

Guidance Note: Sale of Goods Act 1979 – Other types of Agent

1. AGENCY - LEGAL BACKGROUND

1.1 What is an agent in law?

The term “agent” is often used in a commercial or legal context to mean someone who is authorised to act for the “principal”.

English law governing agency has matured over time through case law precedents (and in some respects also been augmented and modified by statute).

As a purely legal expression the term “agent” means someone authorized by a principal to act as an intermediary between the principal with a third party, including entering into contracts with third parties. (An agent is therefore generally has no personal liability involved in making a contract between the agent might negotiate a sale of goods on behalf of the principal and then sign the contract in the name of) the principal.

Alternatively, an agent might be authorized to deal with one or more third parties on behalf of the principal's name with such third parties.

As a commercial rather than legal concept, the term “agent” often embraces functions wider than or different from the pure legal “agent” – see under “Commercial Agency” below.

An agent's authority generally (but not necessarily) arises from an agreement between it and the principal. Principals should have a suitable means by which an agent's authority is defined, limited and regulated, and the principal can clearly set out what the agent is to do.

1.2 What are the general duties of an agent?

An agent has certain key duties implied by common law.

The agent must:

- (a) keep the principal's information confidential;
- (b) not delegate its own duties if the agent's individual skill is not material to the performance of the duty;
- (c) properly account for profits made on behalf of the principal. Not to do so could be criminal offence;
- (d) follow the principal's reasonable instructions and stay strictly within the principal's guidelines;

- (e) follow its instructions and
- (f) act in good faith and fair
- (g) not make any secret prof
- (h) act in the principal's be
- (i) disclose material facts to
- (j) do something that it has

and skill;
 the agent's position;
 (i.e. not pursue any conflicting
 present half-truths;
 reasonable time frame.

1.3 What are the general duties

agent?

The principal's duties include the du

- (a) comply with its obligation
- (b) pay the agent as agreed
- (c) pay the expenses of the
- (d) indemnify the agent for

ement;
 the agent;
 discharging its obligations, unless
 liabilities it incurs whilst properly

1.4 What restrictions might the

under an agency agreement?

The terms of the agency appointm
 agent, but also on the principal. Th
 principal may and may not do in cor
 restriction in an unambiguous way,

clude restrictions not only on the
 n will be a statement of what the
 The agreement should set out this

(a) "Sole agency"

The principal agrees not to appoint
 the agreement states is given to th
 and to negotiate sales directly for its

on its behalf in the territory which
 principal is able to seek customers

(b) "Exclusive agency"

The agent has the exclusive right
 principal is prohibited from trying to
 that territory.

al in the stated territory and the
 negotiate sales directly for itself in

(c) "Non-exclusive agency"

The principal is free to appoint othe
 and sales/transactions itself in that t

territory and also to seek customers

2. COMMERCIAL BACKGRO

2.1 What is the commercial m

As a commercial expression, the te
 beyond, is wider than, or is differ
 recruitment agents or estate agents
 have authority to affect the legal po
 would be a distributor/retailer desc
 fact it only buys goods from that su
 its own customers, i.e. not on beha

d to embrace a function that goes
 meaning of "agent". For example,
 nts in law since they often do not
 (i.e. their client). Another example
 's/manufacturer's "agent" when in
 resells them on its own behalf to
 turer.

2.2 What types of agent are th

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The term “sales agent” includes a distinguish the two forms of agency not a “commercial agent” because between “commercial agency” and

(see below) but it is more usual to be as a sales agent only if they are the parties differs substantially “agency”.

(c) Commission Agent

This is really no more than a general in the form of commission on sales is usually a percentage of the value

any type of agent who is rewarded in some other form. Commission can be a flat fee.

(d) Distributor

An agent is an intermediary, and simply an intermediary between a supplier and derived from a supplier by the distributor buys the goods and resells them which they pay for and own, they can earn a profit margin based on goods. In contrast, an agent earns to the customer, they do not pay for guarantee that the customer will pay liability.

goods, as noted above, is in a sense and customer in that the goods are the other. However, a distributor distributor may hold stocks of goods before they can resell them, and they relative to what They pay for the cannot set the sale price charged own them. An agent may agree to not have to agree to take on that

(e) Franchisee

A franchisee contracts on its own but or proportion of its turnover to the exchange for the use of the franchise agency relationship.

he but will often pay a percentage percentage or proportion is usually in products, so is quite different to an

(f) Introducer/referrer

This is an expression used to refer to a client/customer in return for which itself or (ii) instead for the introduction sale takes place within a state “introducers/referrals” are estate agent potential buyer, or who introduce a supplier/ manufacturer who is introduced order is, or is yet, contemplated.

is to effect an introduction/referral fee (i) for the introduction/referral results in a sale (usually only if the introduction/referral). Examples of produce a seller of a business to a business. It may also refer to a new client where no potential sales

(g) Commercial Agent

A commercial agent is a type of sale largely by the Commercial Agents (Regulations 1993) whereas the relationship between a commercial agent largely governed by the common law

relationship with their principal is governed Regulations 1993 (the “Regulations”), agent and their principal is instead Regulations.

We have set out further details below “Regulations 1993” section, about commercial agents tests that will enable you to distinguish commercial agency rather than some

Agents (Council Directive) section includes a number of key particular arrangement amounts to relationship.

It is essential for businesses to properly with contractors / agents and, in particular agents are “commercial agents” under

status of all of their relationships whether any of their contractors / is vital if they are to understand

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the various legal obligations, duties and vice versa.

we to their contractors / agents

3. WHAT AGENCY AND OTHER DOCUMENTS SIMPLY-DOCS OFFER?

The following document templates are available for download from the Simply-Docs website. For some of these template documents, there is also a video version.

- Introducer, commission and agency agreement (click [here](#)) which you can reach by clicking [here](#)
- Commercial sales agency, purchase order, consignment of goods agency, distribution agreement (click [here](#))
- Heads of Terms templates for agency agreement (click [here](#)) and a checklist for negotiating an agency agreement (click [here](#))
- Power of attorney (click [here](#))
- Escrow agency (click [here](#))
- Advertising agency (click [here](#))
- Self-employed (individual) sales agreement (click [here](#))
- Sales (company) contractor agreement (click [here](#))
- Employment agents (click [here](#))

You will also find various estate agency agreements (click [here](#)) and holiday lettings agency agreement (click [here](#)) in our Property folder.

4. WHAT ARE THE COMMERCIAL AGENTS (DIRECTIVE) REGULATIONS 1993 (“THE REGULATIONS”)? WHEN DO THEY APPLY?

4.1 The Regulations

These Regulations govern commercial agency. Although the Regulations derive from EU law, they are fully part of English law since the European Withdrawal Act 2018 (and subject to the terms of the Act) and will remain in force after Brexit. In many respects, the Regulations represent a substantial change to the English law of agency.

4.2 What is a “commercial agent”?

A “commercial agent” is defined by section 1(1) as a self-employed intermediary who has continuing authority to negotiate or to negotiate and conclude such transactions on behalf of their principal and in the name of that principal.”

The scope of the words underlined above is defined in section 1(2) of the Regulations.

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4.3 When do the Regulations apply

Note that the Regulations apply not only to one who purchases goods, for their principal.

Principals need to be aware that the Regulations provide a level of protection, similar to that available to consumers.

Principals also need to be aware that the Regulations are intended to prevent arrangements with an agent that are not possible to contract out of the protection of the Regulations. It may be possible to structure their commercial arrangements so that the risk of those additional protections applying is minimised – see 4.4 below.

The Regulations only apply to some agents. An agent who falls within all of the following parameters:

- (a) They must be self-employed or a sole trader, partner in a company or partnership, not an employee;
- (b) They must buy or sell on behalf of a principal;
- (c) Their activities as agent for the principal must be in relation to goods, not services. It is not always clear what falls within this definition (see 4.4 below);
- (d) Their activities as agent for the principal must be secondary to their other activities for the principal;
- (e) They have authority to “negotiate” on behalf of the principal. If an agent is not authorised to negotiate terms and conditions on behalf of the principal but only promotes the principal’s goods or services, the agent only promotes the goods or services and does not have authority to bind the principal. The Regulations do not define “negotiate” but the meaning is clarified to a large extent by case law.

In the early years following the Regulations, some principals tried to avoid the application of the Regulations by their agent’s authority to negotiate on their behalf, and in particular by entering into a contractual relationship with the agent. Then, in 2005, a leading case clarified the meaning of “negotiate”. It amounts to “negotiation”. It is not necessary for the agent to be a commercial agent is very wide. An agent who develops the goods or services and procures business opportunities for the principal is deemed to “negotiate”, if as the court said, “.. the agent gets

This means that an agent is deemed to “negotiate” on behalf of the principal in a transaction with a customer where the customer places an order with the agent. It is not necessary for the agent to negotiate or agree the terms of the transaction - it is enough if it takes an active role in the process leading to the transaction between the third party and the principal. Most ‘marketing and

sells goods, but also to one who

commercial agents substantial defined at 4.4 below.

of the Regulations, it is not easy to contract out of the Regulations. However, principals may be able to structure their commercial arrangements so that the risk of those additional protections applying is minimised – see 4.4 below.

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(e). This expression extends to a

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agent” since they will usually act on behalf of the principal. If the agent merely

of negotiation on behalf of the principal, they will not be “negotiating”;

- (f) They have authority to negotiate on behalf of the principal. In a leading case, it was held that an intermediary who negotiated a single contract on behalf of the principal and had continuing authority to negotiate further contracts. Authority to negotiate only a single contract will mean that the agent does not have continuing authority;

principal's behalf which is “*continuing*”. It was held that an intermediary who negotiated a single contract on several times over a number of years on behalf of the principal was a “commercial agent”. It is the only involvement in fact, and not a mere formality, of continuing authority;

- (g) They must be “*independent*”

It has been held that a commercial agent who performs its activities from the principal's facilities does not determine whether an agent is independent. To the principal, it is necessary to consider:

commercial agent even though it is not a commercial agent so long as the agent's use of the principal's facilities is independent. To determine whether an agent is independent, it is necessary to consider:

- agent is subject to the control of the principal;
- agent's ability to organise its own business;
- agent's economic risk.

limited; the agent's economic risk is not affected.

Whether or not the agent uses the principal's facilities for the negotiation or purchase of goods, it does not prevent it from performing agency work if that work is ranked equally with other work.

agent, if it performs some duties for the principal in connection with the negotiation or conclusion of the sale of goods, so long as those duties do not prevent it from performing other work independently and so long as the agent is not under the control of the principal.

To determine whether an agent is independent, other, non-agency activities must be considered:

agent is not compromised by its carrying out other, non-agency activities. It is necessary to consider the:

- nature of the various activities;
- manner in which various activities are carried out;
- proportion of agency work to other work;
- method of calculation of remuneration;
- reality of any financial independence.

out; activities; independent.

4.4 What rights do the Regulations give to the agent?

Commercial agent?

The terms of the Regulations are independent of the agency agreement, whether written, oral formal or informal. They apply to the agent. The ability to exclude any part of the Regulations is limited.

agency arrangements, whether formal or informal, the provision of certain protections for the agent is limited.

It is important that agency agreements are drafted from both the agent's and the principal's perspective to take into account the Regulations and both parties would be well advised to take legal advice before finalising their arrangements.

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Under the Regulation, the amount of remuneration can be agreed with the agent, but in the absence of agreement it is to be based on the amount of commission received by the agent in the territory where the agent's actions, or in the territory where the agent has a regular list of customers. Under certain circumstances, the amount of commission may be based on the amount of commission received by the agent after the agency contract has been entered into.

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attributable to the agent's efforts during a reasonable period after the end of the

agreement if the order is within a

The Regulations also govern the controversial aspects of the Regulation. If an agreement is entered into for an indefinite period, it is possible for either party to terminate the agreement by giving notice to the other, as long as the notice period is at least one year of the agreement, two months for the second year of the agreement, and three months for the third and subsequent years. Although the parties can agree a longer notice period, the principal cannot validly be given a shorter notice to the agent.

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Any agency agreement for a fixed period will be converted into an indefinite period if the agreement expires without being renewed.

be performed by both parties after the Regulations to be converted into an indefinite period if the agreement expires without being renewed.

On termination or expiry of the agreement, the agent is entitled to either an "indemnity" or "compensation" term. If the parties want to opt for an indemnity, they must specify the amount of the compensation payment. The indemnity payment is mandatory and not apply if the principal terminates the agreement due to a breach. Nor will it apply where an agent terminates the agreement on grounds attributable to the principal's death, infirmity or illness, he will still be entitled to an indemnity payment.

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The indemnity payment will be calculated as the value of the business brought new customers to the principal (i.e. the increase in the volume of business), and on other occasions as a proportion of one year's commission, calculated as a proportion of the preceding five years or the period of the agreement if less than five years. The indemnity payment is separate from the compensation payment to which the agent may be entitled.

is built up by the agent (i.e. it has increased the volume of business brought new customers to the principal (i.e. the increase in the volume of business), and on other occasions as a proportion of one year's commission, calculated as a proportion of the preceding five years or the period of the agreement if less than five years. The indemnity payment is separate from the compensation payment to which the agent may be entitled.

The compensation payment is for damages suffered by the agent as a result of termination, as compensation for the loss it will suffer as a result of the agency relationship. The amount should reflect the value of the business brought new customers to the principal (i.e. the increase in the volume of business), and on other occasions as a proportion of one year's commission, calculated as a proportion of the preceding five years or the period of the agreement if less than five years. The indemnity payment is separate from the compensation payment to which the agent may be entitled.

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Under the Regulations, if a claim for compensation is not made within one year of the termination, the agent loses his right to claim.

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5. CAN LEGAL PROBLEMS ARISE FROM THE UNCERTAIN SCOPE OF AUTHORITY GRANTED TO AN AGENT?

THE UNCERTAIN SCOPE OF AUTHORITY GRANTED TO AN AGENT?

The following issues relating to authority arise from the Regulations but all principals and agents should be aware of them.

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An agent's liability

If someone, i.e. the "agent", is not authorised by the principal to create or alter their legal relations with third parties on their behalf, but the "agent" nevertheless does so, the "agent" is personally liable for its own statements and actions. Even if an agent does so on behalf of the principal, he is personally liable. This could occur if the agent's signature and the words "on behalf of the principal" are not clearly stated on the document.

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A principal's liability

Conversely, a principal might be at fault if the principal has not given actual authority to the agent, does not intend that to be the effect of the act of the principal or agent representing to a third party as appearing to have authority to carry out the act authorised by the "principal". Such a principal is liable to a third party on behalf of the principal although the agent does not have that authority.

A principal therefore needs to check the agent's authority, or as having its authority, and when necessary to limit it by appropriate means (e.g. by a written agreement (see below)). A principal also needs to check the scope of the agent's authority and to limit/regulate it by such appropriate means.

An agent's authority generally (but not necessarily) arises from an agreement between it and the principal. Principals should have a written agreement with their agent since that is a suitable means by which an agent's authority is defined, limited and regulated, and the principal can clearly set out what the agent is to do.

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an act of the agent even though the principal has not given authority for that act or that type of act and the principal does not intend that that party might claim that, based on the principal's authority or based on the agent's authority, the agent's act is in law to be treated as if the principal had authorised the agent making a contract with a third party on behalf of the principal although the agent does not have that authority.

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