



Defining a Commercial Agent

by Andrew Leach of Cobbetts LLP.

Commercial agents benefit from significant protection under the Commercial Agency Regulations 1993 (the "Regulations"), such as the right to claim substantial lump sum payments on the termination of an agency agreement in certain circumstances. Consequently, both principals and agents require clear legal advice from specialists in this area before entering into or terminating such agreements.

Further, what constitutes a "commercial agent" under the Regulations is very important and can be an area of dispute. The starting point as to what constitutes a "commercial agent" can be found in Regulation 2(1): "Commercial agent" means 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 the sale or purchase of goods on behalf of and in the name of that principal". A number of elements of the definition require closer scrutiny, and indeed, through a number of cases, the Courts have elucidated what Regulation 2(1) means.

WHAT IS A SELF-EMPLOYED INTERMEDIARY?

A "self-employed intermediary" includes both natural and legal persons (*Bell Electric Ltd v Aweco Appliance Systems GmbH* (2002)). Thus individuals and companies can fall within the definition. In this context, self-employed means, simply, that the agent is a distinct entity from the principal. In *AMB Imballaggi Plastici SRL v PLC Flex Ltd* (1999), it was held that "self-employed" in the Regulations has a similar meaning to the term "independent contractor".

WHAT IS MEANT BY "CONTINUING AUTHORITY"?

Simply conducting one transaction on behalf of another is not thought to constitute "continuing authority". Therefore, should an agent be instructed by a principal to conduct a discrete transaction, the agent is unlikely to fall within the protections of the Regulations. Commercial agents are distinguished from those, such as brokers, who act on a one-off basis, and who therefore do not build up goodwill for their principal. However, the European Court of Justice has also held that an agent would have continuing authority under the Regulations if they were authorised to negotiate successive extensions to a contract.

NEGOTIATE

The meaning of "negotiate" is not defined in the Regulations. Clearly, if agents are authorised to negotiate terms with third parties before concluding agreements on behalf of the principal, they will fall within the definition. The difficulty arises in the type of agency arrangement whereby the agent simply promotes the principal's goods, and refers orders to the principal, but does not have authority to bind the principal. This type of agent is often referred to as a 'marketing agent'.

An agent must, in order to be deemed to 'negotiate', take an active role in the process leading up to the agreement between the third party and the principal. It is thought that most 'marketing agents' will fall within the definition of commercial agent within the Regulations, since they will usually undertake some form of negotiation on behalf of the principal. If the agent merely manages, he will not fall within the definition (*Elf Oil UK Limited v Pilkington* (1994)). In *Parks v Esso Petroleum Co Ltd* (1999), the "agent" ran a petrol station and was paid commission on sales. Whilst the agreement described the petrol station operator as an agent, as a result of the lack of active involvement in the selling process, the agent was held not to be a commercial agent for the purposes of the Regulations. In *Esso*, the Court specifically noted that there could be "negotiations" within the Regulations where the agent had no authority to negotiate price.

Following the leading decision in *PJ Pipe and Valve Co Ltd v Audco India Ltd* (2005) it is clear that the definition of a commercial agent is very wide and will be satisfied if the agent has developed the goodwill of the principal's business and procured business opportunities for the principal.

GOODS NOT SERVICES

The Regulations only apply to agents that have authority to negotiate the sale or purchase of goods (i.e.: not services). There are a few examples of what may constitute goods which may not be immediately obvious. The Courts have held that gas and electricity are goods for the purposes of the Regulations (*Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd* (2000)). Software is likely to be interpreted as goods, provided that it is supplied with hardware, rather than as an email attachment or download (*St Albans City and District Council v International Computers Ltd* (1996)).

The fact that the English Regulations cover only goods could prove troublesome for a principal (and indeed an agent), since in some EU countries, such as France, agents that sell and buy services as well as goods are deemed to be commercial agents. This clearly has implications for principals based in the UK who engage agents based in EU countries. Thought should be given as to the most appropriate choice of law and jurisdiction clauses to govern the agreement.

Cobbetts LLP has specialist teams advising on the impact of the Regulations. We take a pro-active and commercial approach to dispute avoidance and there are a number of options that can be considered in advance of any dispute to limit liability and the prospect of claims. In the event of a dispute, our specialist Commercial Agents Dispute Resolution team is on hand to protect your position.



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