

LEGAL SURGERY



agentbase
THE UK SALES AGENT REGISTER

The Impact of Brexit on Commercial Agent and Principal

What has happened since Brexit?

On 29th March 2017, nine months after the UK voted in a referendum to leave the European Union (EU), Prime Minister Theresa May activated Article 50 of the Treaty on European Union. This in effect gave notice of the UK's intention to withdraw from the EU.

What happens next? From the 29th March 2017 there is a two-year period expiring on 29th March 2019, intended to enable negotiations between the UK and the EU on the terms by which the UK withdraws from the EU. In the absence of agreement between all EU member states to an extension of the two-year period and of a deal being reached as to the terms of withdrawal, the UK will automatically cease to be a member of the EU.

What impact will Brexit have on the relationship between EU Law and UK Law?

Currently the European Communities Act 1972 (ECA), which is UK Law, gives EU Law supremacy over UK Law. This means that when there is conflict between EU Law and the UK Law, EU Law prevails to the extent that the inconsistent UK Law must be set aside or a new UK law, has to be enacted to give effect to the EU Law.

The ECA will inevitably need to be repealed as a result of Brexit and all EU derived laws need to be considered. We understand the Government intends to repeal the ECA with what is currently being described as the 'European Union (Withdrawal) Bill' or the 'Great Repeal Bill'. It is presently intended that this will have the effect of converting all existing EU-derived law into UK Law.

The UK Government's intention in converting all existing EU-derived law into UK Law is to avoid the inevitable uncertainty and chaos that would be created by the gaps that would otherwise be left in UK Law and to ensure consistency in approach for those companies trading with the EU which continues to be subject to EU Law. We understand that the UK Government intends then to decide over time what EU derived law it wishes to retain.

The UK Government published a 'White Paper' with its 'Great Repeal Bill'. The White Paper, proposes the UK Government will be given powers to correct or remove laws that would otherwise not function properly after Brexit, although not to create 'new policy'.

What impact will Brexit have on Commercial Agents

The legal status of commercial agents in the EU is regulated by the Council Directive 86/653/EEC of December 18th 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. It sets the lower limits for protecting commercial agents in the EU.

The Council Directive was implemented into UK law by the Commercial Agents (Council Directive) Regulations 1993 (the Regulations). The Regulations, which came into force on 1st January 1993, give commercial agents in the UK an enhanced level of protection to that afforded to them by the legal position prior to their coming into force, which was governed by the UK Courts by a system of 'common law'.

The extent of those rights is beyond the scope of this article. However, the most radical departures from the common law (pre-Regulation era), include the commercial agent's right to:

1. payment upon termination of the agency agreement either in the form of an 'indemnity' or 'compensation' which may not be excluded;
2. a minimum level of notice, which may not be varied by agreement;
3. the payment of commission post termination for a reasonable period on transactions which are mainly attributable to the agent's efforts;

Given the UK Government's lack of parliamentary majority, there is no certainty that the current Great Repeal Bill will be passed. On the assumption that it is passed and the UK leaves the EU, there is no certainty what EU derived law will be repealed or amended.

Our view on what will happen post Brexit

Given the approach of the Government to the Great Repeal Bill and in particular to its proposal to incorporate into existing EU derived law into UK Law, there is unlikely to be an immediate change in the law following separation from the EU on 29th March 2019.

The Regulations have long been regarded in the UK (by principals at least), as being over-protective of agents. Accordingly, there may well be pressure to withdraw or at the very least to vary the Regulations, particularly where there is focus on extending free market policies or where the Regulations are perceived to interfere with a party's freedom to contract.

On other hand, the rights created by Regulations and the Court's interpretation of the Regulations, including the Court assessment of payments on termination, either by way of an indemnity payment or compensation payment, are now relatively certain. Given this, the Regulations may not be a priority for the UK Government for withdrawal or variation.

Certainly, when one views the relatively low number of commercial agents in this country when compared to other categories of working individuals such as employees, it may be that the Regulations are not be a priority for withdrawal or variation.

Whilst recognising the additional protection afforded to commercial agents by the Regulations, in our opinion, the Regulations afford both principal and agent a well-balanced legal framework within which to trade. We however, would welcome consultation in which the views of agents, principals and lawyers involved in this area of law could be considered before decisions as to changes in the law are considered.

In our view, no changes on any basis will come into force until the UK's withdrawal from the EU on 29th March 2019. It is almost certain that any changes that come into force after 29th March 2019, will be prospective and not retrospective i.e. they will only affect agencies that are entered into on or after 29th March 2019.

If changes are ultimately made, it is our view that such changes may be a watering down of the agent's rights on termination, for example by restriction of the agent's right to be compensated on termination. Now, may be good time to examine existing agreements or the terms of new agreements.

Where uncertainty remains about what will happen post withdrawal from the EU, Principals are probably best advised to continue to try to secure certainty by agreeing an indemnity payment on termination. Agents on the other hand would ordinarily be advised to agree a compensation payment or may be best advised to stay silent, because in the absence of agreement to pay an indemnity, where the Regulations apply, the agent is entitled to be paid compensation.

If you are an Agent or Principal and would like assistance in considering the steps your business should be taking to review its sales strategy in light of potential developments in the law, please contact a member of our commercial team. Alternatively, if you wish to terminate an agency or are facing termination, and require advice, please contact us.

Giles Bright is a Director of Bankside Commercial Solicitors, Head of Dispute Resolution, who specialises in commercial law. Bankside Commercial has successfully represented numerous commercial agents over the last 15 years conducting to trial many of the leading reported cases.

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