

# LEGAL SURGERY

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THE UK SALES AGENT REGISTER

## Commercial Agency 28 Years later (Part I)

**You may have watched the cult horror film *28 Days Later* and its sequel *28 Weeks Later* about a post-apocalyptic world in the aftermath of the killer virus Rage.**

**28 years later, after the coming into force of the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) (as amended) ('the Regulations') implementing Council Directive 86/653 [1986] OJ L382/17 ('the Directive') after Brexit and, we all hope soon, after virus, the Regulations rage on for some, creating their own horror stories.**

**With many principals looking to vary or terminate sales agencies to save costs in these zombified economic conditions, against a backdrop of Covid, we have seen an increase in claims often caused, or worsened, by a misunderstanding of the Regulations.**

**In this article, I summarise a selection of rights and obligations under the Regulations, examine some common misconceptions and set out some practical steps that might be taken to mitigate exposure to the Regulations.**

### Introduction

The Regulations came into force on 1 January 1994 and contain important provisions affecting the relationship between commercial agent and their principal.

Broadly speaking, a 'commercial agent' is a self-employed intermediary who negotiates or negotiates and concludes sales or purchases of goods on behalf of and in the name of his principal.

Unlike the English common law - this was really the big change that threw agents, principals and lawyers alike in 1994 (still today) - the Regulations provide an entitlement to 'compensation' or, if agreed by the parties in writing, an 'indemnity' on termination of the agency agreement by the principal or the agent in certain circumstances.

The Regulations also set out duties owed to each other by commercial agents and their principals.

The Regulations also contain provisions relating to the basis of remuneration of commercial agents, the termination of commercial agencies and the validity of restraint of trade clauses.

In all other respects, relations between commercial agents and their principals are governed by the common law, equity and, to a more limited extent, other legislation applicable to agents and their principals.

The underlying purpose of the Directive is to protect agents by giving them a share of the goodwill which they have generated for the principal, and from which the principal will benefit after the agency agreement has been terminated.

The UK Courts are required to interpret the Regulations (even after Brexit unless the Directive is amended or repealed), so far as possible, in light of the wording and purpose of the Directive in order to achieve the result intended by the Directive.

### Incorporation or Exclusion of the Regulations

The commercial agent and principal may agree to incorporate the Regulations into an agency contract.

The Regulations impose various terms on the relationship between commercial agent and principal, many of which may not be excluded by contract. All are subject to an overriding duty of good faith. If there is no mention of the Regulations in the agency contract, and the agent is a commercial agent, the Regulations restrict the freedom allowed to a principal and agent under English law to contract as they wish.

To the extent that a sales agency contract tries to exclude the Regulations or limit those provisions in the Regulations that cannot be excluded - for example, the right to compensation or indemnity on termination - the clause seeking to exclude is unenforceable.

In my experience, despite the passage of time since implementation of the Regulations, principals often insist upon such 'exclusion' clauses in agency contracts. In recent cases I'm surprised to still see: 'The Regulations do not apply to this agency contract', and 'the parties agree that on termination to the extent the Regulations apply compensation shall not be payable'.

Some principals consider it worthwhile including such an unenforceable clause, because it is possible the agent is persuaded not to make a claim or seek advice, particularly, as if the agent does

not notify the principal within one year of termination his intention to bring a compensation claim, the right to bring a claim is lost.

### How the Agent is Described

There is a general misconception by agents and principals that how the agent is described by the principal, either in the contract or on, for example, a website is the only thing that decides whether the agent is a commercial agent under the Regulations.

On recent cases I've been involved with principals have described agents (presumably to try to avoid the Regulations), as: 'consultant', 'contracts surveyor', 'sales engineer', 'adviser' and 'marketing executive'.

The relevant issue however is what the agent does, not how he is described by the principal.

**The second and third part of this article will be published in the coming months.**

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