Commencement Date free of any duty of confidentiality otherwise than directly or indirectly from the other party to this Agreement;
 - 15.2.2 already in the other's possession other than as a result of a breach of this **clause 15**;
 - 15.2.3 in the public domain (other than as a result of a breach of this **clause 15**);
 - 15.2.4 necessarily disclosed pursuant to a statutory obligation;
 - 15.2.5 disclosed to the professional advisors, auditors and bankers of each party under terms of confidentiality; or
 - 15.2.6 disclosed with the prior written consent of the other party.
- 15.3 Save as otherwise set out in this Agreement, no announcement, circular, advertisement or other publicity in connection with this Agreement, its subject matter or any ancillary matter shall be made or issued by or on behalf of the Distributor without the prior written consent of the Principal.

16. **NON-COMPETITION POST TERMINATION**⁴³

[]

⁴³ A post-termination non-compete clause will not benefit from the Block Exemption unless it is essential to protect know-how which the Principal has provided to the Distributor and is limited to a duration of one year, to goods competing with the Products and to the premises occupied by the distributor. However, the inclusion of such a clause will not prejudice the remainder of the agreement, unlike the inclusion of hardcore provisions. Any restrictive covenant must comply with the general principle, namely that it is to protect a legitimate business interest, and is reasonable in terms of length, territory etc. An example of a post-termination provision can be found in the Sales Agency Know How module [PXSA](#).

17. **ASSIGNMENT AND SUB-CONTRACTING⁴⁴**

17.1 Neither party may assign the benefit (including any present, future or contingent interest or right to any sums or damages payable by either party under or in connection with this Agreement) or otherwise mortgage, charge or otherwise transfer any or all of its rights and obligations under this Agreement without the prior written consent of the other party which [shall not be unreasonably withheld or delayed] [it may in its absolute discretion refuse].

17.2 [The Distributor may not subcontract any or all of its rights and obligations under this Agreement.] [The Distributor may sub-contract any or all of its rights and obligations under this Agreement provided that the Distributor is and will remain at all times during the currency of this Agreement registered for Value Added Tax purposes and only sub-contracts its rights and obligations to other parties who are and will remain at all times during the currency of this Agreement registered for Value Added Tax purposes.]

18. **WAIVER OF RIGHTS**

18.1 The failure or delay by the Principal in exercising any right, power or remedy of the Principal under this Agreement shall not in any circumstances impair such right, power or remedy nor operate as a waiver of it. The single or partial exercise by the Principal of any right, power or remedy under this Agreement shall not in any circumstances preclude any other or further exercise of it or the exercise of any other right, power or remedy.

18.2 Any waiver of a breach of, or default under, any of the terms of this Agreement shall not be deemed a waiver of any subsequent breach or default and shall in no way affect the other terms of this Agreement.

19. **ENTIRE AGREEMENT**

This Agreement contains all the terms [and refers to all the documents] which the parties have agreed in relation to the subject matter of this Agreement [and supersedes any prior written or oral agreements, representations or understanding between the parties relating to such subject matter.] Neither party to this Agreement has been induced to enter into this Agreement [or any of those documents] by a

⁴⁴ Distributorship Agreements fall within the definition of trading schemes for the purposes of the Trading Schemes Act 1996. This is not usually a problem where the relationship is one of Principal/Distributor only since this relationship falls within the single tier exemption to the Act (as set out in Regulation 3 (A) of the Trading Scheme (Exclusion) Regulations 1997). The exemption will not be available where the Distributor appoints a sub-agent. In these circumstances the Trading Schemes Act will apply unless the Principal, its Distributors (within the UK) and all sub-agents (within the UK) are VAT registered bringing the scheme within the exemption set out in Regulations 3(B) of the 1997 Regulations.

statement or promise which [it does] [they do] not contain, save that this clause shall not exclude any liability which one party would otherwise have to the other party in respect of any statement made fraudulently by that party.

20. **[EMU CONTINUITY OF CONTRACT]**

20.1 [The parties to this Agreement confirm that the occurrence or non-occurrence of an event associated with economic monetary union in the European Union will not have the effect of altering any term of, or discharging or excusing performance under this Agreement or any transaction, or give a party the right unilaterally to alter or terminate this Agreement or any transaction.

20.2 The words “an event associated with economic monetary union in the European Union” shall include without limitation each and any combination of the following:

20.2.1 the introduction of, change over to or operation of a single or unified European currency (whether known as the Euro or otherwise);

20.2.2 the fixing of conversion rates between a Member State’s currency and the new currency or between the currencies of Member States;

20.2.3 the substitution of that new currency for the ECU as the unit of account in the European Union;

20.2.4 the introduction of that new currency as lawful currency in a Member State;

20.2.5 the withdrawal from legal tender of any currency which, before the introduction of the new currency, was lawful currency in one of the Member States;

20.2.6 the disappearance or replacement of a relevant rate option or other price source for the ECU or the national currency of any Member State, or the failure of the agreed sponsor (or successor sponsor) to publish or display a relevant rate, index, price, page or screen; or

20.2.7 the withdrawal of any Member State from the operation of a single or unified European currency.]

21. **VARIATION**

No variation to this Agreement shall be effective unless in writing signed by [a Director] [or other duly authorised officer] [of each of the parties] [the parties].

22. **INVALIDITY**

If at any time any clause or part of this Agreement is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid or unenforceable in any respect under the law of any jurisdiction:

- 22.1 that shall not affect any other provisions of this Agreement which shall remain in full force and effect [except where it deprives one of the parties of a substantial part of the benefit intended to be derived by it from this Agreement without any corresponding benefit];
- 22.2 the parties shall in good faith amend and, if necessary, novate this Agreement to reflect as nearly as possible the spirit and intention behind that illegal, invalid or unenforceable provision so that the amended clause complies with the laws of that jurisdiction; [and
- 22.3 if the parties cannot agree upon the terms of any amendment or novation within [6] months of the date upon which a clause was determined to be wholly or partly illegal, invalid or unenforceable by any court, tribunal or administrative body then the parties agree [to submit the terms of the amendment or novation to an arbitrator for determination.] [to refer the terms of the amendment or novation back to the court, tribunal or administrative body that originally found the provision to be illegal, invalid or unenforceable.] The parties agree that the [arbitrator's] [court's, tribunal's or administrative body's] decision in this respect shall be final and binding.]

23. **NOTICE**

- 23.1 Any notice[, demand or communication] in connection with this Agreement shall be in writing and may be delivered by hand, [pre-paid first class post] [Special Delivery post], [or facsimile] (but not by e-mail), addressed to the recipient at its registered office or its address [, or facsimile number] as the case may be stated in **clause 23.3** below (or such other address[, or facsimile number] as may be notified in writing from time to time) and shall be marked for the attention of [NAME].
- 23.2 The notice[, demand or communication] shall be deemed to have been duly served:
 - 23.2.1 if delivered by hand, when left at the proper address for service;
 - 23.2.2 if given or made by prepaid first class post or Special Delivery post, 48 hours after being posted or in the case of Airmail [14] days after being posted (excluding days other than Business Days);

23.2.3 [if given or made by facsimile, at the time of transmission [, provided that a confirming copy is sent by first class pre-paid post to the other party within 24 hours after transmission];]

provided that, where in the case of delivery by hand [or transmission by facsimile,] such delivery [or transmission] occurs either after 4.00 p.m. on a Business Day, or on a day other than a Business Day, service shall be deemed to occur at 9.00 a.m. on the next following Business Day (such times being local time at the address of the recipient).

23.3 The addresses [and facsimile numbers] for the parties are as follows:

[DISTRIBUTOR] [PRINCIPAL]

[ADDRESS] [ADDRESS]

[FAX NO] [FAX NO]

23.4 For the avoidance of doubt, where proceedings to which the Civil Procedure Rules apply have been issued, the provisions of Civil Procedure Rule 6 must be complied with in respect of the service of documents in connection with those proceedings.

24. **FORCE MAJEURE**⁴⁵

24.1 Neither party to this Agreement shall be deemed to be in breach of this Agreement or otherwise liable to the other party in any manner whatsoever for any failure or delay in performing its obligations under this Agreement due to Force Majeure.

24.2 If a party's performance of its obligations under this Agreement is affected by Force Majeure:

24.2.1 it shall give written notice to the other party, specifying the nature and extent of the Force Majeure, [within [seven] days of] [immediately on] becoming aware of the Force Majeure and will at all times use all [reasonable] endeavours to mitigate the severity of the Force Majeure;

24.2.2 subject to the provisions of **clause 24.3**, the date for performance of such obligation shall be deemed suspended only for a period equal to the delay caused by such event;

⁴⁵ This is a very wide definition of "Force Majeure" and must be considered carefully.

24.2.3 it shall not be entitled to payment from the other party in respect of extra costs and expenses incurred by virtue of the Force Majeure event.

24.3 If the Force Majeure in question continues for more than [three] months, [the party not subject to the Force Majeure][either party] may give notice in writing to the other to terminate this Agreement. This notice to terminate must specify the termination date, which must not be less than [15] days after the date on which the notice is given, and once such notice has been validly given, this Agreement will terminate on that termination date.

25. **EXPERT**

25.1 Any dispute or difference which shall at any time arise between the Principal and the Distributor in respect of [**clauses [7.3][7.4]** and **9.1.1**]shall be referred to an independent [DESCRIBE PROFESSION] to be agreed upon by the parties or (in default of agreement within [10] Business Days) to be selected at the instance of either party by the President for the time being of [SPECIFY BODY].

25.2 Any Expert shall act as an expert and not as an arbitrator and shall be entitled to appoint such technical expert or experts as he considers necessary to assist him in determining the matter referred to him. The decision of the Expert (which shall be given by him in writing stating his reasons) shall be final and binding on the parties.

25.3 Each party shall provide any Expert with such information as he may reasonably require for the purposes of his determination; if either party claims any such information to be confidential to it then, provided that in the opinion of the Expert that party has properly claimed the same as confidential, the Expert shall not disclose the same to the other party or to any third party.

25.4 The costs of any Expert (including the costs of any technical expert appointed by him) shall be borne in such proportions as the Expert may determine to be fair and reasonable in all the circumstances or, if no such determination is made by the Expert, by the parties in equal proportions.

26. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999⁴⁶**

[[Except as set out in **clause 9.2.5**,] [T]he parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.]

27. **JURISDICTION**

The formation, existence, construction, performance, validity and all aspects whatsoever of this Agreement or of any term of this Agreement shall be governed by English and Welsh law [as applied in Wales]. The English and Welsh courts shall have [exclusive] [non-exclusive] jurisdiction to settle any disputes which may arise out of or in connection with this Agreement. The parties agree to submit to the jurisdiction.

⁴⁶ This clause is to prevent any third parties taking advantage of the change in the law of privity brought about by the Contracts (Rights of Third Parties) Act 1999. This Act applies to all contracts made after 10 May 2000. The application of this Act should always be considered when drafting any contract. Please see Technical Note [PXIN-CTP](#) for a full briefing on this Act.

1 SCHEDULE 1

Products

2 SCHEDULE 2

Territory

3 SCHEDULE 3

House Accounts

4 SCHEDULE 4

Method of Delivery

5 SCHEDULE 5

Initial Price of Products

6 SCHEDULE 6

Minimum Sales Targets

7 SCHEDULE 7

Trade Marks

8 SCHEDULE 8

Terms and Conditions

9 SCHEDULE 9

After Sales Maintenance Service

10 SCHEDULE 10

Exclusive Customer List

[NB: THIS MUST BE A CLASS OF CUSTOMERS EG TURNOVER ABOVE £500,000, NOT JUST A RANDOM LIST, TO COMPLY WITH THE BLOCK EXEMPTION]

11 SCHEDULE 11

[Customer Lists] [Territories] Reserved to the Principal and Third Parties

SIGNED by

[DISTRIBUTOR - WHERE NOT A
COMPANY])
in the presence of:)

Witness Signature:

Name:

Address:

Occupation:

SIGNED by

[NAME OF SIGNATORY FOR PRINCIPAL
- WHERE PRINCIPAL A COMPANY])
duly authorised to sign for)
and on behalf of)
[NAME] LTD/PLC)
in the presence of:)

Witness Signature:

Name:

Address:

Occupation: