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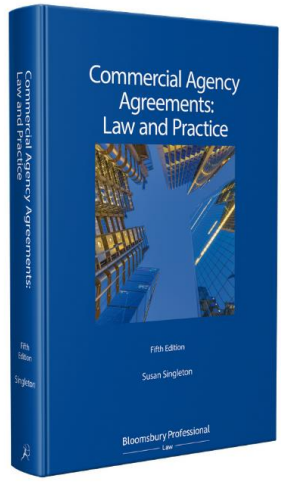

Extracts of Chapter 1:

'The agent and distributor' and 'Relevance of application of the Regulations'

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Chapter 1

Introduction and definitions

> ‘Commercial agents were not a class of agent that had hitherto enjoyed any special protection under English common law. The protection that the Regulations seek to provide originated in the civil law systems of France and Germany where there existed two distinct legal regimes. In Germany, upon termination of a commercial agency, the agent became entitled to an equitable payment, known as an “indemnity”. In France, the system involved the award of “compensation.” The two regimes operated differently, and could lead in any particular case to different results.’
> (Mrs Justice Sharp, *Berry v Laytons* [2009] EWHC 1591 (QB))

1.1

This book examines agency law and, in particular, commercial agency law. It does not examine the many forms of agency at common law but leaves that to the detailed theoretical textbooks. Instead it addresses the law relevant to those who use commercial agents in the course of their business. In particular it concentrates on the commission agent.

1.2

In commercial relationships there are many different types of agency. In one sense anyone acting under the instructions of another is an agent. However, in business a narrow definition is useful.

1.3

In its July 2014 consultation Public consultation on the Evaluation of the Commercial Agents Directive (86/653/EEC), the European Commission described the EU Directive and Commercial Regulations as follows:

> ‘Commercial agents are self-employed intermediaries authorised on a permanent basis to negotiate the sale or purchase of goods in the name and on behalf of another person (the principal). The objective of the Commercial Agents Directive was to move towards a single market for commercial representation and improve the conditions of competition by facilitating the conclusion and operation of commercial representation contracts across borders through harmonised rules.
>
> For this purpose, the Directive defines the commercial agents falling under its scope and harmonises the rights and obligations of commercial agents and their principals, and defines rules for the remuneration of the commercial agent, the conclusion and the termination of the contract and the restraint of trade after the termination of the contract.’

The 2015 report arising from the consultation is reproduced in Appendix 2.4 of this book.

The agent and distributor

1.4

The commercial agent, the subject matter of this book, is not trading on his or her own account. He or she is not a 'distributor'. In practice many businesses call their agents their distributors and vice versa and it is crucial for legal purposes to ascertain the legal status of the individual or company. The most pertinent question to ask is about title to the goods being sold. Does the 'agent' buy the goods and resell them? If so, the agent is a distributor or dealer and not a true agent. If the agent never owns the goods but simply finds customers for the supplier, no matter how extensive the agent's role otherwise is, then the agent will be in all probability a commercial agent of the supplier. The person appointing the agent is known as the 'principal' and this term is used throughout this book. In *AMB Imballagi Plastici Srl v Pacflex Ltd* [1999] 2 All ER (Comm) 249, mentioned below, the judge referred to the one English witness who had called agents 'both middlemen who bought and resold and middlemen who acted as agents for a commission'. In that case the court found that all trading was done on a sale and re-sale basis. The term 'intermediary' in the Directive does not include distributors. Pacflex was not therefore an agent for the principal even though the principal would have let it trade on that basis. It decided not to do so.

Who is an agent or distributor

Case example – *Sagal (t/a Bunz UK) v Atelier Bunz Gmbh* [2009] EWCA Civ 700 (CA)

1.5

Mr Sagal was in the jewellery business and had had his own shop. He started to undertake business for Bunz GmbH. The judge found that:

(i) Mr Sagal was to take orders from UK customers and fax them to Bunz;

(ii) Bunz would deliver jewellery pursuant to those orders and invoice Mr Sagal;

(iii) Mr Sagal would invoice the UK jewellery customers;

(iv) Mr Sagal's terms to the UK customers were to be payment within 3 (in fact 30) days of delivery or 3% discount if cash paid on delivery;

(v) Mr Sagal would have 60 days within which to pay Bunz;

(vi) Bunz would provide a sample line to Mr Sagal (known as 'the UK Collection') and would insure that sample line;

(vii) Mr Sagal would receive a 20% discount on Bunz's wholesale prices and would thus pay 80% of that price.

By July 2002 Mr Sagal had launched himself under the trade name 'Bunz UK', procured note paper so headed and began to seek and secure orders. He sent letters to customers informing them of the 'launch of Bunz UK - the UK branch of Bunz' and he also sent them brochures and price lists. The judge found that the price to UK customers was arrived at

'by dividing the list price [namely Bunz's wholesale prices] by 2.2, a result which would give Mr Sagal a 25% margin.'

The judge then recorded the method of business that operated between 2002 and September 2005 when relationships deteriorated and grievances began:

(i) Bunz UK took an order from a customer sending out a confirmation of purchase order in its own name; it then placed a purchase order on Bunz (to whom I shall now refer as 'Bunz GmbH');

(ii) Bunz GmbH would confirm the order to Bunz UK giving Bunz UK's reference number and showing the appropriate (20%) discount; Bunz GmbH then invoiced Bunz UK;

(iii) Bunz UK sent its own invoice to its UK customers requesting payment to it;

(iv) Bunz UK's invoice referred to 'Standard Conditions of supply' regulating the contract between the UK customer and 'the company' which the judge, correctly, held was a reference to Bunz UK.

It was on the basis of this documentation, evidencing the contract made between the UK customer and Bunz UK (Mr Sagal) on the one hand and the contract between Mr Sagal and Bunz GmbH on the other hand, that the judge concluded that Mr Sagal had no authority from Bunz GmbH to negotiate or contract on its behalf.

However, Sagal held no stock and Bunz GmbH insured the goods but Sagal charged what he liked when he resold the stock.

In practice commercial lawyers regularly are instructed in situations where it is not clear if an agency or distribution arrangement is envisaged. Some clauses suggest agent and commissions and direct sale from principal to customer and others suggest the 'agent' buys and resells. It is crucial to establish what is meant. There is also a category of agent at common law known as undisclosed agent where the customer does not know they are dealing with an agent's principal where there is no case law as to whether the regulations apply.

In the *Sagal* case the court of appeal decided Sagal was not an agent. The following passage from the Court of Appeal usefully summarises the court's view on several relevant points in this area:

'Construction of the Directive

This question is whether the Directive applies only to agents who bring their principals into direct contractual relationship with their customers or whether it can also apply to agents who make their own contracts with their customers. The defining words of the Directive itself are almost identical to the words in the regulation but it is perhaps important to recite Article 1(2) of the Directive itself:

"For the purposes of this Directive 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of the principal."

The difficulty with a construction which includes agents, who make contracts in their own name and on their own behalf is that there would then be no need for the second limb of the definition. If someone is an agent for another he will invariably have authority to negotiate (namely, to find out the terms on which a third party wishes to contract) on behalf of his principal; the question may then arise whether he has authority to contract on behalf of his principal.

The first limb of the definition envisages that the agent does not have authority to contract on his principal's behalf but only has authority to negotiate terms on behalf of his principal and then refer back to him to see whether he wants to make a contract on certain terms with a third party customer. To my mind the definition further envisages that, if the principal does want to make a contract with the customer, he will then do so and there will then be a contract made directly between the customer and the principal which will be made in the name of the principal. It does not envisage that, after the agent refers back to the principal and obtains the go-ahead for making a contract, the agent will enter into a contract in his own name with the customer; the reason for that is that, although he will then have authority to conclude a contract which is not in the principal's name, he will not come within the second limb of the definition which is the limb dealing with authority to contract. In other words agents with authority to contract (as opposed to authority to negotiate) are only commercial agents for the purposes of the Directive if they have authority to contract (and do contract) in the name of the principal as well as on his behalf. That is precisely the authority which Mr Sagal did not have since, as the documents show, he never contracted in the name Bunz GmbH but only in the name of Bunz UK which was (as Mr Stuart recognised) a mere trade name for himself.

It is, of course, possible as a matter of English law for a principal to authorise an agent to make a contract on behalf of the principal but in the name of the agent rather than in the name of the principal. To my mind agents who contract in that way do not come within the definition of "commercial agents". It is perhaps not difficult to see why this should be so. If a principal is unidentified or undisclosed on the face of the contract it will often be difficult to ascertain whether a particular contract is, or contracts in general are, made on his behalf or not. It may require oral and undocumented evidence of the parties' intention. I doubt if the framers of the Directive thought that courts should receive detailed oral evidence over many days about the details of the parties' commercial relationships in order to decide whether someone was a "commercial agent". If the Directive only applies where the principal's name appears on the face of the contracts made with the third parties, the inquiry can be a quick and straightforward inquiry, only requiring disclosure of the parties' contractual documentation.'

1.6

While the English authorities have not had to grapple directly with this particular debate about the proper construction of the Directive, they are by no means inconsistent with the above conclusion. In *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249, BAILII: [1999] EWCA Civ 1618 the judge had found that there was no formalised contract between the claimant principal and the defendant agent but that the way the agent had chosen to do his business was on the basis of a sale (by the principal to the agent) and a re-sale (by the agent to the customer or third party); the agent charged a mark-up chosen by it and not dictated by the claimant. This court held that the agent was not a commercial agent within the Regulations because it had throughout acted on its own behalf not on behalf of any principal. The court does not appear to have had any argument addressed to it about the detailed terms of the contractual documentation but held that an arrangement whereby the agent was entitled to choose his own mark-up on resale to the third party was unlikely to constitute a 'commercial agency'. (No doubt this holding accounted for the detailed argument below on the question whether the price to the UK customer was imposed or only advisory.) Waller LJ said (page 252):

> ‘If a person buys or sells himself as principal he is outside the ambit of the regulations. That is so because in negotiating that sale or purchase he is acting on his own behalf and not on behalf of another.’

In that case therefore it was clear, as a matter of fact, that the so-called agent was not in fact acting on behalf of the so-called principal. It does not follow that every agent acting on behalf of the principal is necessarily a ‘commercial agent’ especially if contracts are made in his own name and not in the name of the principal.

> ‘Mark-up is not, however, conclusive against commercial agency. In *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd* [2002] 1 All ER (Comm) 788, [2002] EWCA Civ 288 the defendant principal was content for the claimant agent to retain an undisclosed margin on contracts made with third parties in the United Kingdom. But all the contracts made with those third parties stated that the contracts were made with the principal and that the claimant was acting as agent only. This court held that that documentation had to be conclusive unless the documentation could be shown to be a sham, other factors allegedly inconsistent with the claimant being an agent (eg the mark-up) could not be relied on to displace that documentation. Rix LJ cited the *Pacflex* case and the earlier case of *Re Nevill ex p White* (1871) LR6 Ch App 697 in both of which it had been held that the parties were in truth seller and buyer rather than principal and agent but he then said (page 798a) that it was critical in both cases that there had not been contractual documentation stating that the contracts were made between the third party and the principal. So, where there is documentation, that documentation is critical. Here the documentation is to the opposite effect to that in the *MIG* case and, to my mind, the opposite conclusion must follow namely that there is no commercial agency.
>
> HH Judge Mackie QC said that, in a case where the picture presented by the documents was clear, oral evidence from many witnesses about the details of the parties’ relationships
>
> > “was not going to change that clear picture.”
>
> I agree with that conclusion and would, therefore, conclude that Mr Sagal was not a commercial agent within the meaning of the Directive.’

Case example – *Bailey and D&D Wines International Ltd in liquidation v Angove’s Pty Ltd* [2014] EWCA Civ 215

1.7

In the *Bailey’s* case D&D International Wines Ltd, the second defendant, was in liquidation so Angove gave notice to D&D to terminate their agreement immediately. Just like many of the muddled client-drafted agreements which come across the writer’s desk on a regular basis, the agreement appointed D&D as its sole agent and distributor. Angrove’s applied to court for a ruling on whether it was entitled to A$570,843.22 and A$302,773.86 which sums were being held in escrow pending the decision and arose from the sale of wines to third party customers. On appeal the Court of Appeal set aside the judgment below and ordered the sums to be paid to the liquidators representing the agent. The Supreme Court overturned this in 2016.

The sums D&D received were not held on trust for the principal and could be used to pay the creditors for D&D.

The moral is not to let the agent receive and handle money. First, because that can make it hard to prove if an agency relationship arises and second, it runs the risk to the principal that the money is lost. Consider setting up distribution arrangements with the distributor paying in advance for the goods as an alternative rather than having an agent at all if the agent might otherwise have to handle money.

Definitions

1.8

A definition is given of 'commercial agent' in the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053 (see Appendix 1). These Regulations are known as 'the Regulations' throughout this work and they set out certain important rights and obligations which apply to agents. The Regulations apply in Great Britain. There is a separate set applicable to Northern Ireland (see Appendix 1). There are no material differences between the two.

1.9

Some agents are not within the definition in the Regulations and yet are clearly 'agents' so the term must be used more broadly than this. For example, the Regulations provide protection for agents who market 'goods' but not agents who market services. Those who market services are just as much 'agents' in many legal senses, and are paid commission and do not contract on their own behalf, but they have no protection (in the UK, though they may in other countries like Spain) under the Regulations or indeed the EU Directive on which the Regulations are based. A copy of the Agency Directive appears in Appendix 2. It is called the Directive throughout.

1.10

How an agreement is drafted can provided assistance. The Court of Appeal in a decision *Mercantile* decided in a case where the individual could have been either agent or distributor that reading the contracts and terms in place, the arrangement was intended and was one of agency (see *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Plc* [2002] 1 All ER (Comm) 788, Court of Appeal). In that case the first instance judgment which was confirmed on appeal held that payment by way of 'mark up' not commission was not to be regarded as inconsistent with an agency agreement.

1.11

Regulation 2(1) of the Regulations provides:

> '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 that principal; but shall be understood as not including in particular:
>
> (i) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association;
>
> (ii) a partner who is lawfully authorised to enter into commitments binding on his partners;

(iii) a person who acts as an insolvency practitioner (as that expression is defined in s 388 of the Insolvency Act 1986) or the equivalent in any other jurisdiction.'

1.12

The Regulations go on to provide that they do not apply to unpaid agents, agents operating on commodity exchanges or in the commodity market, or the Crown Agents for Overseas Government and Administrations, as set up under the Crown Agents Act 1979 or its subsidiaries.

Relevance of application of the Regulations

1.13

All those involved in drafting and advising on commercial agency agreements should first ask themselves if the Regulations will apply. This is because in general terms, if the Regulations do apply, then certain obligations are implied in the agreement and, in particular, as will be seen in Chapter 6, the agent has the right to claim compensation or an indemnity when the contract is terminated. If the Regulations do not apply, then largely the parties are free to agree whatever they like in their commercial agreement subject to the rules applicable to commercial agreements. The law will rarely interfere and clauses will all be upheld by the courts. Sometimes an agency agreement breaches the competition rules (considered in Chapter 3), in article 101 of TFEU where it affects trade between EU Member States (or the Chapter I prohibition in the Competition Act 1998 which applies in the UK), but this is rare. However, in some countries abroad compensation is paid on termination of contract of agents marketing services as well as good so always take local law advice.

1.14

Compensation for agents just like protection for employees and protection against anti-competitive agreements will be superimposed over choice of law. One cannot avoid English employment law by appointing English staff in the UK under the laws of some foreign state with no such protection. In the same way compensation for agents cannot easily be overridden by choice of law and jurisdiction even though the EU Rome I Regulation (593/2008) (on choice of law in contractual matters) and Brussels Regulation (1215/2012) (which replaced for new agreements the predecessor Brussels Regulation from 10 January 2015 (44/2001) – see further in Chapter 8) on jurisdiction in theory mean that in the EU choice of law and jurisdiction in a contract is largely respected. The position after the UK leaves the EU is likely to remain similar.

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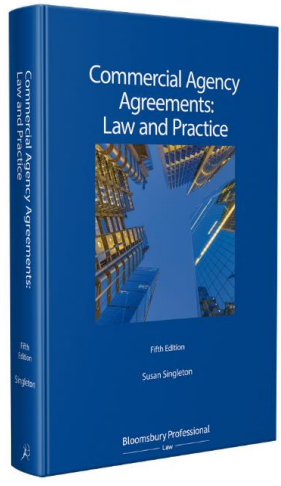

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