

Legal

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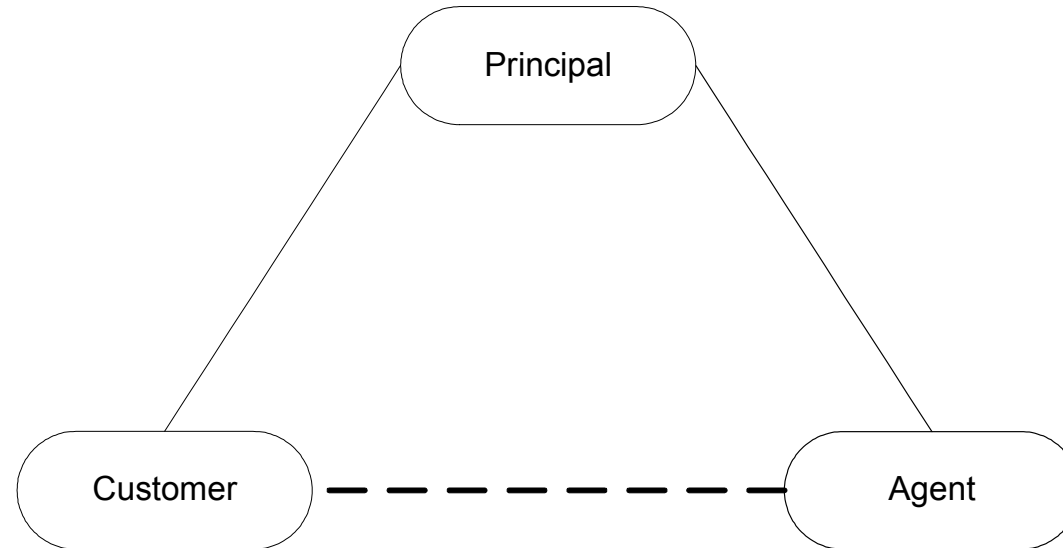
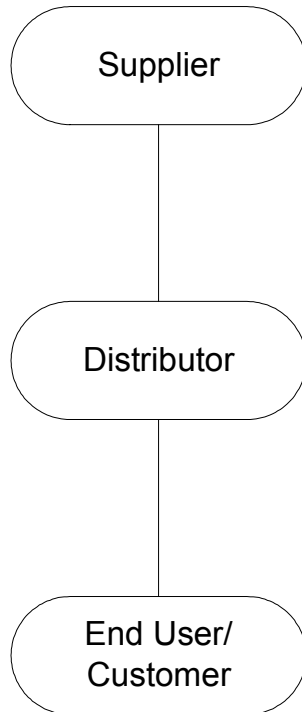


Commercial Agents and Distribution – Pitfalls and Issues to be Aware of

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Agents and Distributors



Commercial Agents

- What is a Commercial Agent?
 - *“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...”*
 - Commercial Agents (Council Directive) Regulations 1993 regulation 2(1)
- Meaning what?
 - Raoul Sagal (t/a Bunz UK) v Atelier Bunz GmbH
- Remuneration structure is not determinative:
 - Invicta UK v International Brands Ltd



The Regulations: Key Terms

- What is not a Commercial Agent?
 - Regulation 2(1) continued
 - Officer of a company or association
 - Partner
 - Insolvency Practitioner
 - Regulation 2(2)
 - Unpaid agents
 - Regulation 2(3) and (4)
 - Secondary Agents
 - Schedule to the Regulations
 - E.g. paragraph 2(b) – nature of the goods
 - Crane v Sky In-Home Service Ltd



The Regulations: Key Terms

- **Basic Duties**

- Regulations 3, 4 and 5
 - Duties of the Agent
 - Duties of the Principal
 - No Derogation
 - Breach of the duties is not necessarily a repudiatory breach (Crocs Europe BV v Anderson & another)
- Vital contract terms
- Barnett Fashion Agency Ltd v Nigel Hall Menswear Ltd



The Regulations: Key Terms

- Regulation 6
 - Form and amount of remuneration in absence of agreement
 - “what is customarily allowed in the place where he carries on his activities ... AND ... reasonable remuneration taking into account all the aspects of the transaction”
- Regulation 7
 - Commission on transactions concluded during agency contract (agent’s action, introduced customer, OR customer in an exclusive territory or group)
- Regulation 8
 - Orders received during agency contract AND transaction concluded after agency contract if “mainly attributable”



The Regulations: Key Terms

- Regulation 9
 - Apportionment between new and previous agents
- Regulation 10
 - When commission is due and date for payment
- Regulation 11
 - Extinction of right to commission
- Regulation 13
 - Right to a written statement of terms – similar to employment
- Regulation 14
 - Continuation after fixed term converts to indefinite



The Regulations: Key Terms

- Regulation 16 – Immediate Termination
 - Because of failure of one party to carry out obligations
 - Exceptional circumstances
- Regulation 17 – Indemnity or Compensation
 - Lonsdale v Howard & Haslam
 - Berry v Laytons
 - Compensation unless contract states otherwise
 - Sheerman v Hunter Boot
 - Applies on death of agent
 - Must claim in time
 - Barnett Fashion Agency Ltd v Nigel Hall Menswear



The Regulations: Key Terms

- **Regulation 18 – Grounds for Excluding Payment**
 - Default of agent justifying immediate termination
 - Agent terminates (unless because of default, age, ill health etc)
 - Agent has assigned contract
 - What else does the agreement say?
- **Regulation 20 – Restraint of Trade**
 - Only if (i) in writing; (ii) relates to the goods, customers, territory covered by the agency agreement; and (iii) its for a maximum 2 years
- **Choice of Law**
 - Parties can choose any EU state law but iff nothing stated – Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA



Distributors: Overview

- **Compare and Contrast with Agency**
 - The dual nature of the Distributor – position in the supply chain (co-ordinating upstream and downstream terms)
 - Supplier's customer and
 - Link to the market
- **Conflicting Objectives for Supplier**
 - Maximise earnings from sales (to Distributor)
 - Enable or encourage Distributor to pursue sales
 - e.g. Margins at each stage, who funds promotions?



Distributors: Legal Issues

- Key Terms

- Parties
- Products included (and excluded)
- Warranties
- Intellectual Property
- Sole or Exclusive status? Territory, market or product?
- Sale of Goods Terms
 - Orders and acceptance
 - Minimum and maximum orders?
 - Delivery (direct to end user?)
 - Risk, retention of title and Insurance
 - Price and other payments: marketing support, loans etc



Distributors: EU Legal Issues

- Some Distribution Agreement jargon
- “Vertical Agreement” - EU Block Exemption

Regulation:

- Art 4: Hard Core Restrictions include setting minimum price; restrictions on active or passive sales; and restriction of cross-supplies between distributors
- Art 5: Lesser Restrictions include prohibition on preventing distributor from competing for more than five years; prohibiting distributor to manufacture, purchase, sell or resell goods or services, unless e.g. indispensable to protect know-how and limited to one year



Distributors: EU Competition Law

- Art 3 and 9 – Market Share Disqualification:
 - Supplier's market share must not exceed 30%
 - Buyer's market share must not exceed 30% where there is exclusive supply
 - Some protection for market share $< 30\%$ and then $>30\%$ but $<35\%$.
 - Agreements of minor importance



Thank You

- Does anyone have any questions?

