



Professional Sales Association

A Guide To The Law For Commercial Agents



THIS IS A GUIDE ONLY PLEASE REMEMBER TO SEEK PROFESSIONAL ADVICE
BEFORE ACTING IN RELIANCE OF ANYTHING CONTAINED WITHIN THESE PAGES

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What are the Regulations?

The Commercial Agents (Council Directive) Regulation 1993 came into force in January 1994 as guidelines to assist Agents in their working relationship with their Principals

This guide is aimed at cutting through the legalities of being a Commercial Agent and giving you the facts you may need to survive.

Commencement of a Commercial Agency Agreement

Who is a Commercial Agent?

A Commercial Agent is defined under Regulation 2 of the Regulations as set out below: -

2 (1) *In these Regulations -*

"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 the principal;

<i>Self-Employed</i>	Put simply not an Employee
<i>Intermediary</i>	A go between
<i>Authority to Negotiate</i>	Not as you may think the ability to make changes to the terms and conditions but simply the ability to manage the sales of the products to the customers.
<i>Sale of Goods</i>	ie not services
<i>On behalf of the Principal</i>	Not on your own behalf as a distributor for example

The major exceptions to this are as follows: -

You are an officer or partner of the company you are working for as their agent
Not an agent for the majority of your working time
You are selling the products on behalf of an overseas government
You are not paid for your services
You are not working on a commodity exchange
Consumer credit agents
Mail order catalogue agents for consumer goods - i.e. not agents who work for Great Universal or Kays etc.

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Rights of an Agent

The Regulations provide, that an Agent can expect during his relationship, the following from his Principal: -

REGULATION 4

The Principal must act dutifully and in good faith and in the Agents best interests. They must provide the agent with enough documentation to enable the agent to sell their products and must inform them of any instance where they believe there may be a problem with the level of supply of the goods.

REGULATION 6

The Principal should pay the Agent in the absence of an agreed commission rate what is the norm for that type of product in that area.

REGULATION 7, 8 & 11

The Agent has the rights to commissions under Regulations 7 & 8, which cannot be lost, unless the Agent agrees, or (according to Regulation 11) the sale did not complete due to a reason for which the principal is not to blame. (See rights on termination for more details)

REGULATION 10

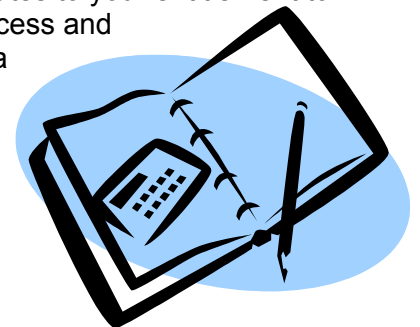
Sets out the latest date by which the Agent should be paid as being the last day of the month following the quarter when it became due. The commission becomes due at the very latest when the customer pays or should have paid if the goods were delivered on time. In this way if your Principal does not pay you on time and uses the excuse of the customer not paying him & you know that the delivery was late you can simply point out this Regulation to them.

REGULATION 12

This states that the Principal should supply a statement setting out the main components used in calculating the Agents commission entitlements and if the Agent is not satisfied they have the right to inspect the Principals books and records in order to check what was due. This does not mean that you have the right of access to all their records, only those that relates to your entitlement to commission. Principals often do not wish to comply with this right of access and hence as a compromise you could suggest that your accountant does a independent audit with the cost met by the principal if errors were found or by you if not.

REGULATION 13

The Agent has the right to a written contract from the Principal under Regulation 13. (See the section on contracts)



REGULATION 14

If you had agreed to a written contract, which was for a fixed period, and that contract was not renewed prior to its expiry and both party's continued to perform their normal agency duties, then the previous fixed term contract becomes a contract for an continuous period. This contract would still be valid with regard to all the other terms, the only difference being that it would not expire on the termination date.

REGULATION 15 & 22

You and your Principal are entitled to a period of notice on termination as set out below. This does not apply if you are on a fixed term period as effectively the agency is already on notice, as both parties know when the agreement should come to an end. (See rights on termination for more details). Any notice that is given has to be in writing according to Regulation 22 and therefore if your principal verbally terminates you should always confirm this in writing. Unless the written contract allows for it faxed or e-mailed termination letters are not valid ways to inform the agent or the principal of their intention to terminate.

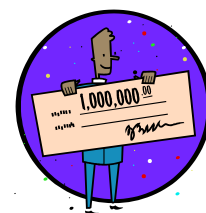
REGULATION 18

The Agent can resign his agency and would not loose the right to pursue his or her entitlement to Compensation or Indemnity, if; the termination was due to either the actions of the Principal or on grounds of illness, infirmity, or possibly age in consequence of which he or she cannot reasonably be expected to continue. This does not mean that just because you reach a certain age you can retire and claim Compensation or Indemnity. You need to prove that you could not be reasonably expected to continue due to your age. Regulation 18 also states; that as long as the Principal agrees in writing, the Agent can sell the agency on as a going concern to another agent.

INTEREST ACT

In addition to the rights under the Commercial Agents (Council Directive) Regulations 1993, the agent has the right to charge interest under the Late Payment of Commercial Debts (Interest) Act 1998. This Act allows agents to charge interest at a current rate of 8% above Bank of England Base Rate i.e. The base rate at present is 3.75%* therefore the statutory rate is 11.75% p.a. payable from the day after it should have been paid.

See draft on page [37](#)



*** Please check the rate with the PSA Office**

Rights of a Principal

The Regulations also provide, that a Principal can expect during his relationship, the following from his Agent: -

REGULATION 3

An Agent, In performing his activities must look after the interests of his principal and act dutifully and in good faith. This means that if an agent wishes to take on another product range they must first seek the approval from all existing Principals first. In addition, a Commercial Agent must: -



- (a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
- (b) communicate to his principal all the necessary information available to him;
- (c) comply with reasonable instructions given by his principal.

This means that if a principal wants a written report from the agent they should be supplied with one if its contents are necessary and the task is reasonable. The excuse of well I don't want to do it so its not reasonable will not hold any water and hence should not be tried. Likewise the requirement to transmit necessary information does not mean actively seeking information unless such action can be proven to be reasonable.

REGULATION 11

The Principal has the right to recover from the Agent, any commission which was paid in advance of the sale completing where the sale does not complete due to a reason not attributable to the Principal. If the sale does eventually complete then the Agent should receive this commission back.

The Principal has also the right to ask for a written contract under Regulation 13 from the agent although these situations are far less common.

REGULATION 15

The Principal has the right to notice if the agent wishes to leave to start work elsewhere or to retire if they are physically able to provide it. If the Agent does not provide this notice then the principal could take legal action against the Agent for damages and prevent them working for the new Principal.

REGULATION 20

If the agent agrees in writing Regulation 20 could prevent the Agent from working for a competitor for up to 2 years following termination in the territory previously worked for the Principal. This is not a restraint of trade and is valid if agreed in writing. This is another reason why your contract would need to be read before signing.

Contracts



When agents read the word contracts they immediately think of a multiple paged document with phraseology that would confuse even the smartest of solicitors. This does not have to be the case.

A contract need not be in writing but could be constructed simply by the actions both parties exhibit in their relationship. For example, if you as an Agent have been acting in such a way, to fit the criteria of a Commercial Agent as defined above, then although the Principal may not have agreed that you are a Commercial Agent in writing, by virtue of the custom and practice of the relationship you would then

be a Commercial Agent.

Be warned, however, in that if you are based in the Republic of Ireland and commenced your relationship with that Principal after 1994 you require a written agreement to fall within the definition of a Commercial Agent due to the subtle difference between Irish and Great British Law. There is no such requirement in England, Scotland, Wales or Northern Ireland.

A written contract this could easily take the form of a letter of appointment rather than a long winded contract and hence agents should always be warned to read this letter with extreme care.

The best case scenario for an agent is to have only a brief written contract setting out the main terms. The second best option is no contract at all followed by the worst case situation of a multiple paged long-winded agreement, which has the agent, tied in knots.

The simple piece of Advice we can give agents is **"When in Doubt, Check it out"**

In any event and what ever is contained in your contract this can also change by custom and practice throughout its duration. A Contract is always a dynamic relationship and can change at any time **subject to both parties' permission being given.**

As with any written contract it is always the fine print that contains the nastiest clauses and these could include one or more of the following: -

A Few Sample Nasty Clauses in Contracts



The Principal reserves the right to alter the terms - This could mean that the Principal could take away all but the smallest proportion of your agency rights to be paid on sales with customers and there would be very little you could do about it.

The Agent agrees to be a Del Credere Agent - Unless you know what a Del Credere Agent is you may fall for this but if you did you could easily be facing the bankruptcy courts. A Del Credere Agent is one who acts as a guarantor for his customers, so that if the customer does not pay, the Agent would then be liable to pay the Principal for the debt.

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The Agent will provide details of the activities of the Principals Competitors -

This may look innocent enough however beneath the surface lies a monster waiting to be wakened. If you have agreed to this clause then the principal may terminate your contract due to a fundamental breach and claim damages from you for not informing them of some information relating to the competitors activities which has caused them financial harm. You may not have been even aware of this situation, but as the clause does not state "that the Agent becomes aware of" it is a potential time bomb. **Further, if you disclose other Principals' business interests to another Principal, this is grounds for dismissal**

If the Agent fails to obtain sales in excess of X per month, the principal reserves the right to terminate with immediate effect -

Sales Targets are fine on their own as they serve as something to strive for throughout the year. However, a clause, which links failure to achieve sales targets with termination, is very dangerous for the Agent as circumstances beyond his control could result in the loss of that contract without any Notice, Compensation or Indemnity.



The Agent agrees that for a period of 24 months following the termination of the Agency contract for whatever reason the Agent will not sell products similar to the Products in the Area. -

You may at first glance think that this would not be enforceable. However, if the clause relates to the geographical area or the group of customers you dealt with and to the kind of goods covered by his agency under the contract and the period in question was for a period of not more than two years in duration, it may well be valid. If you ignored such a clause the legal reifications could be severe in that you could be legally prevented from working for the new principal and fined the legal costs of this action which could run to tens of thousands of pounds.

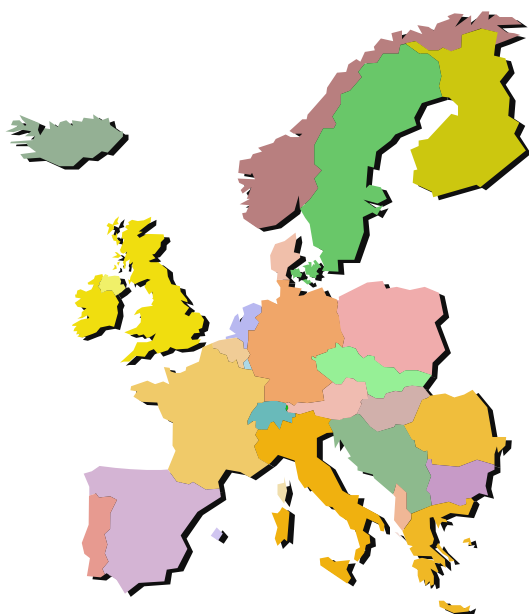
Contracts subject to other Counties Legislation

If you agree to be bound by an agreement which is subject to another country's legislation other than the country in which you are based then it is always advisable to seek legal advice from a solicitor or other trained legal body in that country.

It should be remembered, however that in the absence of a written contract, the legislation that governs the relationship will be that country in which the contract is being performed. This would normally mean the country in which the Agent is domiciled.

If the Country, whose laws govern the contract, were a member of the EU then that country's version of the EU Directive would apply to the agreement as opposed to the Agent's domestic legislation. If the Country, whose laws govern the contract, were not a member of the EU then that country's laws only apply in part, but in the event of dispute, the agent would still retain their rights under their domestic Regulations.

There is (Currently) no single European law in the context of a Commercial Agent



Regional examples of variations in the Regulations are as follows: -

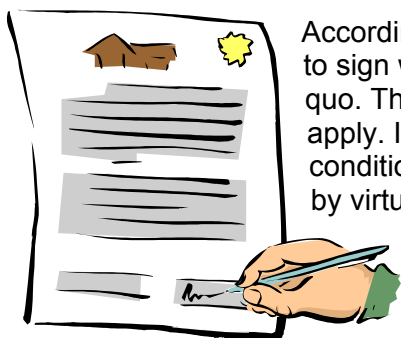
In France and The Republic of Ireland apply the rule, that an agent should have no cap on their entitlement to a termination payment and hence follow the same route as the UK's Compensation entitlement and there is no entitlement to an Indemnity.

In Germany the Agent is a Del Credere agent under their legislation

In Italy Del Credere clauses are unlawful.

In the Nordic countries, Agents selling services are also covered by their version of the EU Directive.

Do I have to sign the contract?



According to Regulation 13 the only contract you would have no choice but to sign would be a document which reflected what was the current status quo. This does not mean that by simply not signing the contract, it does not apply. If you have continued to work for the Principal following terms and conditions as described in the contract, then the Principal could argue, that by virtue of your actions in not rejecting the contract, you have accepted it.

It is therefore vital that you should obtain suitably trained solicitors' opinion on the proposed draft.

What do I do on receipt of a contract?

The first thing that should be done when you receive a contract is to acknowledge its receipt and state that you are having it checked by your legal advisor (see draft letter on page 32). The next stage should be to send a copy of the contract to a solicitor for checking. As a member of the PSA you are entitled to a discounted contract reading from First Assist (see advert on page 41).

On receipt of the solicitors report you would then need to contact your Principal and state which parts of the agreement you cannot agree with and provide a suggested amendment.

All letters regarding this new contract should be marked **'Without Prejudice and Subject to Contract'** meaning that whatever comments you make are strictly off the record and subject to the contract being accepted at the end of the day.

There is no such thing as a Draft ideal Agency Agreement as contracts will be written to either favour the Agent or the Principal. Therefore no matter what is agreed the contract will always be a compromise. On pages [33/35](#) you will find the PSA draft agreement which understandably favour Agents.

Can an Agent send the Principal a Contract?

Either party in an agreement can send a contract to the other, but legally the only contract that has to be signed would be a contract, which does no more than confirm the current status quo.

Custom & Practice

Custom and Practice is the legal term, which acknowledges that not all contracts, or amendments are written down. Even if there is a written agreement in place, a judge hearing a case will always look at what has happened during the agency in tandem with the written contract. Therefore, Agents should always be on guard against any alterations to the agreed terms, which might have a knock on effect on their entitlements.

Custom & Practice can also prove useful when establishing your entitlement to commission. Regulation 7 states the only three times an Agent becomes entitled to commission.

- When they have taken the order themselves
- When the order was obtained from a customer introduced by the Agent to the Principal for that type of product
- Or where the Agent has the exclusivity for the group of customers or area where the customer is a member of that area or group.

If therefore you are routinely paid commission on orders placed directly with the Principal from customers not introduced by the Agent, then the Agent must by Custom and Practice have been granted the exclusivity.

Alterations to an Agency Contract

Unless the written contract between the party's states: that the Principal has the right to make alterations **or** the Agent has given the Principal such authority to do so, by virtue of a previous change in the terms which went unchallenged, (Custom & Practice) the Principal cannot make unilateral amendments to the Agents terms.

What sort of changes are we talking about?

The ones that occur most often include: -

- Removal of an Area
- Additions to House Accounts
- Reduction of the Commission Rate
- Removal of a Product
- The loss of your Exclusivity
- The transfer of your contract to a third party



All but the last one in the above list have the net result of agents losing their right to commission.

Removal of an Area, House Accounts & the loss of your Exclusivity

In the all of the above situations, one thing prevails and that is the Principals request for you to relinquish your rights to commission on the sale of products to a customer or customers. According to Regulation 7 you are entitled to commission when a commercial transaction was concluded during the period covered by the agency contract if; *7.1(a) the transaction has been concluded as a result of his action; or 7.1(b) where the transaction is concluded with a customer whom he has previously acquired for transactions of the same kind.*

In this way you are entitled to receive commission on sales concluded with the customer you introduced no matter who takes the order during the contractual period. But what happens if the order was obtained from a customer whom you did not introduce? Regulation 7.2 states: -

7.2 A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group.

Even if the contract states that you are a non exclusive agent, you must look at the realities of the situation and take into consideration the custom and practice. It still may be possible to argue that the Principal has agreed by virtue of their actions that you are exclusive. (See Custom & Practice)

If therefore the Principal cannot obtain your agreement to this change he would be acting in breach if they withheld the commission from the sale of the products to this area, account or those made by any other route on your territory.

Reduction of Commission

If and only if there is no agreement on the amount of commission that should be paid to an agent Regulation 6 applies, which states: -

Form and amount of remuneration in absence of agreement

6. (1) In the absence of any agreement as to remuneration between the parties, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities and, if there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.
- (2) This regulation is without prejudice to the application of any enactment or rule of law concerning the level of remuneration.

Therefore the amount should remain the same as previously stated if there is no agreement as to any other commission rate. If therefore the Principal only pays you commission at the reduced rate, they are breaching the contract.

Reduction of Product Range

In the case of a removal of a product the area is a bit more of a grey area as it might be said that your Principal is constantly changing his range to cope with the market forces and new fashions in the industry. If however it involves the removal of a type of product, shirts for example, and they stated that you could no longer sell these items, then you may have a justifiable case.

What can be done about the unpaid commission that results from these alterations?

Often the last thing an Agent would wish to do whilst working for a Principal, would be to rock the boat. However, if the Agent does nothing they could be setting a legal precedent, giving the ongoing authority to the Principal to make such future alterations.

Therefore there are only eight realistic options: -

- Do nothing and give the Principal the right to make future changes
- Agree to the alteration but strictly on the understanding that it would be only on this occasion
- Reserve your rights to the commission (Not recommended as it has never been tested and it is doubtful as it would be successful in delaying the matter until after termination).
- Continue to invoice the Principal for the commission that would have been due had there not been the alteration.
- Claim for the interest on the commission under the Late Payment of Commercial Debts (Interest) Act 1998.
- Lodge a claim under section 13 of the Employment Rights Act 1996 if you fall within the category of a 'worker' as defined under section 230.3.(i.e. non partnerships and no limited Company contracts with Principals)
- Lodge a claim for breach of contract under the Commercial Agents (Council Directive) Regulations 1993
- Resign due to fundamental breach of contract by the Principal (not Recommended unless legal advice is sort before you take such a step).

At the end of the day if some compromise and a payment of damages is obtained amicably there should not be any need for the agency to come to an end.

Transfer of contract

If the contract does not allow for the transfer of the engagement but the principal wishes to either change from a sole trader or a Limited Company or Partnership, or one company is being sold to another there may be a situation where the Principal may wish to alter who you are effectively working for.

This may result in the termination of the contract, if the purchaser of the business does not wish to use agents.

But who do you then claim from?

If sold as a sale of shares and the agency is terminated after the sale - **claim against new owners**

If sold as a sale of shares and the agency is terminated before the sale - **claim against old owners**

If some assets are purchased but not others - **claim against old owners**

Non Payment of Commission

The normal practice in an agency is for the agent to be paid either at the end of the month following invoice or settlement. Regulation 10, however, provides that an agent should be paid at the latest by the end of the month following the quarter when the payment becomes due. Payments become due at the latest when either the customer pays or ought to have paid if the goods were not delivered on time. Even in a written contract, this may not be exceeded.



Despite this, some Principals do not pay on time and hence breach the contract and on occasions the Regulations. In itself, although this may be a breach of contract, the courts may not view it as fundamental enough to warrant immediate termination, by the Agent.

Situations like these need to be handled carefully, with an ever-increasing level of response to the Principals' actions.

What to do

Initially, the agent should contact the Principal by letter within a fortnight following the missed payment day, stating that you believe that there may have been a slight oversight, in that they have not paid you the commissions that you are due.

If no response is received within the next fortnight, send a second letter, stating your surprise at not being paid despite your earlier letter & enclose a copy.

If still no response is received within the next fortnight, state that you are becoming increasingly concerned that you have now missed not one but two payment dates without any money. State that unless you receive payment in full you will have to take further action.

If the Principal still does not pay up within the next fortnight, then threaten them with interest on the outstanding balance, under the Late Payment of commercial Debts (Interest) Act 1998. (See draft letter on page 37)

If a fortnight goes by, and the Principal still has not taken any action, send him an over-estimated invoice for the commission that you believe is outstanding with an additional amount for interest on the balance. Make it clear that this is an estimated amount, but will be adjusted to the correct balance once they provide copies of the relevant pages, from their books and records to enable you to check your calculations. I would then point out that according to Regulation 12 the Agent has the right to demand access to this information, which you hope, can be avoided.

If yet another fortnight goes by and still no reply is received, we suggest that you send yet another letter pointing out that unless you receive the payment and the information in the next fourteen days, you will commence legal action to recover the monies through the courts. Point out your rights under Regulation 10 as stated above and also send a revised invoice including more interest.

If the Principal ignores this letter then depending on the value of the outstanding amount, you should either commence a Small Claims Court action or contact the PSA office regarding the possibility of taking this matter further, either through an Industrial Tribunal, or the courts system. It will be at this stage when you will be advised as to whether or not your Principal has acted in such a way as to have fundamentally breached the agreement. If the Principal is in fundamental breach, you may be able to resign, due to their actions, without losing your rights to a payment of Compensation or Indemnity **(but it is crucial to seek legal advice first before taking this step)**.

All but the first two letters should be sent by both Recorded delivery and by fax.

Can I claim Against the Directors and Shareholders if A Company Goes Into Liquidation?

The answer is no unless you can prove that the Directors were disposing of assets, in order to avoid having to pay their creditors for far less than their commercial value, prior to the company going into liquidation. You cannot claim against the new company either, if it does not purchase the company from the liquidators, warts and all, including the Companies House registration number.



The only body you can claim against would be the company, which is now in liquidation. Currently the status of Commercial Agents falls into the category of unsecured creditors and hence, other than the owners, you are last but one to be paid, along with other suppliers of goods and services.

You can still make a claim for notice, unpaid commissions and compensation or indemnity in the usual way, but it is unlikely that you will be paid the full amount. It may result in you receiving only a few pence in the pound.

Advantages & Disadvantages of Limited Companies & Partnerships

Although there may be tax advantages to being a Limited Company or a Partnership, there are also disadvantages. As stated earlier an Agent can resign on grounds of their age or illness and still have the right to Compensation or Indemnity. Limited Companies and Partnerships, however, cannot get ill or become infirm and are ageless. Therefore, if your agency contract is with the partnership or the Limited Company you forgo your entitlement to a retirement payment of Compensation or Indemnity.

According to Regulation 17.8, upon the death of a Commercial Agent, their estate would have the right to claim Compensation or Indemnity. This again would be waived if the contract was with the Partnership or Limited Company as they cannot die.

In addition if the Agent is working for the Principal as a Sole Trader and not as either a Limited Company or a Partnership then they might fall within the definition of 'a worker' as set out under Employment law. An example of this would be the definition described by section 230.3b of the Employment Rights Act 1996 in that they are: -

an individual who has entered into or works under (or, where the employment has ceased, worked under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed according

In other words an individual who performs a task or provides a service for payment.

The only real advantage with a Partnership or Limited Company in an Agents context is where the owners of the Agency wish for the contract to be passed from father to son etc. In this situation the Agency Contract has not been altered as the parties have not been altered in the agreement, only their respective owners.

Changing from Sole Trader to a Partnership or Limited Company

If during the contract you wish to alter the agreement from that of the sole trader to a Limited Company or from a Partnership to a Limited Company or any of the possible combinations then it must be remembered that effectively you would be resigning and proffering the services of a third party to take over your duties. If, therefore, the Principal does not accept the new legal entirety as the Agent or will not recognise your previous term as being transferred you may have just resigned and given up all your rights to lodge a claim for your previous length of service. It is therefore not a recommended course of action.

SOLUTION

Check with your accountants first but it may be possible to have all the payments made to you, pay them to your Limited Company or Partnership then stating that as you are the contracted Agent you make no profits from this agency at all with regard to tax. You could then reap the benefits of both the tax and legal positions without the risk.

Retirement from A Commercial Agency

At present there is no case law, which confirms that compensation arises automatically when an agent retires because of age alone.



Retirement on what Grounds

The Commercial Agents (Council Directive) Regulations 1993 provide under Regulation 18 that a Commercial Agent can retire from an agency and still have the entitlement to Compensation or Indemnity.

The only reasons given in Reg. 18 are however: -

- Actions taken by the Principal in consequence of which the agent would not reasonably be expected to perform his duties
- Illness in consequence of which the agent would not reasonably be expected to perform his duties
- Infirmary in consequence of which the agent would not reasonably be expected to perform his duties
- Age in consequence of which the agent would not reasonably be expected to perform his duties

The first two are relatively simple to prove you should obtain a medical report from a specialist. The third however is more difficult. After all, what age would prevent you from continuing or at least make it difficult?

Can I retire from some agencies and not others?

Yes but it would have to be something special about your activities for Principal 1 over Principal 2 that would make it difficult. For example, if one agency involved some heavy lifting and the other didn't and you had a bad back, then you might have a case, if you gave your Principal the opportunity to work around the problem in some way, without success. If you intend to retire on grounds of your age therefore there needs to be some clear reason why your age would prevent you from working for Principal 1 & not preventing you from working for Principal 2.

Do I Have To Give Notice?

Regulation 15 states: -

Minimum periods of notice for termination of agency contract

15. (1) Where an agency contract is concluded for an indefinite period either party may terminate it by notice.
- (2) The period of notice shall be—
 - (a) 1 month for the first year of the contract;
 - (b) 2 months for the second year commenced;
 - (c) 3 months for the third year commenced and for the subsequent years;and the parties may not agree on any shorter periods of notice.
- (3) If the parties agree on longer periods than those laid down in paragraph (2) above, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.

A Guide To The Law For Commercial Agents

Please remember to seek professional Advice before acting in reliance of anything contained within these pages

- (4) Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.
- (5) The provisions of this regulation shall also apply to an agency contract for a fixed period where it is converted under regulation 14 above into an agency contract for an indefinite period subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

Therefore, unless exceptional circumstances arise, you must provide the principal with notice and if you fail to do so the legal ramifications are very severe. Such exceptional circumstances would include any medical problem such as a heart attack or stroke where by you cannot continue to operate as an agent.

Fixed Retirement Date Clauses In Contracts

If you have a clause in a written agreement for example, which states that your agency comes to an end on your 65 birthday, then this is a fixed term contract and hence if and when you reach that magical age you have the choice to continue as normal (if the principal agrees) or retire on grounds of the expiry of your contract.

In the Scottish case of *Frape -v- Emrio* The Principal tried to argue that there was no entitlement as they had not terminated. The Principal argued that the Agent had terminated the contract by reaching 65. **The court did not accept this and an agent could still claim at the end of a fixed term contract**

If there is a fixed term in place there is no need to give notice, as effectively the Principal and the Agent were aware of the termination date. If however the contract continues to be observed by both the Agent and the Principal, after the fixed term, then the notice period should be one, two or three months minimum as stated above in Regulation 15 as the contract would then continue in force and effect with the obvious exception of the termination date. (see regulation 14)

Are There Any Alternatives?

Yes according to Regulation 18.c the Agent could sell on his agency to another Agent if the Principal agrees. In this way the principal would not pay any Compensation or Indemnity as the selling Agent would recover this payment from the new Agent. The Principal would also win as they would have a keen replacement without any cost to them and the new Agent would gain because they would be buying an continuous length of service and hence your protection rights. If you are thinking of this option you should ensure that there is a three ways agreement to stop the agent working in this field following the sale & gaining the agreement of the Principal that all your rights are transferred to the new Agent.

How Do I Approach My Principal on This Matter?

The first thing to remember about retirement on grounds of age is that although you may have the right to lodge a claim for Compensation or Indemnity, it is unclear as to your chances of success. If you are retiring on grounds of your health, matters are a lot clearer but are dependent on a medical report.

Agents have a duty under Regulation 3 to inform the Principal of all necessary information & hence you should inform them of any medical treatment you are receiving and difficulties you are facing in dealing with the Agency.

If the Principal then suggests a reduction in your area you should state that you would consider it only if a suitable figure could be put on the table re compensation. If you are thinking of retiring, then why not discuss this with them as to their long term plans and state that none of us are getting any younger etc. You could then set a date for your retirement and transform the arrangement into a situation where they have agreed to your proposals re notices and agreed the date of termination.

Unless the Principal raises the subject or is of the rare friendly and reasonable variety, we would not advise mentioning any payments re Compensation until after your departure to avoid there being problems during the time you are working for them. It must be remembered that you have a year from the date of termination to lodge your claim, why rock the boat while you are still there.

If you intend selling you must of course inform the Principal and discuss the legal situation with them re Compensation or Indemnity as opposed to the option to allow you to sell, which will cost them nothing.

The PSA would suggest sending an initial letter to the principals you work for, along the lines of the draft letter on page [38](#). Then follow this up at a later stage with a letter pursuing a claim for compensation or indemnity along the lines of the draft letter on page [39](#).

Please remember if you intend to retire you must provide either one, two or three months notice at minimum depending on your length of service, according to the Regulations, but you should also check your written contract as it might provide that a longer period of notice would be required.

Rights on Termination

When entering into a contract an agent needs to be aware of what rights they have when their agency comes to an end.

Provided that you are a Commercial Agent as defined under Regulation 2 of the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 3053), **and you are not in breach of your contract, you would ordinarily, have the following entitlements: -**

- *Commission on completed orders*
- *Pipe-line Commission*
- *Notice*
- *Either Compensation or Indemnity*
- *Damages for irrecoverable expenses*



The above would also be true if you resigned but only if the resignation fell into one of the exceptional circumstances outlined in Regulations 18 and 17.8. Due to: -

- *A Fundamental Breach by the Principal*
- *Your retirement on grounds of age*¹
- *Your retirement on grounds of ill health or infirmity*
- *Your death*

¹ Only applies if you can prove that due to your situation you could not reasonably be expected to continue. **Always get legal advice on this first**

If you were in breach or have left for some other reason then you would still retain the rights to commission unless you have signed this right away in an agency agreement.

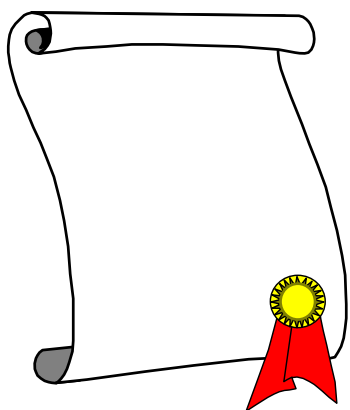
A Notice Period

What is a notice period?

A notice period is not a wind down period for the agent, or a period where the Principal can treat the Agent differently. A notice period is a period of a contract like any other with the one exception - you know the date when the contract is coming to an end.

Regulation 15 sets out **minimum** notice periods. The parties can agree to longer periods than those stated minimum's below but the period to be observed by the Agent needs to be equal to or less than those to be supplied by the Principal.

Check your agreement



- ◆ Is it for a fixed term, i.e. from January 20** to December 20**? If so then the agent was effectively on notice from the date he signed the contract. As such if the principal ends the relationship prior to the expiry of the fixed term then it could be argued that the principal should pay the agent for the balance of the remaining period as a payment in lieu of notice.
- ◆ Is it for an indefinite period? Any agency agreement for a fixed period which continues to be performed by both parties after that period has expired is considered to be converted to an agency agreement for an indefinite period. See Regulation 14.

An agency agreement may be terminated without notice if one party is in breach of contract or under exceptional circumstances.

- ◆ You should be allowed to work the notice period
- ◆ Have you been given the correct amount of notice? If not you should claim commission in lieu of notice from the principal.

Please note that if there is no provision for a mid month termination date in your contract then the last day should coincide with the last day. Therefore, if you are notified of your termination on the first of a month and for example; you have been working for the principal for more than two years, the notice requirement would be for the rest of that month plus three more, ending on the last day of that third complete month. Effectively almost four months notice.

If the Principal will not let you work the notice period then you can claim for an amount to represent the total of commission you could have earned if you had been given the opportunity to work the period. If therefore you could prove that a trade show which occurs within this time would have generated 70% of your years orders, then you can claim for 70% of the yearly total plus the commission from the other orders that would have been taken around that time.

If you are offered another Agency during the notice period and your principal is not allowing you the opportunity to work this period, you cannot take this agency on without their agreement. If the principal does give permission, then it could be argued that the income generated should be deducted from any claim for commission in lieu of notice. Under common law there is always a duty to mitigate losses. Hence if you would not have been in a position to take on the new agency if the principal had let you work the notice, by taking on this agency, you have in someway, recovered some of the income lost from the inability to work for your old company. If you start working for another principal during a notice period, which is competitive, the principal can stop you by bringing an injunction against you.

Commission Entitlements

On top of commissions that you may be owed on completed orders, you may also be entitled to pipeline commissions

NOTE: - Your rights to commission under Regulation 8 can be excluded in a written contract



These rights are covered by Regulation 8 of the Commercial Agents' Regulations.

A commercial agent is entitled to commission on transactions concluded **after** the agency has terminated if: -

- The transaction is mainly attributable to the agent's efforts during the period covered by the agency agreement and if the transaction was entered into, within a reasonable period after that contract terminated.
- The agent is also entitled to commission on orders, which reached the principal before the agency contract was terminated.
- An agent has the right to inspect the principal's books in order to check the commission due to him.

A reasonable period could vary depending on the type of industry, i.e. an agent in the fashion industry takes orders a season ahead, and therefore a reasonable period in this instance would be one season. In the building trade where Agents sell to architects the period could be several years.

Principals also try to fool Agents into saying that they will honour the Agents notice provisions by paying them all the commissions generated over the notice period and not allowing the agent to work the notice.

THIS IS NOT NOTICE. YOU ARE ENTITLED TO THIS COMMISSION ANYWAY UNDER REGULATION 8

If you work the notice period then at the end of this there may be orders that had been received but had not completed and there may be orders that will arrive after this date. These are your Regulation 8 entitlements. If no notice is given you still have the right to claim for these amounts that are outstanding but in addition you should receive one two or three months commission in lieu on top.

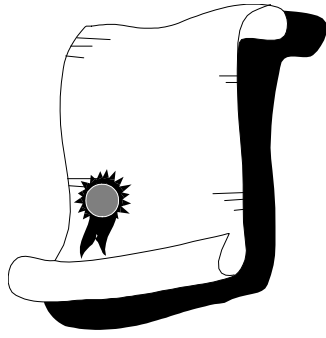
One defence the Principal may try and bring in is to argue that the order was not down to your efforts but those of the company or your replacement. According to Regulation 9 this is a valid defence and as such you would need to provide evidence that the order was obtain primarily due to your efforts.

But how would you prove this? The best way we have found is for the Agent to either keep a log or diary or even provide the principal with a detailed report of who they have seen, when and where and if at all possible, details of what was shown with reactions and comments. Obviously the more detail that is provided the more likely it would be to win this argument.

Indemnity or Compensation on termination of an agency contract.

This is covered by Regulation 17 of the Commercial Agents Regulations, which states:

- 17 (1) *This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.*
- (2) *Except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.*
- (3) *Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to an indemnity if and to the extent that -*
- (a) *he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and*
- (b) *the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.*
- (4) *The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.*
- (5) *The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.*
- (6) *Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.*
- (7) *For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which -*
- (a) *deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or*
- (b) *have not enabled the commercial agent to amortise the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.*
- (8) *Entitlement to the indemnity or compensation for damage as provided for under paragraphs (2) to (7) above shall also arise where the agency contract is terminated as a result of the death of the commercial agent.*
- (9) *The commercial agent shall lose his entitlement to the indemnity or compensation for damage in the instances provided for in paragraphs (2) to (8) above if within one year following termination of his agency contract he has not notified his principal that he intends pursuing his entitlement.*



Check your agency agreement

- Does it give you entitlement to an indemnity following termination?

If so, this may not exceed a figure equivalent to one year's commission calculated on the average annual commission over the previous five years, or if the contract goes back less than five years, the indemnity is to be calculated on the average for the period in question.

If there is no mention of indemnity then the agent is automatically entitled to claim compensation.

The three ways Indemnity can be written into a contract are as follows: -

- ◆ A clause, which states simply that if, anything the agent agrees to be indemnified rather than compensated.
- ◆ A clause, which states that the laws of another member state of the EU applies, other than France or the Republic of Ireland.
- ◆ A clause which states the method of calculation of the compensation to be those of one years commissions based on the average of the last five years of the relationship.

If none of the above apply then you will automatically be entitled to lodge a claim for compensation

Indemnity

Although the words Compensation & Indemnity in the dictionary are interchangeable concerning the Regulations they distinguish between two distinct methods of calculation.

If your contract limits your claim to that of an Indemnity the most you will receive is a year's commission based on the average of the last five years. This is the maximum. Not all agents will however be awarded the maximum and hence it has to be determined how one would go about calculating any intermediary sums of Indemnity.



In the case of Duncan Moore -v- Piretta PTA the agents payment was calculated as follows: -

Total the Agent would have received in commission between the end of the agency and the trial date

minus

The running costs of the Agency

minus

What is far and equitable in the case

minus

**a percentage for the accelerated receipt of the commissions
(in that they should have been paid in one lump sum on termination)**

**Then when the judge had calculated this amount he compared the result with the maximum
(i.e. one years average of the last five years)
and awarded the lower of the two.**

plus

Interest as it should have been paid on termination

plus

**VAT as the judge felt that the payment was a payment for a service
i.e. the good will the agent had given the principal.**

It is debatable regarding the VAT award if this was wholly correct and HM Customs and Excise have said that they believe this judgement was incorrect.

Thompsons solicitors, who handled the Moore --v- Piretta case provided the following advice on what is meant by the term 'Far & Equitable'

*"Under English law we normally think of damages or indemnity as some sort of remedy for a civil wrong done by one party to another. The idea of indemnity, under the Regulations, seems to be based entirely on the **achievement** of the agent during his agency from which the principal is still deriving substantial benefit"*

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In cases where turnover has been increasing, or the number of customers has increased, or a territory has been opened up from nothing the 'substantial benefit' is pretty obvious. In cases where turnover has been declining, however, or where the customer base has remained substantially the same throughout the agency, it is going to be much more difficult to establish a claim for indemnity. If the agent has simply taken over a territory from a previous agent, and kept it ticking over, without any substantial improvement, it may well be argued that no indemnity is payable."

It is essential, therefore, to be able to show the development of an agency by providing annual sales figures and a list of the new customers introduced which could be compared with the business prior to the agent taking on the agency.

It is also important to record any changes in the territory, and make claims for the reduction, on the grounds of a partial termination:



- Have any accounts introduced by you been taken as "House Accounts" and is the principal still deriving benefit from these?
- Has your territory been reduced in size at all?
- Has the commission rate been cut?

Compensation

Unlike the Indemnity route Compensation has no limits and is not based on what will happen in the future, but looks to the past and the saleable value of the agency. In addition unlike the Indemnity route compensations originates from the French legislation and not the German in the case of Indemnity.

The method used to calculate these sums is based also not on the future earnings limited by the earnings over the past five years but by the total of the last two years commission or twice the average of the last three as a starting point for negotiations.



To date there have been only three cases in the High Courts in England on this matter and a court of appeal decision in Scotland in the case of ***Douglas King -v- T. Tunnock Ltd.*** In that case the judge awarded Mr King whose agency had been running for over 30 years two years commission. In the case of ***Ingmar GB Ltd -v- Eaton Leonard Inc*** in the High Courts the agent received three years net profits.

In the Case of Moore -v- Piretta the Judge stated:

“It is apparent from the preamble that the primary purpose of the Directive is the harmonisation of community law by requiring all member states to introduce rights and duties similar to those already subsisting in at least two of the member states of the Community, the Federal Republic of Germany and France.”

The preamble notes that a transitional period is to be allowed to countries such as the United Kingdom where many of the rights and duties specified in the Directive will be novel, Article 22 of the Directive gave to the United Kingdom and to the Republic of Ireland the right to postpone until 1st January 1994 the obligation imposed by the Directive to bring necessary provisions into force. Consistent with the purpose of achieving harmony between member states, it is in my judgement permissible to look into the law and practice of the country in which the relevant right, in this case the right to indemnity originated, namely the Federal Republic of Germany; and to do so for the purpose of construing the English Regulations and to use them as a guide to their application. The practice in other countries where the rights appear to be new, for example Italy, seem to me to be of less assistance”.

MR J. MITTING, Q.C.
(Sitting as a Deputy Judge of the Queen’s Bench Division)
Moore -v- Piretta PTA Ltd. 25/02/1998

This judgement is therefore invaluable to a solicitor fighting a claim for either Indemnity or compensation, in addition in the Scottish case of Roy - v - M.R. Pearlman Limited, the Judge stated:-

“I agree with the view of Mr John Mitting QC (in the case of Moore - v - Piretta PTA Limited) ... In the context of a Directive which provides for a remedy drawn from French legal experience, assistance towards a harmonised approach may be obtained by having regard to the longer experience of the French courts in applying that remedy.

That is more in the nature of a comparative law exercise, for the purposes of which a Scottish Court is entitled to have direct regard to sources of foreign law.”

From this it can be gleaned that Compensation would be based on the agents last three years earnings for compensation and that Indemnity would be based on a maximum of one years average of that earned in the last five years.

On 16 March 2000 this position became much more clear when Lord Caplin stated the following in the case of King -v- Tunnock Ltd :-

“It is obvious, in our view, that on the basis of their own terms Regulation 17(6) and Regulation 17(7) provide for a different basis of making compensation than our traditional common law approach. However, as stated, the Regulation does fit in well with the French approach to such compensation. The legislation provides for valuation at the date of termination rather than requiring an explanation of the future prospects for the agency. During the currency of the agency the agent has owned a valuable asset and what he chooses or omits to do after he has lost that asset has no bearing on the value of what he has lost. If he had assigned the agency he would normally have received some compensation for that assignation observing that he could do so only with the principal's agreement and been free thereafter to do as he chose. Thus the French conclusion that mitigation of loss by the agent is not a factor when compensation is approached as we have described, is in our view persuasive. The implication would be (and in our view we consider this to be inevitable) that in the present case the post-termination activities of the pursuer and any sums of sickness benefit he received have no application to the measure of his loss. The Directive and Regulations, as presented, seem to harmonise with the French approach and given their terms, and the general objective of achieving harmonisation, we see no justification for construing the Regulations as being radically different from the French approach.

The matter of fixing an appropriate level of compensation remains. It seems that even in France the two year rule is only a benchmark and can be varied at the discretion of the judge. However, this does not mean that we are precluded from considering what will happen in France for the rulings of a judicial system applying the same legislation (intended indeed to operate in the same way between the relevant systems) must be entitled to some respect. There are also practical considerations. The French law obviously considers that there is some merit in finding a clear and practical basis for determining a fair level of loss. We equally consider that given the particular type of loss we are dealing with a broad approach is both inevitable and a practical requirement of the law. This approach is emphasised when we consider that they are seeking an overview of the commercial situation, where one of the dominant aims is to protect the agent”

Lord Caplin went on to say:-

“The compensation would, of course, require to be tied to the commission he was earning. Thus this is a case where we can conclude, even on the limited information that is available that the agent would have expected to receive a capital sum representing at least the total for the last two years of his earnings to be paid before he would voluntarily have given up his agency. We are reassured that under French law compensation of two years commission would be regarded as a standard compensation for loss of an agency, so that it is difficult to believe that in the present case such compensation could be other than reasonable.

We shall not deduct the payment in lieu of notice from the pursuers loss because he is entitled to this in addition to compensation, and our evaluation of the loss of the agency is made without reference to the fact that he would be entitled to the statutory notice."

During the Ingmar case the judge ruled that there should be several 'guard against windfall factors' these are: -

"Taking into account the following factors: the length of time of the agency, approaching 8 years, the inevitable lack of profitability in the early years, the high degree of engineering and sales expertise required and put into the agency in obtaining, nurturing and developing the customer base, and the degree of profitability of the agency at the time of its rupture, in my judgement a fairer and more realistic result"

When is Compensation or Indemnity not payable?

Compensation or indemnity is not payable to the agent if the principal has terminated the agency because of default of the agent, i.e. breach of contract, or the company going bankrupt.



Compensation or Indemnity is not payable to the agent if the agent terminates the agency contract, unless the termination is due to one of the factors listed below i.e.:

- the action of the principal. (For instance, failure to pay commission to the agent in accordance with the agency agreement for 6 months or more).
- on the grounds of infirmity, illness of the agent and possibly age.
- if the agent, with the agreement of the principal, assigns the agency to another person.

The agent must inform the principal in writing within one year of the termination of the agency that he intends to pursue a claim for compensation or indemnity otherwise he will lose the right to make such a claim.

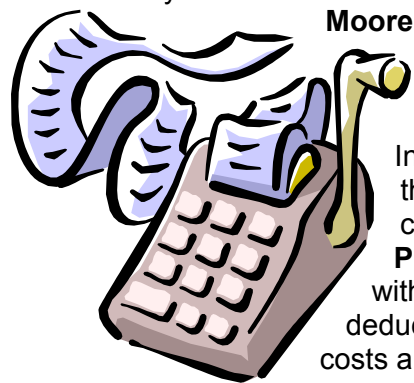
The grant of an indemnity does not prevent the agent from seeking damages.

Such damages are considered to occur when the termination takes place in either or both of the following circumstances which:

- deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing the principal with substantial benefits linked to the activities of the commercial agent, or
- the agent has not been able to recover the costs and expenses which he/she incurred in the performance of the agency contract on the advice of the principal.

Can the costs of running the agency be deducted from any Compensation or Indemnity?

With regard to an Indemnity payment the deduction of running costs comes off from the amount of commission you could have earned had the agency continued if we follow the case judgement in



Moore -v- Piretta. In the case of **Ingmar GB Ltd -v- Eaton Leonard Inc** the judge based his calculations on the profits of Ingmar & not the Gross commission as the judge felt that this was more representative of their losses. However both Mr Moore and Ingmar were working for just the one Principal and were not seeing the same customers post termination for the other agencies they carried at the same time as the agency that was lost. In **Doniger & Pringle -v- Filigree Stiebel** heard in early 2002 the judge agreed with the PSA's Barrister that the amount should be paid with out any deductions as both Mr Doniger and Mr Pringle were still incurring these costs and therefore the running costs of this agency to the two agents was zero.

Rights of Estate on Death of Agent

In the event of death in service the estate of the agent would have a claim against the Principal in the normal way unless the contract is with the Limited Company or Partnership. If the contract was with the Agents Company then the contract should continue to operate in the normal way.

Sample Documents

The following are draft contracts and letters that may assist you in dealing with the type of problems you may encounter during your agency.

- Draft Letter to principal on receipt of new contract
- Draft formal Contract
- Draft confirmation of terms
- Draft Letter warning the Principal of your intention to charge interest under the Late Payment of Commercial Debts (Interest Act) 1998
- Draft Initial letter to Principal on Agents Retirement
- Draft letter on retirement making claim for compensation or indemnity
- Contract reading service

Draft letter to a Principal on receipt of a new contract

[Date]

[Name and Address of Principal]

Without Prejudice and Subject to Contract

Dear [Name of contact]

Re New Agency Contract

Thank you for your draft contract.

Understandably I am seeking legal advice on this matter and hence cannot agree to this documents' terms until I have sort clarification on my position.

Please do not take my silence on this matter as either an acceptance or refusal of this contract but be assured that I will be responding on this matter as soon as I am able.

In the mean time I will continue to observe the current terms that have been established by custom and practice since [signing the previous agreement.] [commencing my appointment with you].

Yours sincerely

[Agent]

Draft Formal Agency Contract

This agreement commences on and amends the current arrangement that commenced on the Commencement Date

Between

.....
.....
.....

here in after known as the Principal

And

.....
.....
.....

here in after known as the Agent

The following words shall be deemed to have the following meanings:-

House Accounts those customers listed in Schedule 1 as varied only by agreement in writing

Territory all outlets in
.....
..... with the exception of House Accounts as detailed in Schedule 1

Products those products manufactured, imported or distributed by the Principal with the exception of those products which the Agent has decided not to carry as they may conflict with the products currently carried for another Principal prior to the production, importation or distribution of the product by the Agents other principals or for some other substantial reason.

Customers those accounts, which are not contained, on the list of House Accounts as stated on Schedule 1 operation within the Territory.

Net Sales Value the total invoice price for the Products to the customers in the Territory after deducting VAT or any similar tax or levy replacing this tax in the future.

Commission Rate X % (X [amount in words] percent) or at such other rate that has been agreed in writing between the Principal and the Agent.

Regulations the Commercial Agents (Council Directive) Regulations 1993 or such other legislation so replacing this act at some time in the future.

Headings are for convenience only and any clause stating the masculine shall also refer to the feminine and to the neuter and any reference to the singular shall also be deemed to be a reference to the multiple and vice versa.

1. Appointment

A Guide To The Law For Commercial Agents

Please remember to seek professional Advice before acting in reliance of anything contained within these pages

- 1.1. The Agent is hereby appointed as the Principal's exclusive Agent in the Territory for the negotiation of sales of the Principals Products.
- 1.2. For the avoidance of doubt the Principal agrees not appoint any other person, company or other body as agent, representative, distributor, wholesaler or any thing akin to the above in the Territory.

2. Payments

- 2.1. The Principal will pay the Agent at the Commission Rate on the Net Sales Value of all orders that complete in the Territory
 - 2.1.1. during the agreement
 - 2.1.2. on orders received on or before the termination date
 - 2.1.3. on orders received within [] months after the termination date which were mainly due to the agents efforts..
- 2.2. If the sale does not complete due to a reason for which the Principal is not blameless then the Principal will pay the Agent at the Commission Rate as set out in clause 1.1 above

3. Notice

- 3.1. The Agent shall supply the Principal with a minimum of:-
 - 3.1.1. 1 months notice up to but not including the first anniversary of the Commencement Date
 - 3.1.2. 2 months notice after the completion of 1 years service up to but not including the second anniversary of the Commencement Date
 - 3.1.3. 3 months notice after the completion of 2 years service.
- 3.2. The Principal shall supply the Agent with at least four times the period of notice of the termination of the Agency relationship to be supplied by the Agent as set out in Clause 3.1.

4. Assignment

- 4.1. Neither party shall be permitted to transfer their obligations to another body without the agreement of the other party in writing

5. Termination

- 5.1. Apon termination the Agent shall:-
 - 5.1.1. Not continue to negotiate sales on behalf of the Principal.
 - 5.1.2. Hold themselves out as having the authority to act on the Principals behalf
 - 5.1.3. Shall return all samples not purchased by the agent
- 5.2. The Principal shall subject to clause 5.3 pay the Agent on termination of the contract a payment of compensation which the parties agree should amount to not less than the total earned by the agent in the last twenty four months of his relationship.
- 5.3. The Principal does not have to pay the Agent any Compensation where:-

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- 5.3.1. The Agent, with the agreement in writing of the Principal; sells on the agency contract to a replacement agent
- 5.3.2. The Agent has fundamentally breached his/her obligations to the Principal
- 5.3.3. Subject to the exceptions listed in regulation 18.b and regulation 17.8 of the Regulations the Agent terminates the relationship.

6. Alteration

- 6.1. Neither party may assign or transfer their contractual obligations to a third party without the agreement in writing of the other party.
- 6.2. If either party wave their rights under any part of this agreement it shall not constitute a variation of any future right of that party to insist on compliance with that obligation.
- 6.3. Any alteration to this contract shall be in writing and signed by both party's.

7. Jurisdiction

- 7.1. This contract shall be governed by English law and the party's hereby submit to the exclusive jurisdiction of the English courts and for the avoidance of doubt the party's agree that the agent shall fall within the definition of the Regulations.
- 7.2. Any clause which can be proven by any competent legal authority to be unlawful shall be not constitute the whole contract or even the remainder of that clause as unlawful. Where a section of a clause is found to be unlawful the party's shall meet and discuss ways of novating the situation.

Signed on behalf of

Signed on behalf of

Witness

Draft Letter asking for the Principal to confirm the terms of the Agreement

[Address]

[Date]

Dear

I have been asked by my {legal advisors}{accountants with regard to IR35} to ascertain certain facts regarding our relationship as currently we do not have a written agreement. Would you please sign below and on the attached copy to indicate that you agree that the following statement reflects my understanding of our current relationship.

I have worked as the exclusive agent in [Territory (needs to be clearly defined)] {(with the exception of mutually agreed house accounts)} for [Name of Principal] since [date commenced], negotiating the sale of all of the products which [Name of Principal], imports or distributes with the exception of those products which I have decided not to carry as they may conflict with those carried for another Principal or for some other substantial reason and for my efforts I receive commission at X% ([amount in words] percent). *{Neither [Name of Principal] or I can transfer our obligations to any other third party or alter any part of our arrangement without the agreement in writing of the other}. {For the avoidance of doubt no variation of this agreement shall be valid unless agreed in writing by the party's to this agreement} {and no waiver of any rights by either party shall be deemed to be a waiver of any subsequent omission to enforce such right}.*

Yours

.....
[Agent] (the Agent)

.....
for an on behalf of [Principal] (the Principal)

key

[] sections to be completed

{ } sections which are optional

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Draft Letter warning the Principal of intention to charge interest under the Late Payment of Commercial Debts (Interest Act 1998

Date

Dear [contact name]

Re late payment of commission {and commission in lieu of notice}

It has been some [number of weeks] since I was due to receive from you, payment of the outstanding commission {and commission in lieu of notice}. This amount was due to be paid at the latest [date due to be paid].

This is a breach of my rights under our agreement and feel that unless this amount is forthcoming in full in the next fourteen days I will have no option but to start charging interest on this amount as is my right under the Late Payment of Commercial Debts (Interest) Act 1998. The rate of interest is set by the Secretary of State for Trade & Industry and currently stands at 8% ¹ above the Bank of England Base Rate. As the Base Rate is currently 3.75% ¹ this results in a standard interest rate of 11.75% ¹ interest per annum being charged.

I therefore look forward to receiving payment in full from you within the next fourteen days.

Yours sincerely

¹ **Always check with the PSA Office that the rate has not changed**

Draft Initial letter to Principal on Agents Retirement

Date

Address

Dear [Name of Sales Director]

Whilst we have had a most profitable and friendly relationship over the years I now find myself in a position where due to my [age / health / health and age] I am finding it increasingly difficult to continue.

[Following medical advice / All good things must come to an end, however, and] I find myself in a position where I must resign my agency with you on grounds of my [health / age].

[Enclosed you will find a copy of a letter from my doctor, which I feel, is self explanatory and as such I regret that I will not be able to work the statutory notice period that is required of me under the Regulations. I am informed however that should exceptional circumstances apply the compulsory notice period is waved.]

If you wish to discuss this matter please contact me.

Yours sincerely

PLEASE SEEK LEGAL ADVICE BEFORE SENDING THIS LETTER

Draft letter when agent retires due to infirmity, illness or age, claiming for compensation or indemnity

Name and address of principal

Date

Dear

RE: TERMINATION OF AGENCY

It is with regret that I hereby wish to inform you that as from (date of termination) I will no longer be able to continue as an agent for (principal's name). The termination of this agency is due to my (infirmity or ill health) which prevents me from continuing as your agent.

I am advised by the Professional Sales Association, to which I belong that I do not forfeit my right to compensation under Regulation 17 of the Commercial Agents Regulations. I have been advised that such compensation is based on the substantial benefits which the company will continue to derive from my work on your behalf during the agency. I have contacted the Professional Sales Association who have informed me that such claims are based on the substantial benefits which the company will continue to derive from my work on your behalf during the agency. The Association has received a Report from the EC on the application of Regulation 17 which states that the compensation system was based on French law, which dated from 1958 and whose aim was to compensate the agent for the loss he suffered as a result of the termination of the agency contract.

In the recent case of Moore -v- Piretta the judge stated that:

"It is apparent from the preamble that the primary purpose of the Directive is the harmonisation of community law by requiring all member states to introduce rights and duties similar to those already subsisting in at least two of the member states of the Community, the Federal Republic of Germany and France. The preamble notes that a transitional period is to be allowed to countries such as the United Kingdom where many of the rights and duties specified in the Directive will be novel, Article 22 of the Directive gave to the United Kingdom and to the Republic of Ireland the right to postpone until 1st January 1994 the obligation imposed by the Directive to bring necessary provisions into force. Consistent with the purpose of achieving harmony between member states, it is in my judgement permissible to look into the law and practice of the country in which the relevant right, in this case the right to indemnity, originated, namely the Federal Republic of Germany; and to do so for the purpose of construing the English Regulations and to use them as a guide to their application. The practice in other countries where the rights appear to be new, for example Italy, seem to me to be of less assistance".

MR J. MITTING, QC

(Sitting as a Deputy Judge of the Queen's Bench Division)

Moore -v- Piretta PTA Ltd. 25/02/1998

In addition in the Scottish case of Roy - v - M.R. Pearlman Limited, the Judge stated:-

"I agree with the view of Mr John Mitting QC (in the case of Moore - v - Piretta PTA Limited) ... In the context of a Directive which provides for a remedy drawn from French legal experience, assistance towards a harmonised approach may be obtained by having regard to the longer

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experience of the French courts in applying that remedy. That is more in the nature of a comparative law exercise, for the purposes of which a Scottish Court is entitled to have direct regard to sources of foreign law."

Lord Hamilton

(Court of Session)

Roy - v - M.R. Pearlman Limited 10/03/99

From these precedents, it can be surmised that a judge hearing a case for compensation would follow the principles laid down in the French law. By judicial custom in France, the level of compensation is fixed as the global sum of the last two years commission or the sum of two years commission calculated over the average of the last three years of the agency contract.

I hope that we are able to reach a mutually agreeable settlement and look forward to discussing this matter with you.

Yours sincerely

(Agent's name)

NOTE: - As the regulations do not state an age when you would be considered old enough to claim that your age prevents you from continuing as an agent, the principal's solicitors will argue that despite your age you physically could have continued. Therefore please seek legal advice before taking this course of action.

Contract Reading Service

Details of how to obtain a contract reading

The Contract between an Agent and a Principal is of crucial importance in regulating the relationship between them.

In recognition of this the Professional Sales Association negotiated the provision of a Contract Reading Service at preferential rates for its members. This service has been both popular and successful for a number of years.

The Contract Reading service is provided by the First Assist Group Limited who are well known both to members and the Association as the providers of our 24 hour legal advice line.

- The cost is a guaranteed flat rate of £150 plus VAT
- There is a 20% discount on the fee for a second contract
- A detailed written report will be provided within 14 days of receipt of the contract by First Assist
- There is the FREE facility to make follow up calls to clarify any outstanding points

The service is easy to access.

All you have to do is send a copy of the contract and a cheque in their favour for £176.25 to First Assist together with a letter outlining any particular points concerning you and any background information you think might be relevant. They will confirm receipt and within 14 days provide you with a detailed explanation of the Contract in the light of relevant legislation and regulations.

The address of the First Assist Group Limited is

**PSA Contract Service
First Assist Group Ltd
Wheatfield Way,
Hinckley
Leicestershire
LE10 1YG**