



Engaging Commercial Agents



Business Support on Your Doorstep

Enterprise Europe Network London

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1. Introduction

There are a number of different approaches to selling to new markets. One of these is using a commercial agent. Companies have used commercial agents for hundreds of years and they are still crucial intermediaries for many companies (SMEs in particular) when entering new markets today. Other approaches include direct selling, distributors, export houses, employment of local sales staff and franchises.

2. Definition of commercial agents

Commercial agents are independent professional providers of sales and marketing services who, under a contractual arrangement, represent a manufacturer or supplier in a given geographical area.

In the Commercial Agents Directive (86/653/EEC) a commercial agent is defined as *'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 that principal'.*

To strengthen the position of commercial agents, who for decades had found themselves in a disadvantaged position when dealing with their principals, the Commercial Agents Directive (Council Directive 86/653/EEC on the co-ordination of the laws of the Member States relating to self-employed commercial agents) was adopted on 18 December 1986. The Directive is still in force today and has not been amended since it was adopted.

The Commercial Agents Directive was implemented into UK legislation in 1993 by the Commercial Agents (Council Directive) Regulations 1993 which came into force on 1 January 1994.

The Commercial Agents Directive is product-focused and does not apply to services. It does not cover:

- Unpaid commercial agents
- Agents who operate on commodity exchanges or in the commodity market
- An officer of a company or association acting as an agent for that company
- A partner acting as an agent on behalf of his partnership
- Insolvency practitioners
- UK Crown Agents for Overseas Governments and Administrations

As a general rule, unless the parties to a commercial agency contract have chosen otherwise, the laws of the country in which the agent carries out his/her activities apply to the contract. Hence, the Commercial Agents (Council Directive) Regulations 1993 apply to all agents who undertake their activities in Great Britain unless their contract specifies that the laws of another EU Member State should apply.

3. How to find commercial agents

Commercial agents can be found in a number of ways, these include:

- The local Business Link is able to recommend suitable agents for your business.
- In most of the EU member states there are national commercial agents organisations that publish journals which include advertisements from principals for their members. These organisations are also likely to have agent databases on their websites that principals can access (possibly for a fee)
- Trade fairs
- Exhibitions
- Trade missions
- Chambers of commerce
- Commercial libraries (for example the British Library IP & Business Centre, Manchester Commercial Library, Birmingham Central Library's Business Insights Centre)

4. Advantages and disadvantages of employing a commercial agent

As the relationship with an agent is based on mutual trust, this relationship is essentially personal and it is important that a principal meets prospective agent face to face before appointing them. It is equally important to keep in close contact after the appointment. Prior to engaging a commercial agent, a principal should ensure that the agent has experience with the product, has contacts among target customers, and has the right skills. A principal should also investigate the agent's reputation and financial standing. There can be advantages and disadvantages to using commercial agents.

Advantages:

- Commercial agents know already the local market and can therefore offer a fast means of entry and a good source of market intelligence
- Commercial agents can communicate with customers in their own language and offer a convenient and 'user-friendly' means of responding to customers' requirements and problems
- Commercial agents often represent a range of product lines and when these complement each other, they can be part of an integrated product range
- Commercial agents are usually paid on the basis of results and the principal maintains the responsibility for customers and the control of important considerations such as pricing, promotion, delivery and after-sales services
- The cost of investigating the market is borne by the agent

Disadvantages:

- A common cause of friction is that a principal believes that their products are not being promoted as well as the other products represented by the agent
- It can be difficult to control the agent's activities and to ensure they continually work hard on behalf of the principal
- Relying on an agent can sometimes tempt a principal to ignore the need to get to know the market and the customers
- Principals need to take the possibility of goodwill compensation into account when a contract is terminated

5. How to draw up a contract with a commercial agent

An agency agreement can be either oral or written but either party has a right to require a signed document containing the provisions of the contract from the other party.

As the purpose of the Commercial Agents Directive is to protect commercial agents, it is advisable for principals to draw up a written contract which outlines the exact details of the agreement to avoid as much trouble as possible if disputes arise or if the contract is terminated. The more detailed the contract, the better it will be because there will be fewer issues to dispute. The contract can be used to enhance an agent's obligations to his/her principal and can be used by the principal to better monitor his/her agent's performance. The contract should also define exactly where the agent can sell products and services, precisely what they are expected to sell and to which customers they are expected to sell.

Principals and agents alike are advised to use a model agency contract or to consult a lawyer specialised in commercial agreements. A standard contract usually contains the following information:

- Identification of the parties
- Definition of the contractual territory or group of customers and exclusivity
- Duration of contract (including whether it is a fixed or an indefinite contract), notice period, and right to renewal/automatic renewal
- Regulatory requirement (some countries require agents to be registered)
- Agent responsibilities e.g. can the agent enter into contracts with third parties on behalf of the principal or should enquiries be passed on to the principal?; treat received information confidentially; keep the principal informed about the situation in the territory/with the customer

group; agent must use his/her best endeavour to promote his/her principal's product(s) in the area/to the customer group

- Principal responsibilities e.g. supply condition of sale to agents and clients; specify delivery details, order processing and quality of goods; set sales targets
- The product(s) covered by the contract, including after-sales services, guarantees, complaint procedures, conditions of sale and credit risk evaluations of customers
- Intellectual property rights (patents, trademarks)
- Payment of commission
- Indemnity/compensation
- Transferability of obligations i.e. is it possible for either party to transfer or delegate its obligations to a third party
- Restraint of trade clause (if required)
- Applicable law and jurisdiction
- Modifications to the contract

6. Remuneration of commercial agents

Commercial agents work usually on a commission basis which means that principals will pay their agents commission on the revenue that the principal accrues as a result of his/her agent's activities. Subject to the terms of the agency agreement, a commercial agent is entitled to commission on a transaction which has been concluded during the period covered by the contract if the transaction:

- Has occurred as a result of the agent's action
- Is a repeat order from a customer previously acquired by the agent, although the order is not placed through him/her
- Relates to the geographical area or group of customers entrusted to the agent

Unless contracted out, a commercial agent is entitled to commission on a transaction which has been concluded after the contract has been terminated if:

- The transaction is mainly attributable to the agent's effort during the period covered by the contract and if this transaction was entered into within a reasonable time after the contract terminated
- An order from a third party which was the result of the action of the agent, or a repeat order from a customer previously acquired by the agent reached the principal or the agent before the contract terminated

A commission is due from the principal to his/her agent when:

- The principal has accepted or delivered the goods
- The principal should, according to his agreement with the customer, have accepted or delivered the goods
- The customer accepts or delivers the goods

Commission is due at the latest when the customer has executed his/her part of the transaction or should have done so if the principal had executed his/her part of the transaction. It is common for goods to be delivered in instalments and it would therefore be advisable to state in the agency contract when commissions on instalments become due.

When commission is due, the principal must pay his/her agent no later than on the last day of the month following the quarter in which it became due. The right to commission can only be nullified if the contract between the customer and the principal will not be executed and the cancellation is not due to the principal's actions.

A principal has an obligation to provide his/her agent with a statement of the commission due no later than on the last day of the month following the quarter in which the commission is due. This statement must outline the main features used to calculate the commission. A commercial agent is also entitled

to be provided with all the necessary information, including extracts from his/her principal's books, to check the commission due if requested.

7. Termination of the contract

An agency contract can be for a fixed period, which means that it will come to an end on an agreed date, or it can be indefinite. If a contract for a fixed period continues after the end of the fixed term, it will be deemed to be converted into an indefinite contract. Either party to an indefinite contract may terminate the contract by giving notice.

Notice periods

Contract Length	Notice Period
First year	One month
Second year commenced	Two months
Third year and subsequent years commenced	Three months

The above notice periods are minimum periods which mean that the two parties are not allowed to agree on a shorter notice period but they are allowed to agree on a longer notice period.

Under English law an agent is entitled to either an indemnity or compensation for the damage caused due to the termination of a contract which has not been terminated because he/she has not fulfilled his/her contractual obligations. An agent is only entitled to an indemnity if this has been included in the contract, if it has not, the right to compensation applies. The amount of an indemnity is capped at a sum equal to the equivalent of the agent's average annual remuneration over the previous five years. If the contract does not go back five years, it will be the average of the annual remuneration for the period of the contract. An agent is entitled to an indemnity if:

- He/she has expanded the principal's business by bringing in new customers or increased the volume of business from existing customers and the principal will continue to derive substantial business from these customers
- It is equitable having regards to all the circumstances and, in particular, the commission lost by the agent on the business transacted with those customers (please note that the word 'equitable' is very open to interpretation)

An agent is entitled to compensation for the damage he/she has suffered as a result of the termination of his/her contract with his/her principal and in particular when:

- He/she has been deprived of the commission which a proper performance of the contract would have procured him/her whilst providing his/her principal with substantial benefits linked to his/her activities
- The agent has not been able to write off the debts (costs and expenses) that he/she has incurred while carrying out his/her activities under the advice of his/her principal

An agent is not entitled to indemnity nor compensation if his/her principal terminates the contract because the agent has not fulfilled his/her obligations, if the agent terminates the contract, unless the termination is due to age, infirmity, illness or death, or if the agent assigns his/her rights and duties to another agent.

Notice of an intention to make a claim for compensation or indemnity must be made by the agent in writing no later than one year after the contract was terminated. It is important to bear in mind that compensation or indemnity may be payable even if the principal has given proper notice to the agent. It is essential for both an agent and a principal to ensure that the compensation/indemnity clauses of a contract are drafted carefully. Principals should also note that, in addition to compensation/indemnity, an agent may still be entitled to receive commission on future orders (please see the previous section on commission).

It is important for principals to remember that their agents are also entitled to indemnity or compensation if the contract is terminated due to the agent's age, infirmity, illness or death. A contract automatically terminates when an agent dies if it is a 'one man band' operation. However, the situation is different if the agent is part of a partnership or a company, as the partnership or the company is likely to continue after the death of the agent.

8. Model contracts for the employment of commercial agents

Model contracts for the employment of commercial agents do exist, but it is advisable to have the contract drawn up by a lawyer rather than using a model agency contract to ensure that all issues are covered correctly. The most commonly used model contract is the 'ICC Model Commercial Agency Contract (publication 644)' and this has been designed to cover almost every country in the world. The contract costs £77 and can be purchased from the International Chamber of Commerce in London on 020 7838 9363 or on www.iccbookshop.com.

9. How can disputes be resolved?

If disputes between a principal and his/her agent cannot be resolved without third party intervention, below there is a list of ADR (Alternative or 'Amicable' Dispute Resolution):

- Arbitration i.e. the submission of a dispute to one or more impartial persons for a final and binding decision. Disputes can, for example, be referred to the ICC International Court of Arbitration (www.iccwbo.org/court)
- Dispute Boards (introduced in the UK on 1 September 2004). Independent bodies comprised of a number of independent industry experts jointly selected by both parties. Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration
- National courts/litigation, i.e. the appointment of a lawyer to take the dispute to court

As there is no guarantee that disputes between principals and agents will not arise, it is advisable for both parties to keep good business records and keep records of important matters and of changes to the agreement.

If you have any concerns or doubts, contact a lawyer specialised in commercial agreements and he/she should be able to tell you if there is any cause for concern and give you practical advice and guidance. Please find a list of solicitors specialised in commercial litigation on the following link: www.lawsociety.org.uk/choosingandusing/findasolicitor/action=lawfirmsearch.law

10. Useful information and contacts

The Manufacturers 'Agents' Association

Unit 16 Thrales, End Harpenden, Herts AL5 3NS

T: +44 (0) 1582 767618 F: +44 (0) 1582 766092 E: info@themaa.co.uk

W: www.themaa.co.uk

International Union of Commercial Agents

De Lairessestraat 131-135

NL-1075 HJ Amsterdam

T: +31 (0) 20 47 00 177 F: +31 (0) 20 67 10 974 E: info@iucab.nl

W: www.iucab.nl

ICC International Court of Arbitration

38 Cours Albert 1n, Paris 75008

T: +33 (0) 149 53 30 48 F: + 33 (0) 149 53 57 19

W: www.iccwbo.org/policy/arbitration/id2882/index.html

London Court of International Arbitration
70 Fleet Street, London EC4Y 1EU
T: +44 (0)20 7936 7007 F: +44 (0)20 7936 7008
W: www.lcia-arbitration.com

The Commercial Agents (Council Directive) Regulations 1993
W: www.hmso.gov.uk/si/si1993/Uksi_19933053_en_1.htm

The Commercial Agents (Council Directive) (Amendments) Regulations 1993
W: www.hmso.gov.uk/si/si1993/Uksi_19933173_en_1.htm

The Commercial Agent Directive
W: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31986L0653:EN:HTML>



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