

AGENCY

Overview

The use of self-employed agents abroad, is a long established method of marketing and selling. The agent is usually the exporter's representative in another country. He is not an employee. He is an independent contactor who works on his own account. The agent concludes contracts for a supply of goods and services on behalf of the exporting firm and usually receives a commission in return.

Relations with a commercial Agent within the EU is subject to special regulation. Most of this cannot be overridden by the terms of the agency contract. Commercial agents are given special rights, including rights of compensation. See our separate note in relation to Commercial agents

An agent is a person with authority to bind another party. The agent's authority will depend on the scope of his appointment. This should be carefully defined. Irrespective of what the private contract with an agent may say, if the home firm holds out his agent as having particular authority and gives that impression, it will be bound the agent's acts within the scope of the agent's apparent authority, even if his actual authority is less.

The scope of the agency will be all important. The agent may be authorised only to introduce third parties to the exporting firm leaving decisions as to whether to conclude the contract or supply, to the home firm. Alternatively, the agent may have authority to actually conclude contracts with third parties on behalf of the home/export firm. A distributor is not an agent because he does not act on behalf of the supplier and is not accountable to it. He buys his own goods and sells them for his own profit.

Duties of Agent and Exporter

A contract of agency under English law creates an obligation of good faith between principal and agent. The extent of the agent's authority will depend on the agreement. It is important that the exporter should make searching enquiries regarding the reputation and standing of the agent. The agent will have power to bind the exporting firm who appoints him in relation to the business concerned.

Typically an agent will have a probationary period, before any long term commitment is entered. A personal relationship should ideally be established between the agent and the appointing business. The agents should be regularly visited in order to maintain the highest confidence, which is a vitally important.

The agent must disclose all material facts to the appointing principal. He must not accept bribes or obtain secret profits. He must not divulge confidential information to third parties. He must account to the principal for all monies and property received. He must keep records and keep the money and property of the principal separate from his own. He must pay over to the principal all monies received on behalf of the latter. He will be entitled to a set off or lien on monies owed to him.

The principal is the person who appoints the agent, such as the exporter. The principal must act dutifully and in good faith towards the agent. He must provide the agent with the necessary documentation concerning the goods and information to enable him carry out the service. He must advise the agent in reasonable time if he anticipates that the volume of business will be lower than expected and he must inform the agent of his acceptance or rejection or non performance of any contract involving the agent.

Commission

At common law, the principal must pay commission on business actually acquired by the agent through his efforts. An agent may be obliged to indemnify the principal against loss sustained through insolvency of customers introduced by him. This incentive can be useful in preventing the risk that an agent will seek to introduce customers without regard to their financial standing.

An agent is entitled to commission where he has earned it in accordance with the terms of the contract. Sometimes agents are paid fixed sums on account of the commission which will have accrued to them.

An agent cannot generally claim commission if a customer places an unsolicited order with the principal. This rule can be modified by trade or custom or by the terms of the contract. For example, an agent may have exclusivity in relation to a particular territory.

It is a matter of interpretation of the agency agreement, whether an agent is entitled to commission for a repeat order. Issues may arise in relation to repeat orders during the contract and after the contract. An agency agreement may provide a self employed agent with sole or exclusive rights in a particular territory. In this case, the agent would be paid commission on all sales emanating from the territory whether procured by his efforts or otherwise.

The agent will usually undertake to promote the exporter's business systematically in the territory reserved by him the distribution of principal's goods by an advertisement or other means. This type of agreement would be similar to a distribution agreement but with the difference that the agent is contracting on behalf of the principal while the distributor trades on his own account.

Exclusive agency contracts may have implications under European Union law. The European Union has granted a block exemption under certain conditions.

Other types of Agent

European continental countries and other legal systems recognise "commissionaires" as a special class of self employed commercial agents. This is sometimes referred to in English as a "commission agent" or a "commission merchant".

A commissionaire is a person who has a relationship with the principal but as regards third parties acts in his own name. No direct contract exists between the principal and the third party. The commissionaire is accountable to the principal for the profit on the

transaction and must use reasonable diligence in the performance of his duties. He must not make an undisclosed profit or bribe. On the other hand, the principal cannot recover the price from the third party nor is he liable for any defects in the goods.

A del credere agent undertakes to indemnify the principal for any loss which he may have sustained, owing to failure of a customer introduced by him to pay the purchase price.

A mercantile agent is an agent who carries stock. He has authority in the ordinary course of his business to sell the goods or consign goods for sale or buy goods or raise money on the security of the goods. Third parties acting in good faith with a mercantile agent are protected against the fact that they may not have title to the goods, under certain circumstances.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.