

TRADE TALK

COMMERCIAL AGENCY

INTRODUCTION

Commercial agents provide businesses with the opportunity to expand into new sectors and geographical territories. Agents have market, customer and competitor knowledge that a business wanting to enter into a new market may not have and which could take years to develop. In the context of international trade, agents also offer businesses the opportunity to experiment with sales into new markets to assess whether they have any long-term potential without incurring the expense of establishing their own sales presence in a foreign territory.

Despite its advantages, commercial agency is a complex area of law with a considerable body of case law. A thorough understanding of the risks is essential for anyone considering this route to market for their products.

WHAT IS A “COMMERCIAL AGENT”?

English law defines commercial agents as self-employed intermediaries with continuing authority to negotiate the sale and purchase of goods on behalf of a third party (the principal) or to negotiate and conclude the sale or purchase of goods on behalf of that person. The sale contract exists between the customer and principal alone and the agent does not assume any financial or commercial risk in relation to the performance of the transaction.

APPOINTING COMMERCIAL AGENTS IN THE EU

The law relating to commercial agents is heavily regulated within the EU through the EC Commercial Agents Directive 86/653. The Directive was introduced by the European Commission to protect commercial agents vis-à-vis their principals. Despite the intended harmonisation of agency law across the EU, member states have implemented the Directive in different ways resulting in some significant variation in commercial agency law across the EU.

In Great Britain, the Directive was implemented into domestic law through the Commercial Agents Regulations 1993 (“**Regulations**”). The Regulations set out matters such as:

- the duties of the agent and principal;
- remuneration of the agent;
- termination of the agency relationship and compensation on termination; and
- post-termination and non-competition obligations of the parties.

Some of the Regulations cannot be contracted out of and others apply unless the parties have agreed otherwise. A written agreement ensures that only those non-mandatory Regulations chosen by the parties apply to the agency relationship.

Sub-agents appointed by the commercial agent are not protected by the Regulations as there is no direct contractual link between the sub-agent and the principal. Also, the Regulations do not apply to agents engaged in the supply or purchase of services. By contrast, in some EU countries, such as France, legislation implementing the Directive into domestic law was extended to include services.

ARE MARKETING AGENTS PROTECTED BY THE REGULATIONS?

A marketing agent who is solely engaged in the marketing of products and does not introduce customers to the principal is not a commercial agent for the purposes of the Regulations. A marketing agent therefore does not receive the same protection as a commercial agent under the Regulations. Whether or not an agent is a commercial or marketing agent is a question of fact and the courts tend to favour agents when determining whether the Regulations apply to the agency relationship. It is not possible to avoid the Regulations by entering into a “marketing agency agreement” if the agent’s duties are indeed those of a commercial agent.

TERMINATING AN AGENCY IN THE EU – AT WHAT COST?

Subject to certain exceptions, EU-based commercial agents are entitled to a termination payment upon termination of the agency agreement in return for the goodwill generated by them on behalf of the principal during the agency relationship. Depending on the location of the agent, the termination payment is calculated on an indemnity or compensation basis and the amount payable depends upon the model used for the calculation. Whilst the indemnity model operates in both Germany and Italy, France has adopted the compensatory system.

In the UK, the parties are entitled to decide for themselves whether to adopt the indemnity or compensation basis for their agency agreement. In the absence of express agreement, the agent is entitled to compensation rather than indemnity. Whilst indemnity payments can be limited to an amount equivalent to one years remuneration averaged over the last five years or the length of the contract if less, the amount of compensation payable is determined on a case by case basis. Under current case law, compensation payments can amount to in excess of two years net commission, a potentially significant cost for any business considering terminating an agency relationship.

APPOINTING AGENTS OUTSIDE THE EU

The regulation of agencies conducted outside of the EU generally depends upon the content of the laws of the agents country. Many countries have developed systems that afford legal protection to commercial agents and the laws vary considerably from one country to another.

For example, in the United States, the laws of each state regulate agencies differently. These laws are focused upon ensuring that agents are paid for work done and paid on time. Very few states impose notice periods for termination of the agency, although most do require the agency to be documented in a formal agreement. Generally, only agencies for the sale of products to *wholesale* customers are regulated and agency sales directly to *end users* are not regulated.

DO I NEED A WRITTEN AGREEMENT?

English law does not require an agency agreement to be in writing in order for it to be valid. However, entering into a written agreement is advisable since most legal problems regarding agency agreements arise from the failure of the

parties to prepare a complete record of their agreement or any material changes. A written agreement can reduce the likelihood of costly disputes arising on issues such as whether commission is due and what happens when the agency comes to an end.

When entering into an agreement with an agent based outside of the UK, it is worth checking whether there are any local legal formalities which must be complied with in order for the agency agreement to be enforceable under local laws. For example, many Middle Eastern countries, such as the United Arab Emirates and Saudi Arabia, have formal registration requirements and failure to comply with these may render the agreement invalid.

WHAT FACTORS SHOULD I CONSIDER WHEN APPOINTING AN AGENT?

- Where is the agent to be based? This will affect the law and level of regulation applicable. Understand your obligations under the applicable laws.
- To give clarity to the arrangement, use a written agreement setting out all of the terms, such as where the agent can market the goods and the level of remuneration that they will receive.
- Understand the impact of mandatory local laws on the costs associated with terminating the agency. To the extent possible, minimise the cost of exiting the agency relationship with appropriate drafting.

Ask your lawyers to explain to you the pros and cons of agency agreements for your business.

ANY QUESTIONS?

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The next edition of Trade Talk reviews the key issues in appointing distributors within and outside of the EU.

Warning

This bulletin is intended to jog memories and provide a simplified overview of the law. It is not a substitute for taking legal advice.

The law is summarised as at the date of publication.