

## **AGENCY & COMMERCIAL AGENTS REGULATIONS**

This guide has been produced by L'Estrange & Brett, Solicitors and contains a brief overview of the law relating to commercial agents and distributors, including the commercial reasons for establishing such relationships.

### 1. **Agents**

An agent is an intermediary involved in making contact between a principal and that principal's customer. The label 'agent' covers a broad spectrum of arrangements from a self employed salesman operating on commission for a single principal within part of a single country to a sales agent appointed for an overseas territory and working for several different principals, over whom the principal has very little affective control. Although the legal framework is similar for both ends of the spectrum, the issues that arise vary considerably.

### 2. **Distributor and Agency compared**

The terms 'agent' and 'distributor' are often used interchangeably causing considerable confusion.

An agent:

- is appointed by a principal to negotiate and possibly conclude contracts with customers on the principal's behalf;
- may be paid commission on the sales he makes usually on a percentage basis;
- will generally have no contractual liabilities to the customer.

A distributor:

- buys products from the manufacturer/supplier and then sell them on to customers, adding a margin to cover his own costs and expenses.

### 3. **Why appoint an agent rather than a distributor?**

An agency arrangement may be preferable to distributorship in the following situations:

- ❖ if a supplier wishes to retain greater control of the terms of sale of the products;
- ❖ if a supplier wishes to restrict its agent's freedom to choose customers with whom the agent will deal;

- ❖ where direct contact between manufacturer and customer is important;
- ❖ where close control over the methods of marketing is important;
- ❖ where the manufacturer wishes to retain the financial risk of stock;
- ❖ where commission is to be paid. Typically commission paid to an agent is lower than the margin which a distributor will earn since the distributor is taking a greater financial risk and as such an agency arrangement will probably cost a supplier less than a distributorship arrangement; and
- ❖ where the Commercial Agents Regulations do not apply (see below) the exit route from an agency arrangement, if things do not work out, may be cheaper than that from a distributorship arrangement.

#### 4. Commercial Agents Regulations

If considering entering into an agency arrangement it is important to consider the effect of the Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993 which came into force on 13<sup>th</sup> January 1994. The effect of the Regulations is to confer a number of protections on commercial agents, regardless of the intentions of the parties.

##### A. **Do the Regulations apply?**

The Regulations apply to all oral or written agreements and to those agents employed on permanent or probationary terms, but do not apply where no activity is to be carried out by an agent within another member state of the EU. They apply to agreements which were directly in existence or commenced on the 13<sup>th</sup> January 1994 **but do not apply where parties have agreed that the agency contract is to be governed by the law of another member state.**

The following agents are protected:

- (i) agents who market goods (agents who market services are not protected);
- (ii) agents who are self employed;
- (iii) agents who operate as limited companies and partnerships; and
- (iv) agents whose activities are principally those of agency (therefore if an agent mostly distributes goods for example and only carries out some agency work he is not protected).

The Regulations do not apply to:

- distributors
- officers of companies i.e. directors, insolvency practitioners
- unpaid agents
- partners lawfully authorised to enter into commitments binding on other partners (as they are not commercial agents). However, a partnership may be a commercial agent

- persons whose activities as commercial agents are secondary to their usual business.

## B. **Mandatory rights and obligations**

The Regulations lay down certain mandatory rights and obligations for both principal and agent, which cannot be excluded. Amongst the key obligations are the following:

- (i) both parties are entitled to receive from the other, **upon request**, a signed document setting out the terms of the agency contract;
- (ii) the agent must look after the interests of the principal and act dutifully and in good faith;
- (iii) the principal must also act dutifully and in good faith and must provide the agent with necessary documentation relating to the goods concerned;
- (iv) the principal must also inform the agent, within a reasonable period, of his acceptance or refusal of any commercial transaction negotiated or concluded by the agent on his behalf;
- (v) the principal must also notify the agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the agent could have expected in normal circumstances.

## C. **The Treatment of Commission under the Regulations**

### No Express Agreement

If the parties do not agree on the level of remuneration or commission the Regulations provide that the agent should receive the customary amount payable and allowed to an agent in the territory where he carries on his activities, dealing with the goods in question, or, if there is no such customary practice, an agent should receive "reasonable commission".

### Concluded Transactions

The agent is entitled to commission on transactions concluded in the period covered by the agency arrangement, where the transaction is concluded:

- (i) as a result of the agent's action; or
- (ii) with a third party previously acquired as a customer by the agent for a transaction of the same kind.

### After Agency has Terminated

Agents are also entitled to commission on commercial transactions concluded after the agency arrangement has terminated if:

- (i) the transaction is mainly attributable to the agent's efforts during the period covered by the agency contract and if the transaction was

entered into within a reasonable period after the contract terminated;  
or

- (ii) the order of the third party reached the principal or the agent before the agency contract was terminated.

#### When does Commission become Due?

Commission becomes due as soon as, and to the extent that one of the following events occurs:

- (i) the principal has executed (i.e. completed) the transaction; or
- (ii) the principal should according to his agreement with a third party have executed the transaction; or
- (iii) a third party has executed the transaction.

#### **D. Notice of termination of the agency**

If the Regulations do not apply then the agreement can be terminated on reasonable notice where no period is specified.

Where the Regulations apply and the contract is for an indefinite period, then the minimum periods of notice specified under the Regulations are:

- (i) one month in the first year of the contract;
- (ii) two months in the second year which has commenced;
- (iii) three months in the third year which has commenced and for subsequent years.

Therefore the maximum notice period is three months. However, the parties can agree to longer periods of notice and in such cases the period of notice given to one party cannot be shorter than that given to the other party.

#### **E. Compensation on termination of the agency**

Compensation will be payable where the principal terminates the agency arrangement unless the agent is in breach of the contract.

An agent is entitled to compensation on termination, rather than an indemnity for the loss which he has suffered unless it is expressly stated in the contract.

It is not entirely clear how the courts will assess compensation under the Regulations but the following are some of the factors which may be taken into consideration:

- (i) the level of commission paid over the period;
- (ii) factors known at the time of termination which might in the future affect the relationship (e.g. proposed expansion, launch of a new range);

- (iii) the principal's poor financial state;
- (iv) the probable future duration of the contract in the absence of termination; and
- (v) the conduct of the agent (e.g. if the agent has been under-performing).

**F. Restrictive covenants under the Regulations**

The Regulations permit the principal to place certain limitations on the agent to compete in the market following termination of his appointment. These obligations will only be enforceable if they:

- (i) are concluded in writing;
- (ii) relate to geographical area in which the group of customers with whom the agent has customarily dealt with trade;
- (iii) relate to goods covered by the contract; and
- (iv) are imposed for a period of no more than 2 years before termination.

In addition, such a clause must be reasonable from the point of view of both parties.

**Every care was taken in the preparation of this briefing paper, however readers are advised to seek specific legal advice before making any decisions based on any aspect of this guide.**