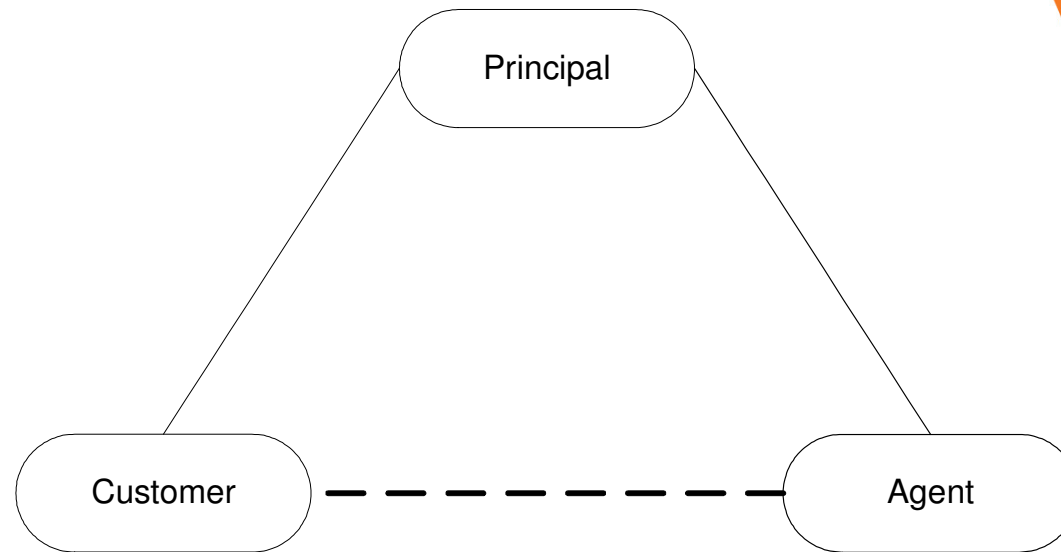
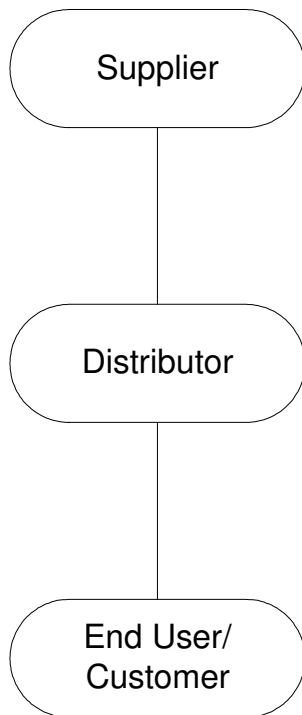


Legal

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Agents and Distributors



Commercial Agents

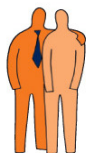
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Commercial Agents

- 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
 - July 2009 – Court of Appeal
 - Agent or Distributor?



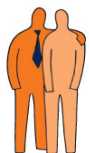
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The Regulations: What and Where?

- **The UK 1993 Regulations**
 - Implementing EC Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents
 - Effective from 1 January 1994
- **Scope of the Directive**
 - “Commercial Agents”
 - In the EU

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

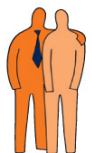


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The Regulations: Key Terms

- **Basic Duties**

- Regulations 3, 4 and 5
 - Duties of the Agent
 - Duties of the Principal
 - No Derogation
- Barnett Fashion Agency Ltd v Nigel Hall Menswear Ltd



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The Regulations: Key Terms

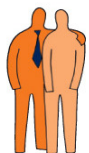
- **Commission**

- Regulation 6

- Form and amount of remuneration in absence of agreement
- “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”
- “reasonable remuneration taking into account all the aspects of the transaction”

- Regulation 7

- Commission on transactions concluded during agency contract
- Reg 7(1)(a)&(b) – agent’s action or introduced customer
- Reg 7 (2) – customer in an exclusive territory or group

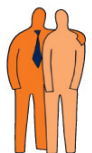


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The Regulations: Key Terms

- **Commission**

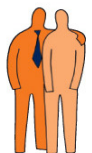
- Regulation 8
 - Transaction concluded after agency contract
 - “mainly attributable”
 - Order received during agency contract
- Regulation 9
 - Apportionment between new and previous agents
- Regulation 10
 - When commission is due and date for payment
- Regulation 11
 - Extinction of right to commission



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The Regulations: Key Terms

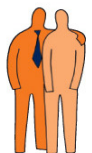
- Conclusion and Termination
 - Regulation 13
 - Right to a written statement of terms
 - Regulation 14
 - Continuation after fixed term converts to indefinite
 - Regulation 15
 - Minimum notice periods
 - Rules about notices
 - Regulation 16 – Immediate Termination
 - Because of failure of one party to carry out obligations
 - Exceptional circumstances



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The Regulations: Key Terms

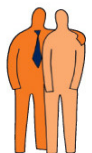
- Regulation 17 – Indemnity or Compensation
- Indemnity
- Compensation
- Compensation unless contract states otherwise
 - Lonsdale v Howard & Haslam
 - Berry v Laytons
- Applies on death of agent
- Must claim in time
 - Barnett Fashion Agency Ltd v Nigel Hall Menswear



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The Regulations: Key Terms

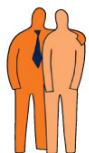
- Regulation 18 – Grounds for Excluding Payment
- Default of agent justifying immediate termination
- Agent terminates (unless because of default of principal, age, ill health etc)
 - Tony Vick v Vogel-Gapes Ltd
- Agent has assigned contract
 - Barnett Fashion Agency Ltd v Nigel Hall Menswear Ltd
- What could be in the contract to clarify this?



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The Regulations: Key Terms

- Regulation 20 – Restraint of Trade
 - Only if
 - In writing
 - Relates to goods, customers, territory covered by agency
 - Maximum 2 years
 - BUT
 - “Nothing in this regulation shall affect any enactment or rule of law which imposes other restrictions on the validity or enforceability of restraint of trade clauses or which enables a court to reduce the obligations on the parties resulting from such clauses”
- Choice of Law
 - Parties can choose any EU state law
 - If nothing stated – Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA



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Commercial Agents: Case Study

- **Savage v Thinkfirst Industries**
 - Glen Fool of Thinkfirst Industries is in email contact with Damien Savage, Commercial Agent
- Review the emails

Commercial Agents: Case Study

- **Savage v Thinkfirst Industries**
- Is there a contract?
- What terms are expressed?
- What terms do the Regulations add?
- Which law applies?
- Lessons to learn?
- Three simple words.



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Time for a
well-earned
break



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Distributors

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Distributors: Overview

- Compare and Contrast with Agency
 - The dual nature of the Distributor
 - 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?



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Distributors: Legal Issues

- Legal and commercial issues
- Position in the supply chain
 - Co-ordinating upstream and downstream terms
- Key Terms
 - Parties
 - Products included (and excluded)
 - Warranties
 - Intellectual Property
 - Sole or Exclusive status? Territory, market or product?
 - Sale of Goods Terms



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Distributors: Legal Issues

- Sale of Goods Terms
 - Orders and acceptance
 - Minimum and maximum orders?
 - Delivery (direct to end user?)
 - Risk and Insurance
 - Retention of Title
 - Price
 - Other payments: marketing support, loans etc



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Distributors: EU Legal Issues

- Some Distribution Agreement jargon
- “Vertical Agreement”
 - Why is it relevant?
 - EU Block Exemption Regulation
 - Removes the effect of competition law for agreements keeping within the exemption
 - Why is that relevant?
 - Makes your contract easier to enforce and defend
- “Qualitative Selective Distribution” and “Quantitative Selective Distribution”



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Distributors: EU Competition Law

- **Block Exemption Regulation**

- Art 4: Hard Core Restrictions:

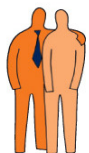
- “the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties”;
 - restriction of active or passive sales by retailers to end users in a selective distribution agreement BUT can restrict to authorised places of establishment;
 - restriction of cross-supplies between distributors within a selective distribution system;
 - restriction between a supplier and buyer of components limiting the supplier's sale of spare parts.



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Distributors: EU Competition Law

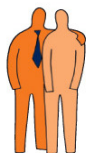
- Art 4: Hard Core Restrictions:
 - “the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except:
 - the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer....,
 - the restriction of sales to end users by a buyer operating at the wholesale level of trade,
 - the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
 - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier”



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Distributors: EU Competition Law

- Art 5: Lesser Restrictions:
- “any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years...”
BUT can be longer if connected to premises
- “any direct or indirect obligation causing the buyer... after termination ... not to manufacture, purchase, sell or resell goods or services, unless...”
 - relates to goods or services which compete
 - is limited to the premises and land used in the contract
 - is indispensable to protect know-how
 - is limited to a period of one year
- “any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers”



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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 $<35\%$.



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Distributors: Case Study

- **Thinkfirst Industries (again)**
 - Mr Fool went on holiday to the Irish Republic
 - He met a very helpful man with a distribution business
 - Learning the lessons from his experience with Mr Savage he decided to write a contract there and then
- Review the contract he wrote



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Distributors: Case Study

- **Thinkfirst Industries (again)**
- Is it a contract?
 - Probably
 - A very poor one
- What's wrong with it?



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Common Issues

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Common Issues

- Key Terms in the Agreement
 - Sole or exclusive
 - Choice of law and jurisdiction
 - Select English law where possible
 - AND get local advice on enforceability
 - Attitude of local courts?
 - Local legal restrictions (e.g. on ownership of businesses trading in the territory)
 - Extent of appointment
 - Dispute resolution
 - Interaction with other agreements



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Final Case Study

- **Poco Pecicillo (Deceased) v Biggershot Ltd**
 - Biggershot Limited gets a letter of claim
 - The new MD (who took over from founder Mr Biggershot when he retired last year) gets out the file
- Review what he finds
- What can the company do?