

COMMERCIAL AGENTS REGULATION

The EU Regulations

EU wide Regulations govern the legal relations between self employed "commercial agents" and their "principals". These regulations contain important provisions, many of which cannot be avoided or overridden by the terms of the agreement between the parties.

A "principal", under the Regulations, is a company or individual who appoints the agent. A "commercial agent" is a self employed intermediary who has continuing authority to negotiate the sale and purchase of goods on behalf of another business, or to negotiate or conclude the sale and purchase of goods in the name of that business.

The Regulations do not apply to agents who are only authorised to introduce potential clients, leaving the negotiation and conclusion of the contract to the home firm. Certain other categories of agents are excluded. The Regulations can apply to both written and oral appointments.

The Regulations may override the terms of the Agency Agreement in relation to certain matters. This is because many of the provisions of the Regulations are mandatory. Each party is entitled on request to a signed written contract. The best course is to tailor the Agency Agreement to the requirements of the Regulations, where the Regulations apply.

The Regulations provide that agents must act in good faith and look after the interests of the appointing firm. In particular, they must make proper efforts to negotiate and conclude transactions where they are instructed and they must communicate to their principal all necessary information and comply with reasonable instructions.

Commission

The Regulations curtail the parties' freedom of contract in relation to payments of remuneration. Where there is no agreement in relation to remuneration, the remuneration is to be that customary in the business where the agent works. Where there is no custom in the business and there is no specific agreement on commission, the remuneration should be reasonable in the circumstances.

The agent is entitled to commission on a transaction entered as a result of his actions and as a result of transactions of the same kind with a customer he has previously acquired. He is also entitled to commission on transactions where he has an exclusive right to a specific area or group of customers.

Commission is due when the principal has concluded the transaction or when it should have been concluded. Commission has to be paid no later than one month following the quarter in which it became due. After termination of the contract, the agent is entitled to commission if the order was placed before termination.

The agent's right to commission is extinguished if the contract is not executed and the principal is not to blame for non-execution. Commission actually received by the agent for such a contract must be refunded.

In order for the agent to ascertain commissions due, the principal must provide him with appropriate information statements within a prescribed time. He is entitled to all information available to the principal and access to the principal's books.

Termination

There are detailed provisions in the Regulations regarding termination of an agency contract which is subject to the Regulations. If an agency agreement continues beyond its fixed term, it is converted into a contract for an indefinite period.

Certain notice periods are required in order to terminate. One month's notice applies in the first year, increasing to two and three months in the second and third year

respectively. If the contract stipulates longer period of notice, this will apply. The principal's notice period should not be shorter than that for the agent. The notice must generally expire at the end of a month.

The immediate termination of the agency agreement (i.e. without notice) is allowed if one party fails to perform its obligations under the contract or exceptional circumstances arise.

Compensation for Termination

An agent is entitled to be indemnified or compensated where the agency contract is terminated. The Regulations set out circumstances in which compensation is payable, even if the agency contract was validly terminated at common law. These rights are like "unfair dismissal" rights and cannot be excluded. The parties can opt for a "compensation" or "indemnity" basis in their agency agreement.

If an agent is entitled on the "indemnity basis", he is entitled to an indemnity to the extent he has brought the principal new customers or significantly increased the volume of business with existing customers, and the principal continues to derive substantial benefits from the business with such customers. The payment on the indemnity basis is to be equitable having regard to the circumstances.

The agent's entitlement on the indemnity basis is to a maximum of one year's commission. This is calculated on the basis of average remuneration over the preceding five years (or less, if the period was less). The agent may also be entitled to claim damages for breach of contract.

Under the compensation basis, the agent is entitled to be compensated for damage suffered by the principal's termination of contract. Damage is deemed to occur where the termination deprives the agent of commission, which proper performance of the agency would have earned for him while providing his principal with substantial benefits linked to his activities as agent.

Damage is also deemed to be incurred where the circumstances have not enabled the commercial agent to amortise costs and expenses he has incurred in the

performance of the agency contract on the advice of his principal. Unlike the indemnity basis, no maximum amount is provided.

No indemnity or compensation is payable to the agent where the agent is at fault so as to justify immediate termination on specified grounds. This is also the case if the agent with the principal's consent, assigns the agency. This also applies where the agent terminates the contract unless the termination is justified by the principal's actions or the termination is justified because the agent is unable to continue due to infirmity or illness or where common law rules.

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.