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Commercial Agency Law Update

The definitive legal advice for sales agents

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Myerson Solicitors is the leading Commercial Agency firm outside of London.

With a team of both contentious and non-contentious specialists experienced in advising both agents and principals, Myerson is the 'go-to' firm for expert agency advice.

In this update our agency specialists:

Brexit and Agency Law–The Latest

Over 2 years have passed since the UK's choice at the Referendum of 23 June 2016 to leave the EU.

Although progress can seem frustratingly slow, much has actually happened in the interim, though significant uncertainty remains.

However, it is possible at this stage to make some predictions regarding the effect of Brexit on the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations").

Progress to date

In March 2018, the UK and the EU agreed the draft European Withdrawal Agreement. This confirmed the UK's leave date from the EU of 30 March 2019 and agreed a transition period until 31 December 2020. In addition, the UK Government passed the EU Withdrawal Bill (or the "Great Repeal Bill") which has the effect of converting all EU Legislation into EU law following Brexit.

The proposed transitional arrangements therefore ensure the Regulations will remain untouched until at least 31 December 2020 and will remain in place beyond this date for an indefinite period until the UK Government acts to repeal or alter existing legislation and thus diverge from the EU's laws.

Earlier this month Theresa May's cabinet agreed the Chequers Proposal (further detailed in a subsequent White Paper) setting out the UK government's proposals for an ongoing trading relationship with the EU, post Brexit. (It should be noted that at the time of writing this article, Mr Davis and Mr Johnson have just resigned from the cabinet and so the proposals within this White Paper look particularly shaky).

The proposed trading arrangements are somewhat more conciliatory to the EU than many perhaps expected and

propose a full legal alignment with the EU on laws relating to the trade in goods and agricultural products. As the Regulations apply only to the sale of goods it can be assumed that if a deal along these lines is achieved with the EU then the Regulations will remain untouched. The passage of this proposal is somewhat uncertain given that it appears to have irritated both Remainers and Brexiters equally (and it can probably best be described as a "medium-soft" Brexit as opposed to hard Brexit).

The Regulations in the event of a "hard Brexit"

Even if regulatory alignment cannot be achieved with the EU and a "hard Brexit" or "no deal" Brexit is the outcome, there will be no immediate divergence from EU law given terms of the EU Withdrawal Bill.

The Regulations are a statutory instrument that implements the EU Directive into UK law. It should be noted that in the ten year period between 1994 and 2014, some 4,283 statutory instruments importing an element of EU law were passed by the UK Government. The Regulations are just one of thousands that will need to be analysed by the UK Government's lawyers over the coming years post Brexit and I suspect that if there is a "bonfire of red tape" the Regulations will be a long way down the list.

Any assessment of the Regulations is likely to be many years down the line and even then will be subject to a lengthy consultation period with the opportunity given to interested parties to make representations to the Government.

Upon analysis, even in the case of a "no deal" Brexit, I suspect that all but the most ideological law-makers will concede that albeit the origin of the Regulations is foreign, there would be nothing to gain and much to lose from doing away with them.

The fact is that the European equivalents of the Regulations are never going to disappear. With ever-increasing trade between countries many UK agents are retained by European manufacturers often as an (initially) cheap and risk-free way of breaking into UK markets, just as UK manufacturers utilise EU-based agents.

There is no point in the UK Government unilaterally removing protections for UK agents, leaving them open to abuse by EU manufacturers, whilst at the same time leaving our manufacturers liable to pay large sums in compensation upon termination to EU-based agents. The only outcome would be a net transfer of wealth from the UK to the EU with the UK unilaterally removing a trade barrier and the EU not.

Given all of the above, and despite all the current uncertainty, I am prepared to stick my neck out – the Regulations are here to stay.

Death of a Salesman

A staggering two thirds of adults in the UK are thought to have not prepared a will, meaning that their possessions, money and property could be left with someone they have not chosen.

Of those people who have made a will, many may have overlooked entitlements which may arise upon their death. One of those is the entitlement of an agent upon death to compensation or an indemnity under Regulation 17 of the Commercial Agents Regulations.

In the same way that an agent is entitled to compensation or an indemnity upon the termination of the agency during his lifetime, he is entitled to the same benefit upon death as if the principal had terminated the agency agreement.

This right of the agent to claim compensation or an indemnity, in addition to other post-termination payments, is one of many protections afforded to agents by the Commercial Agents Regulations. Such a claim passes to the agent's estate upon death, but can only be pursued if the executor of the estate is aware of the entitlement in the first place.

The difficulty arises when the person dealing with the estate has no knowledge of the agency, or more fundamentally, the right to post termination payments upon the death of the agent, or how to go about claiming the compensation.

Such lack of knowledge and awareness is easily remedied by the agent at very little or no cost, and is a step which all agents can and should take regardless of their age, health or otherwise.

To ensure the estate benefits from the agent's entitlement on death, reference to the entitlement should be included within the agent's will, or within a letter of wishes accompanying the agent's will. Of even greater assistance would be detailed instructions to an executor regarding the estate's entitlement to compensation.

It is also advisable for the agent to highlight in his instructions that notification of a claim under Regulation 17 must be made to the principal within 12 months of the date of death, otherwise the entitlement will lapse. The agent could also, if he so wished, specify a law firm with expertise in administering complex estates and commercial agency law to act as executor. The more detail an agent can provide at this stage, the easier the process will be for the person who ultimately deals with the estate upon the agent's death.

Whether an agent is entitled to compensation or an indemnity depends on whether the parties have specifically agreed that an indemnity shall apply. If the agreement is silent then the compensation alternative will apply. This benefit can certainly be substantial, particularly in the case of compensation where there is no cap on the value of the payment. It is certainly not a benefit to be overlooked when calculating the assets of an estate.

The value of an agent's entitlement to compensation can vary enormously and is dependent on a variety of factors. Ensuring that up to date records of sales, commissions and agency expenses throughout the term of the agency agreement are readily and easily accessible will be invaluable to the executor as this is central to the valuation process. The executor will also need a clear understanding of the terms of the agency. Those terms may be embodied in a written agreement which should also be readily accessible. If there is no written agreement it would be advisable for the terms to be detailed in a letter accompanying the will.

This important and often substantial entitlement should be viewed as a "death in service" type benefit. A termination payment on death will increase the size of an agent's estate and will assist dependants financially upon the agent's death.

Nobody likes talking about preparing for death, but if you want your loved ones to benefit from the years of efforts you have put into your agencies, you need to act now. Preferably you need to instruct a firm that understands the Regulations and that has a specialist private client department.

At Myerson Solicitors LLP we have a team of specialists who can advise on all aspects of commercial agency law. We also have a team of lawyers who are experts in the drafting of wills and administration of estates.

Challenging The Small Agency Injustice

The law regarding the assessment of an agent's entitlement to compensation has been long settled following the case of Londsdale v Howard & Hallam [2007] 1 WLR 2055.

Agents and principals are now familiar with the concept that compensation falls to be calculated by reference to the price which a hypothetical purchaser would have been willing to pay for the agency business at the date of its termination. This is intended to compensate the agent for the loss of value of the agency business, including goodwill.

Whilst agents and principals alike have welcomed this clear guidance, there remains scope for clarification of the law in this area in the instance of an agent with a single, low earning agency.

There are many different methods of valuing a business, and there remains scope for arguing what methodology should be used.

It is common in our experience for accountancy experts to value commercial agency businesses using the capitalised earnings method. However, in the case of a low earning agency this method may produce what appears to be an absurd outcome.

In the case of *Nigel Fryer Joinery Services Limited & Mr Nigel Fryer v Ian Firth Hardware Limited [2008] EWHC 767*, the court was required to consider whether Mr Fryer, who was employed by the defendant as a sales representative, was a commercial agent for the purposes of the Commercial Agents Regulations 1993.

Mr Fryer was, on the facts, found to be a commercial agent for the purposes of the Regulations. However, it

was determined that the principal had validly terminated the agency agreement because of a repudiatory breach of contract by Mr Fryer which meant that he was not entitled to compensation under Regulation 17. Despite finding that Mr Fryer was not entitled to compensation, the court did go on to address the question of whether he would have been due any compensation if he had not been in repudiatory breach.

Mr Fryer was earning a salary as a sales representative of £11,000 per annum plus commission of 1.5% of the net value of sales from all new accounts introduced by him. After taxes and expenses he was left with a net income of £14,100 per annum, which was well below the UK average earnings of £27,128 per annum. The Judge commented that he did not think that anyone would be willing to pay a premium for such a business, and would therefore have rejected a claim for compensation under Regulation 17. These comments are not binding because they did not concern the decision which was made in the case, but they are noteworthy and of much interest nonetheless.

They suggest that the idea that an agent is automatically entitled to compensation on termination may not be correct. In addition to what a hypothetical buyer might be willing to pay for the agency, there may be a further factor for the court to consider– that being whether there would be a buyer at all?

The comments made in the *Nigel Fryer Joinery* case as to the entitlement of Mr Fryer's hypothetical claim for compensation are highly questionable in our view. Why should an agent with a low value but steady agency be penalised in this way? Should every agent not be entitled to be compensated to some extent for the value of the goodwill in the agency?

It is argued by some commentators that it is unlikely on commercial grounds that any purchaser or investor would be willing to pay for a business providing a return equal to the market wage for the proprietor's efforts, when he or she could obtain that in the employment market without any capital outlay or investment risk. Whilst at first blush these comments have some force, the idea that an agent with a low earning agency will not be entitled to any compensation under Regulation 17 simply because a hypothetical purchaser would be unwilling to pay anything for the agency business, does not sit comfortably with the intention and spirit of the European Directive from which the Regulations are derived.

Of interest is the observation that the valuation methodology used in commercial agency claims is often the capitalised earnings method. In the case of low earning agencies where this methodology provides an unfavourable outcome for the agent on a Regulation 17 claim, a different methodology might be more appropriate.

The decision in the *Nigel Fryer Joinery* case is a County Court decision so has limited impact on future decisions of the court. Nevertheless, the court's comments are regularly relied upon by principals facing claims for compensation in similar circumstances.

It therefore remains to be seen what stance the court will take when faced with a claim for compensation which under current caselaw appears unviable on the figures. The question is when, not if, the comments of the court in *Nigel Fryer Joinery* will be challenged?

Never one to dodge a challenge, Myerson Solicitors LLP, in conjunction with Old Square Chambers, are looking to overturn the current inequitable status quo and create a more nuanced interpretation of the Regulations that would produce a favourable result for lower-earning agencies. We are therefore interested in hearing from agents with sole low earning agencies which have been terminated and whose claims for compensation have been rejected. If you are an agent in this or a similar position, our specialist team would be delighted to hear from you to discuss how we may be able to assist on favourable terms.

Making and Unmaking … What Are The Limits?

Frequently commercial agents find themselves having variations to the terms of their agency imposed upon them informally by their principal.

Common variations are a reduction in the agent's territory, a reduced rate of commission on some or all of the agent's accounts, or more onerous reporting obligations. Agents often feel powerless to object to the imposition of the new terms.

Oral agreements can frequently give rise to misunderstandings between the parties, particularly when variations are involved. Questions arise as to what the parties actually intended, and the precise terms of the variation. This can lead to disputes, and may ultimately may lead to termination by the principal who considers the agent to be in repudiatory breach of the varied agency agreement. A lack of clarity surrounding a variation to the contract as an undesirable position for an agent.

Where an agent has a written agency contract it may contain a clause requiring any variation to the contract to be in writing. This is sometimes referred to as a *"no oral variation clause"*. Such clauses are common in written contracts but are often overlooked by the parties.

The reason for a principal not complying with the requirement to record the variation in writing may be two-fold. The principal may believe that just as the parties had the ability to agree to such a term when making the contract, they also had the ability to unmake it. In other instances, a principal who wishes to impose a variation to the detriment of the agent may simply choose to ignore the requirements of such a clause because of the difficulty in obtaining the agent's agreement to the variation in writing. In both cases an agent may consider himself bound by the oral variation, but careful consideration should be given to the terms of any written agency agreement.

The validity of such clauses has recently been considered by the Supreme Court in the case of *Rock Advertising Limited*

v MWB Business Exchange Centres Limited [2018] UKSC 24. The Supreme Court overturned the earlier decision of the Court of Appeal and held that such clauses are valid. This means that if a variation to the contract is not made in writing in accordance with the requirements of the clause, the variation is not binding even if the parties have orally agreed the change.

This is a welcome decision for commercial agents which will empower them in situations where the principal is seeking to impose variations to the terms of their agency against their will.

The reality is that a clause which requires any variation of a commercial agency agreement to be in writing is no more of a fetter on the agent or principal's autonomy than any other provision in the agreement. The parties are simply required to follow the express terms of the agreement if they want to vary it. Failure to do so will invalidate any purported variation. This will mean that agents who have their territory reduced, for example, may have a future claim for unpaid commissions from the carved out territory. The sums can be added to the usual claims for compensation or indemnity at termination of the agency.

Agents who are negotiating terms of their agency at the outset of the relationship are advised to include a *"no oral variation clause"* within in any written agreement. It will restrict the ability of a principal to undermine the written agency agreement by informal means, which may be open to abuse. A variation which is recorded in writing will give certainty to the parties and provides welcome protection for the agent further down the line.

Commercial Agent - FAQ's

Regulations

Am I a commercial agent and why does it matter?

A commercial agent is defined as "a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal), or to negotiate and conclude such transactions on behalf of and in the name of that principal".

Commercial agents are usually paid a commission on sales achieved, are not a party to the sales contract and are not a distributor (see below). It is important to determine if you are a "commercial agent" because if you are, you will benefit from the significant protection of The Commercial Agents (Council Directive) Regulations 1993, with regard a principal's conduct and behaviour towards you and protection from being dismissed without due compensation.

What are The Commercial Agents (Council Directive) Regulations 1993?

The Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") implement the EU's Commercial Agents Directive (86/653/EEC), a Directive of European Law which was introduced to effect the co-ordination of laws between European member states relating to self-employed commercial agents. The Regulations came into force in England and Wales on 1 January 1994 and cover the rights and obligations of both agents and principals, as well as providing commercial agents with a number of significant protections.

When and to whom do the Regulations apply?

The Regulations apply to all commercial agents in Great Britain, where English law applies. Therefore, if you are a commercial agent in England and Wales (an agent) or if you engage commercial agents in England and Wales (a principal), the Regulations will apply to you.

What is the difference between being a commercial agent and a distributor?

A commercial agent will have the authority of his principal to negotiate sales or purchases in the principal's name, so the commercial agent will not be a party to the sales contract with the customer. Further, because the commercial agent contracts in the principal's name, the commercial agent would not take possession or control of the principal's goods and would not take part in the delivery of goods from the principal to the customer. By comparison, a distributor would usually take possession of goods and then deal with re-selling or distributing them on to customers, usually by contracting in its own name.

What is the difference between a commercial agent and a marketing agent?

As set out above, a commercial agent negotiates sales or purchases between a customer and the principal, with the authority of the principal to conclude transactions on behalf of the principal. A marketing agent, by comparison, would be responsible for carrying out marketing activities for the principal to encourage sales or purchases for the principal but would not have the authority to negotiate sales or to bind the principal to any transactions. The Regulations do however, extend to marketing agents to afford their protections.

Do the Regulations apply to sub-agents?

The answer to this question is very much – it depends. This question is subject to much academic debate and has not been properly tested by the Courts. Normally, if you are a sub-agent, your contractual relationship is with the main commercial agent and not with the principal. Therefore, the Regulations would apply between the principal and the main agent, with only a simple contractual arrangement between the main agent and the sub-agent. However, this very much depends on the contract and/or the terms agreed between the main agent and sub-agent. It has been suggested that a sub-agent could claim a contribution from a main agent bringing a claim against its principal.

What is the difference between a commercial agency relationship and a franchise?

In a franchise relationship, the franchisee contracts on its own behalf and in its own name but will often pay a percentage or proportion of its turnover to the franchisor. This percentage or proportion is usually in exchange for the use of the franchisor's name, goodwill or products, so is quite different to a commercial agency relationship.

What is the difference between being a sole, exclusive or non-exclusive agent?

A sole agency is when the principal is not able to appoint any other commercial agents to act on its behalf in a specified territory (where the sole agent is authorised to act) but the principal is able to seek customers and to negotiate sales directly for itself.

An exclusive agency is when the agent has the exclusive right to represent the principal in a territory and the principal is prohibited from trying to seek customers and to negotiate sales directly for itself.

A non-exclusive agency is when the principal is free to appoint other commercial agents in the same territory and also, seek customers and sales/transactions itself.

How do the Regulations affect me?

The Regulations are important to both principals and agents in confirming their respective rights and obligations and also providing for what should happen, in the event that the commercial agency relationship is terminated or otherwise comes to an end. If you are an agent, you may have the right to bring a claim for compensation under the Regulations should the principal terminate your commercial agency. Likewise, if you are a principal, you may be able to rely on certain provisions of the Regulations to either deflect or reduce your liability to a terminated or outgoing commercial agent.

What are the obligations of an agent?

Generally speaking, a commercial agent must look after the interests of his principal and act both dutifully and in good faith. Specifically, the commercial agent must make proper efforts to negotiate and conclude transactions, must communicate all necessary information he has to his principal and must comply with any reasonable instruction given by his principal. In addition, the agent must comply with the terms of the agency agreement in place with the principal, whether it be by way of written or verbal contract.

What are the obligations of a principal?

A principal must act both dutifully and in good faith in his relations with his commercial agent. This includes providing the commercial agent with the necessary documentation concerning any goods, obtain whatever information is necessary for the agent to perform the agency agreement, inform the agent if a significantly lower than usual volume of transactions is expected and inform the agent of his acceptance or rejection of any transaction procured by the agent. A principal must provide the agent with a statement of commission due to the agent and must pay the agent "reasonable remuneration", in the absence of any agreement in relation to a specific level of remuneration. In addition, the agent must comply with the terms of the agency agreement in place with the principal, whether it be by way of written or verbal contract.

Am I able to contract out of the Regulations?

No, it is not possible to contract out of or exclude the Regulations in their entirety however, it is possible to limit the application of certain specific Regulations. We would strongly recommend that legal advice is taken if you are considering limiting the effect of any of the Regulations.

Agency agreement

Must I have a written agency agreement?

No, it is not a legal requirement to have a written agency agreement in place, although it is often the case that a written agency agreement clarifies the rights, duties and obligations of both agent and principal, which assists in determining the contractual relationship between them. Both agent and principal have a right to receive from the other a signed written document setting out the terms of the agency contract, on request. Often however, it will be in an agent's interests not to have a written agreement in place.

What if I don't have a written agreement?

If there is no written agency agreement in place, the Regulations will apply as the fall-back position. Relying solely on the Regulations can have advantages and disadvantages depending on whether you are agent or principal and also, the circumstances of any dispute which might arise between you. The Regulations tend to favour agents, hence why not having a written agreement is often preferable for an agent.

Is it better to have a written agreement or not have one?

This very much depends on the circumstances of your individual relationship with your agent/principal. If you are an agent, it may be advantageous to you not to have a written agreement so that you are not bound by sales targets and so that you may benefit from the payment of compensation on termination (as opposed to indemnity – see below), under Regulation 17. If you are a principal, it may be advantageous to you to have a written agreement, so that you may try to impose sales targets on your agent(s) or that you might specify that an indemnity is payable on termination under Regulation 17, rather than compensation. While there are definite advantages in having a written agreement, if the written agreement is poor or is drafted without an understanding of the workings of the Regulations, it may not do its intended job and may fail to provide you with the protection which you were expecting it to.

Can I make my principal give me a written agreement?

Yes – under Regulation 13 you are entitled, on request, to receive a signed written document from your principal, which sets out the terms of your agency contract.

Can I make an agent sign up to a written agreement?

At the outset of an agency, the agency and principal are free to negotiate and sign up to a written agreement. However, if a commercial agent has been acting for a principal for some time without having had a written agreement in place, the principal is not able to then "force" the agent to sign up to a written agreement when the contractual relationship is already in existence, where the agent does not want to do so.

Can a written agreement exclude or contract out of the Regulations?

No, a written agreement cannot exclude or contract out of the Regulations but it is possible to limit the extent and effect of some of the Regulations. We would strongly recommend that you take legal advice on which of the Regulations may/may not be limited.

Can I change a written agreement once it has been signed?

This depends on the wording of the agreement and whether both parties agree that the terms of the agency relationship should be changed. If this is the case, the original written agreement must be complied with in terms of any requirements for making amendments to the agreement between the parties. If the written agreement does not provide for amendments, it will be necessary for all parties to the agreement to consent to the amendment and for a further document or addendum to the agreement, to be agreed and signed, in order for the amendment to legally take effect.

What if the agent/principal is in breach of the agreement?

If you are a principal and your commercial agent is in breach of the agreement, this may entitle you to terminate the agreement without the need to make certain post-termination payments to the commercial agent (if the breach is serious enough). If you are an agent and the principal is in breach of the agreement, you may be able to take action to, for example, compel the principal to provide you with sales data and/or accept any repudiatory breach of the contract and bring the commercial agency to an end and retain your right to a termination payment.

What are the common issues with written agreements?

There are a number of common areas for disagreement when it comes to negotiating written agreements. These include the imposition of sales targets on the agent, when either party is able to terminate the agency relationship, whether compensation or indemnity under Regulation 17 is payable on termination, restrictions on the activities of the agent after termination and which country's laws and courts should determine any dispute (where the agent and principal are based in different countries).

Should I agree to sales targets?

If you are an agent and you agree to the imposition of sales targets into your agency agreement, you are accepting that you are contractually bound to meet those sales targets. If you do not then meet those sales targets, you may be in breach of contract, which can have serious consequences.

As such, you may wish to think carefully about whether or not those sales targets are achievable and further, whether you would wish to be contractually bound to achieve them.

What happens if I don't meet my sales targets?

This depends on the wording of any agreement and/or whether or not your failure to meet the sales targets constitutes a repudiatory (a serious) breach of the commercial agency relationship. If your written agreement specifies that failure to meet sales targets is a repudiatory breach of contract then your principal may be able to terminate your agency, without having to give you any notice or to make termination payments under the Regulations. Similarly, if you do not have a written agency agreement in place but your principal is able to show that your failure to meet sales targets is a really serious breach of the agency agreement, it may be able to terminate the agreement without notice or any obligation to make payments under the Regulations.

What should I look out for when negotiating an agency agreement?

As set out above, you may wish to seriously consider sales targets and also, whether an indemnity or compensation will be payable in the event that the agency is terminated. An agent should also beware any other onerous obligations.

What do I do if my principal wants to take my clients away from me?

When agents service large or repeat order customers, it is not unusual for principals to wish to take these customers "in-house" and remove the agent's involvement, such that the principal no longer has to pay commissions to the agent for sales made to those customers. You may therefore, wish to resist any attempt by your principal to take customers in-house or to cease the payment of commissions to you in relation to sales made to those customers. Alternatively, you may wish to negotiate a settlement with your principal which compensates you for the loss of future commissions which you would have received from future sales to those customers.

What do I do if my principal wants to reduce my territory?

It is highly likely that if your principal wishes to reduce your territory, your commissions will fall as a result. Depending on the wording of any written agreement, it is not possible for a principal to vary the terms of an agency agreement without the agent's consent and therefore, if your principal does wish to reduce or change your territory, you may wish to negotiate a settlement to compensate you for the expected reduction in your future commissions.

Can my agreement be only for a fixed-term?

Yes – commercial agency agreements can be specified as being only for a fixed term. However, the fact that a commercial agency is specified as being only of a fixed duration does not prevent the application of the Regulations and therefore, post-termination payments under the Regulation may still be payable to the agent after the end of the fixed term.

Can I stop an agent from competing against me after the agreement has ended?

Generally, you would only be able to prevent an agent from competing against you if you have reasonable restrictions on such competitive activity within a written agency agreement.

Payment

What do I do if my principal won't pay me?

You are able to demand sales information from your principal if you need that information to check the amount of commission due to you. If you believe that you principal is not paying commissions due to you then you are able to take legal action. You may also be able to terminate your agency and preserve the right to a termination payment.

How much commission should I be paid?

At the outset of the commercial agency relationship, agent and principal should agree the amount of commission to be paid. Agent and principal can also agree to vary the amount of commission paid during the agency relationship, if desirable.

What if my principal goes bust?

If your principal goes bust, you may still be entitled to claim termination payments from the liquidator or administrator of your principal. If this happens, we would strongly recommend that you get in touch with us straight away in order that we might advise you as to how to proceed.

Termination

When is my principal entitled to terminate my agency?

Your principal might choose to terminate your commercial agency at any time however, if it does so, it is likely to be liable to make post-termination payments to you under the Regulations and/or in accordance with any written agency agreement.

If your principal is able to establish that you are in repudiatory breach of the agency agreement (which means that you have committed a very serious breach of the agency agreement), it may be entitled to terminate the agency without any obligation to make post-termination

payments to you and without having to provide you with a notice period under Regulation 15. You would still, however, be entitled to be paid all commissions due and owing up to termination.

What is repudiatory breach?

There is little case law which assists in determining what is and what is not classed as a repudiatory breach in a commercial agency context. In simple terms, a repudiatory breach is a very serious breach of the agency agreement which entitles the principal to treat the agency agreement as immediately at an end. If you are in repudiatory breach, your principal is not obliged to make termination payments to you under the Regulations because of the seriousness of your breach of the agency agreement. However, it is often difficult for your principal to prove that you are in repudiatory breach as you must have committed a very serious breach of the agency agreement – trivial or minor breaches will not be sufficient.

When can I terminate a poorly performing agent?

You are able to terminate a commercial agent at any time, provided you give the agent the necessary notice. Termination may however, mean that you must make post-termination payments to the agent. If you believe the agent is in repudiatory breach of the agency agreement then you may be able to terminate the agent without having to give notice or make post-termination payments. We would recommend that you get in touch with us before you terminate, in order that we may advise on your potential liability to the agent.

What do I do if I want to terminate an agent?

You should carefully consider the terms of the agency agreement and if there is a written agreement in place, consider the terms of that written agreement. It would be advisable for you to get in touch with us before you proceed to terminate, in order that we might advise on your potential liability.

What do I do if my agency is terminated?

We would recommend that you contact us in order that we may advise on whether or not we think the termination has been carried out as a result of a repudiatory breach on your part and in order that we may advise on your ability to bring a claim under the Regulations.

Should I be given notice of termination of my agency and if so, how much?

If your principal is alleging that you are in repudiatory breach, it is not obliged to give you any notice of termination. If your principal is not alleging repudiatory breach, the notice required to be given will be dependent on the length of the agency. For any agency which has lasted for three years or more, you must be given three months' notice of the termination of your agency. If the agency has lasted for two years then you should be given two months' notice and one year, one months' notice etc. However, if you have a written agency agreement in place which provides that you should be given a longer notice period than three months', it is likely that this longer period would apply.

What if my principal makes it impossible for me to do my job?

If your principal makes it impossible for you to carry out your role as an agent, for example, by taking away samples required for you to do your job, it is possible that your principal may be in repudiatory breach of the agency agreement. This breach might be capable of acceptance by you, which would bring the agency agreement immediately to an end and preserve your right to post-termination payments. If you think your principal might be in repudiatory breach, you should contact us immediately in order that we may advise you.

What if my principal doesn't give me as much notice as it should?

If you are provided with insufficient or no notice of the termination of your agency, you are likely to have a claim against your principal for a payment "in lieu of" the notice which should have been provided to you. It is not possible to agree shorter notice periods than those provided in the Regulations and therefore, regardless of what your written agency agreement might say, the notice periods provided in Regulation 15 should be complied with.

What do I do if after termination, my principal won't pay me what I am owed?

In this case, you are likely to have a claim against your principal under the Regulations for post-termination payments. We would suggest that you get in touch with us in order that we may advise you in relation to your claim and its potential value.

Claims

How can I fund legal proceedings and do you offer CFAs (no win no fee agreements)?

We recognise that if you have been unexpectedly terminated by your principal, you will be without all or part of your income. If you have funds, you are able to pay privately, that is, as the litigation progresses. However, in some cases, we will offer a CFA or "no win no fee" agreement, which defers payment of our fees until the end of the case. A CFA agreement may not be suitable in all cases but we would be happy to discuss funding options with you, at the outset of your matter.

How do I make a claim?

You should get in touch with us in order that we may advise you as to the correct procedure to be followed to set out your case. Usually, a claim would be made in the Mercantile Court (a division of the High Court), given the requirement to obtain complex expert evidence.

When do I have to make a claim?

Under the Regulations, you are required to notify your principal of your intention to bring a claim under the Regulations within one year of the termination of your agency.

Do I have to go to court?

If it is necessary to issue court proceedings against your principal to recover post-termination payments under the Regulations, it may be the case that your claim is listed for a trial in court. If your claim proceeds to trial, you would be required to attend court to give oral evidence. However, the vast majority of cases settle prior to trial and many commercial agency claims settle at a mediation, such that it is now not a common occurrence for a commercial agency claim to run to trial.

Do I have to notify my former principal that I am bringing a claim?

Yes, you are required to notify your principal of your intention to bring a claim against it within one year of the termination of your agency. A letter should suffice.

What if I can't afford to bring a claim?

We would be happy to consider whether we might take on your claim on a conditional fee arrangement or "no win no fee" basis. This type of funding arrangement is not suitable for all cases but we would be happy to discuss this with you.

Compensation/indemnity

What is the difference between compensation and indemnity?

The requirement for a principal to pay either compensation or indemnity to a terminated agent stems from Regulation 17. Compensation requires the principal to pay a sum of money to the agent as compensation for the agent's loss of the agency with reference to the value of the agency to a purchaser whereas an indemnity requires the principal to indemnify the agent for commissions which the agent would have received, had the agency not been terminated.

How do I know if I should pay or be paid compensation or indemnity?

The default provision is that compensation is payable unless the parties have agreed that indemnity should be payable instead. As such, if you are to be paid an indemnity, there should be a written agency agreement confirming this.

Is compensation or indemnity better?

In most cases, a terminated agent will receive a higher sum of money through payment of compensation rather than indemnity. However, this is not always the case and will depend on a number of factors and circumstances.

Should I be paid compensation?

Unless there is a written agency agreement which specifies that you should be paid an indemnity on termination, you will be entitled to claim compensation.

How is "compensation" calculated?

The method of valuation for Regulation 17 compensation was decided in the House of Lords case of Lonsdale v Howard and Hallam. The purpose of compensation is for the principal to pay the agent a sum of money which represents the value of the agency at the time of termination to a hypothetical purchaser.

The method of calculation of the level of compensation is complicated and will take into account the profits of the agency, the expenses attributable to the agency and whether the agency has been growing, shrinking or remaining stable.

How is "indemnity" calculated?

Indemnity is capped at a maximum of one year's gross commission and is calculated with reference to the increase in value and goodwill resulting from the agent's efforts. In most cases, a successful agent will be able to reach the cap of one year's commission.

Do I have to go to Court to be paid compensation?

Before Court proceedings are issued, the Court would expect you to write to you principal to set out your claim. This has the potential to open up negotiations to achieve a settlement without the need for you to go to Court. However, if you cannot agree an acceptable level of compensation with your principal, it may be necessary for Court proceedings to be issued. As the vast majority of Court claims settle before they get to trial, settlement is often reached during the course of the litigation and without you needing to give oral evidence to a Court.

Is compensation calculated on two years' commissions?

This is the old method for calculating the level of compensation under Regulation 17 and as such, is no longer the correct test to apply. Regulation 17 compensation is now calculated on the basis of the value of the agency at the time of termination to a hypothetical purchaser, in accordance with the principles set down in the case of Lonsdale v Howard and Hallam.

Do I have any other claims on termination and if so, what for?

It is possible that you may also have claims under Regulations 7, 8 and 15.

Regulation 7 provides that an agent should be paid all commissions due to him during the course of the agency. If your principal has not paid you all commissions due to you up to termination, you would have a claim under Regulation 7.

Regulation 8 provides that you should be paid commissions on all sales made by your principal to your customers and/or in your territory, for a reasonable period after the termination of your agency. This is often known as pipeline commission.

Regulation 15 – you may have a Regulation 15 claim if you have not been provided with sufficient notice of the termination of your agency.

Retirement/death

What happens if I want to retire as a commercial agent – do I get any money?

If you retire as a commercial agent on the grounds of ill health or old age, you are still entitled to claim post-termination payments from your principal under the Regulations. However, if you wish to retire as a commercial agent before the normal retirement age, you may not be able to make a claim under the Regulations. We would recommend that you get in touch with us in order that we may advise you on this point.

What happens if I die – can my estate sue my principal?

Yes – if you die while acting as a commercial agent for your principal, your estate is able to make a claim against your principal for post-termination payments under the Regulations.

Can a principal make me retire?

Your principal will not be able to force you to retire without making post-termination payments to you, under the Regulations.

Jurisdiction/choice of law

What does it mean to say a country has jurisdiction to decide a dispute?

If you have a written agency agreement which contains a jurisdiction clause which, for example, says that the French Courts have jurisdiction to hear any claims arising out of the agreement, this will mean that any claim which you bring against your principal must be brought in the French Courts.

What is a choice of law clause?

If you have a written agency agreement, you may have a choice of law clause which specifies which country's law should apply to any claim or dispute arising out of the agreement. For example, your written agency agreement may specify that English law should apply to any dispute.

Therefore, if a written agency agreement has a French jurisdiction clause and an English choice of law clause, any claim must be brought in the French Courts but the French Courts would have to apply English law.

Do I have to sue my principal in a country other than my own?

It is possible that you may have to sue your principal in a country other than that in which you reside. If you have a written agency agreement, it is possible that this agreement may specify in which country any claim must be brought however, other laws may apply which determine which country should decide the dispute and which country's law should apply. This is a very complex area and if this is applicable to your circumstances, we would strongly recommend that you get in touch with us in order that we may advise.

What if my principal is based abroad – which country do I sue in?

As set out above, it is possible that you may be required to sue your principal in a country other than that in which you are based. The position in relation to jurisdiction and choice of law is very complicated and we recommend that you take advice from us on this point, if applicable.

What is the difference between jurisdiction and choice of law?

Jurisdiction relates to which country's courts should hear the dispute and choice of law relates to which country's law should apply. It is possible that one country may have to apply the law of another country, if the jurisdiction and choice of law clauses conflict.

How do I sue my principal in another country?

In the first instance, we would recommend that you get in touch with us in order that we may advise you. We are a member of the MSI Global Alliance and have partner lawyers all over the world. As such, if it is necessary for you to issue court proceedings in another country, we will be able to recommend and put you in touch with a law firm in that country who are able to assist you.

What if it is not clear which country's law applies to my dispute?

This is a very tricky area and as such, we would strongly recommend that you get in touch with us in order that we may advise.

Foreign principal/agent

How can I regulate agents across Europe or the world?

We understand that an increasing number of principals and agents act for each other all over the world. If you are a principal, we would recommend that you have written agency agreements in place with all of your agents across the world, which specify both jurisdiction and choice of law in the event of a dispute.

Do the Regulations apply to principals/agents based outside of England and Wales?

No – the Regulations only apply to commercial agents who carry out their activities in the Island of Great Britain where English law applies. However, each member state of the European Union has its own version of the Regulations so it is likely that commercial agents in other European countries would have some protection but would need to seek legal advice from a lawyer in the applicable country.

How will Brexit affect the Regulations?

At the moment, the Regulations are still good English law. It is looking likely that Parliament will pass the "Great Repeal Bill", which will ensure that all EU derived legislation (including the Regulations) remains good English law, while arrangements in relation to the terms of the UK's exit from the EU are negotiated and concluded. As the negotiations are likely to take a number of years, we do not expect the law surrounding commercial agents to change significantly, in the meantime.

How we can help...

We act for both agents and principals in drafting agency agreements, advising on rights, duties and obligations, advising on strategy, advising on termination and acting for both agents and principals in disputes, arising both during an agency and after termination. In terms of funding, we would be happy to consider all suitable funding arrangements with you.

Why should I choose Myerson?

We have a dynamic team of seven solicitors who are experienced in and regularly deal with commercial agency matters, both contentious and non-contentious. We act for both agents and principals across a wide variety of industry sectors and have considerable experience in assisting with commercial strategy, as well as the law.

We have acted and continue to act for agents and principals all over the world and are retained by Agentbase as a panel solicitor, given our significant knowledge of and experience in commercial agency matters. We are also supported by APSA, the Association of Professional Sales Agents.

We are experienced and knowledgeable professionals who go about our work in a friendly and approachable manner to achieve your objectives.

About our Commerical Agency team

We are an award-winning, **"Top Tier"** Legal 500-rated law firm, specialist in advising and acting for both agents and principals before, during and after disputes.

The team is led by Adam Maher who is described as a "first-class litigator" with "razor sharp commercial judgement, tenacity and communication skills" and "extremely robust under pressure" by the Legal 500, 2017. He leads a team of 16 solicitors, a team which is rated as "top tier" by the Legal 500. Adam is regularly retained to advise on high-value, complex and international litigation and has significant experience of advising agents and principals in dispute. He is recommended by both Agentbase and the Association of Professional Sales Agents as a solicitor specialist in this area.

The solicitors in our team are happy to discuss your circumstances without obligation. In many cases we will act pursuant to a "no win, no fee" agreement (also known as a conditional fee arrangement). We often act on behalf of agents seeking indemnity or compensation at the termination of an agreement and understand that a major source of income has been removed and we are therefore open to exploring other methods of funding.

Because of our breadth of experience, we have strong team of solicitors at Myerson to prosecute your case. We also have developed excellent links with specialist barristers and forensic accountants so that you are provided with a complete team of experts for your case. Often the barristers we have developed relations with will act on a "no win, no fee" agreement.

For more information visit **www.myerson.co.uk** or call **0161 941 4000**

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