Capitolo Quinto

Commercial Agency Contracts: Termination and Indemnity
England and Wales

Gregor Kleinknecht, LLM MCIarb, Solicitor

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1. Legislation

1.1 The Regulations


1.2 Scope of Application

Regulation 1.(2) defines the scope of application of the Regulations. It provides that they govern the relations between commercial agents and their principals and apply in relation to the activities of commercial agents in Great Britain. However, Regulation 1.(3) gives the parties freedom expressly to agree that the agency contract is to be governed by the laws of another Member State (the assumption being that the agent will nevertheless be protected by the legislation implementing the Directive in that other Member State). If the law of a non-EU country is chosen then the provisions of the Regulations are intended to override that choice of law insofar as any of the activities of the commercial agent are carried out in Great Britain (see further below on questions of the applicable law).

1.3 Definition of Commercial Agent and Exclusions

Regulation 2.(1) defines a “commercial agent” as 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. The Regulations do not apply to commercial agents whose activities are unpaid or to persons whose activities as commercial agents are considered to be secondary as defined in detail by the Schedule to the Regulations.

Contrary to the law of some other Member States, in implementing the Directive, English law has not extended the scope of application of the Regulations beyond the sale or purchase of goods to include also the supply of services³. The Regulations also do not apply to any other type

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³ Supplies of gas and electricity are to be treated as goods under the Regulations: Tamarind International Ltd –v- Eastern Natural Gas (Retail) Ltd [2000] CLC 1397; although software on its own is not goods, software bundled with hardware would be: Accentuate Limited –v- Asigra Inc [2009] EWHC 2655 (QB).
of commercial agency or distribution arrangement falling outside of the scope of the definition of “commercial agent”. Dealerships, distributors and franchisees therefore fall outside the scope of application of the Regulations. This will further exclude, for example, an agent appointed for a specified number of transactions, who will lack the continuing authority required by Regulation 2.(1) for him to be considered a commercial agent within the meaning of the Regulations; or an agent who acts on behalf of an undisclosed principal but not in the name of the principal4.

1.4 Del Credere Agents

There is some uncertainty in English law as to whether a del credere agent, who, in consideration of extra remuneration, will guarantee to his principal that third parties with whom he enters into contracts on behalf of the principal will duly perform their obligations under those contracts, falls within the Regulations. The answer will depend very much on the individual circumstances of each case: while the additional features of a del credere agency do not in themselves cause the agency to fall outside the definition of “commercial agent”, the question can arise whether the del credere agent does not in reality act on his own account5.

1.5 Marketing Representatives

Although the term “agency” is frequently used also in relation to marketing representatives (also sometimes referred to as “introducing” agents as opposed to “sales” agents), a marketing representative has more limited authority than a commercial agent proper and is entitled only to canvass business on behalf of the principal, to acquire and solicit prospective customers, and to make introductions, but is not entitled to alter the principal’s legal relationship with third parties. An introducing agent lacks the authority to negotiate and conclude the sale or purchase of goods on behalf of and in the name of the principal and therefore does not fall within the scope of the Regulations6.

There is however a developing line of case law which is seeking to bring introducing agents into the scope of application of the Regulations, based on the construction of the term “negotiate” in Regulation 2.(1). The term “negotiate” was found to include an agent whose role it was to encourage third party interest, suggest prices subject to confirmation, and encourage the third party to place an order7. However, the courts have gone further and found that, where the commercial agent was actually retained to develop a principal’s business and goodwill, and the principal continued to derive benefit from that goodwill after termination of the agency, less

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6 See the definition of “Commercial Agent” in Regulation 2.(1); and Poseidon Chartering BV –v- Marianne Zeeschip VOF and others [2006] EUECJ C-3/04; petrol station operators do not “negotiate” the sale of petrol and cannot therefore be considered agents for the purpose of the Regulations: Parks –v- Esso Petroleum Company Ltd [1999] EWCA Civ 1942.
7 Nigel Fryer Joinery Services Ltd –v- Ian Firth Hardware Ltd [2008] EWHC 767 (Ch).
importance was to be given to the question whether the agent actually participated in
discussions on price and commercial terms with the third party, so that the introducing agent
was nevertheless considered to be a commercial agent for the purpose of the Regulations. What
is clear from this line of cases, is that the meaning of “negotiate” has a low threshold and that
the courts are reluctant to limit or restrict the application of the Regulations.

2. General Principles of Agency Law

Outside of the scope of application of the Regulations, there is no specific statutory provision for
commercial agency relationships. Rather, the rights and obligations of principal and agent are
determined principally by the express and implied provisions of their commercial agency contract.
A sufficiently detailed and well drafted commercial agency contract is therefore essential for both
parties. These contractual provisions are supplemented, clarified and construed in accordance with
the common law and jurisprudence on agency law, which has a wide scope of application under
English law. The general law also applies where the Regulations are silent on a specific issue.

3. Formation of Contract Including
Form Requirements

3.1. English common law does not stipulate any form requirements for commercial agency
contracts; the contract can be made orally or in writing. However, if the agent is a commercial
agent within the meaning of the Regulations, each party is entitled to receive from the other
upon request a signed written document setting out the terms of the commercial agency
contract, including any terms subsequently agreed. Any purported waiver by either party of this
right will be void. The requirements of Regulation 13 are not a form requirement as such: the
commercial agency contract can still be valid if made orally in circumstances were neither party
requires a written document or, at least, until one of the parties makes such a request.
3.2. As pointed out above, in practice, and notwithstanding the absence of a form requirement,
the parties will be well advised to set their agreement down in writing to create certainty as to
their mutual rights and obligations under the agency relationship; in particular, if the agency
relationship takes effect across borders in more than one jurisdiction.

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9 Regulation 13.(1).
10 Regulation 13.(2).
4. Termination

4.1 Fixed Term Agreements

Where a commercial agency contract has been entered into for a fixed period of time, it will automatically come to an end upon expiry of the contractual term. However, it is not unusual in practice for parties to continue their agency arrangement beyond the termination date and most fixed term commercial agency contracts will therefore provide for termination on notice where the agency relationship continues beyond the date on which the fixed term comes to an end.

Where a commercial agency falls within the scope of the Regulations, Regulation 14 provides that an agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period. Where such a deemed conversion into a commercial agency contract of indefinite duration occurs, Regulation 15.(5) clarifies that the commercial agent will benefit from the minimum notice periods provided for in Regulation 15. The earlier fixed period must be taken into account when calculating the notice period.

4.2 Indefinite Agreements

Where the commercial agency contract has been entered into for an indefinite period of time, it can be terminated on notice in accordance with the termination provisions in the agency agreement between the parties. Where the commercial agency contract falls within the scope of the Regulations, Regulation 15.(1) confirms that an agency contract concluded for an indefinite period may be terminated by either party on notice. Regulation 15.(2) then provides for certain minimum notice periods depending on the length of the commercial agency contract. The notice period must be not less than:

- 1 month for the first year of the contract;
- 2 months for the second year commenced; and
- 3 months for the third year commenced and for the subsequent years.

The parties may not agree on any shorter notice periods. If the parties agree on longer periods than those laid down in Regulation 15.(2), the notice period to be observed by the principal must, pursuant to Regulation 15.(3), not be shorter than that to be observed by the commercial agent. Finally, Regulation 15.(4) requires that the end of the notice period must coincide with the end of a calendar month unless otherwise agreed by the parties.

Where the commercial agency contract falls outside of the scope of the Regulations, and the parties have not agreed on a notice period in their commercial agency contract, the contract can be terminated on reasonable notice. What constitutes a reasonable notice period will depend

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on the circumstances of each case, having regard to the facts in existence at the time notice was given, not at the time when the contract was entered into\textsuperscript{12}. Factors such as the duration of the commercial agency contract prior to termination, whether there is a post-contractual restrictive covenant, the degree of investment required by the agent at the outset of the agency relationship, the question whether the agent is free to sell competing products, and the proportion of the agent’s turn-over contributed by the principal’s goods must be taken into account in determining the appropriate notice period. Most English case law on reasonable notice periods concerns distributors. In circumstances where the agency relationship lasted between two and a half and three years, and the agent had to incur significant start-up costs, the English courts considered notice periods of 9 months\textsuperscript{13} and 12 months\textsuperscript{14} to be reasonable. Depending on the circumstances of the case, English common law may therefore afford the agent more generous notice periods than the Regulations.

4.3 Immediate Termination

Fixed term commercial agency contracts as well as commercial agency contracts for an indefinite period of time can be terminated immediately if the other party commits a fundamental breach of contract. However, if the party terminating the agreement fails to establish grounds for a termination without notice, such termination will itself amount to a breach of contract and may entitle the other party to damages and/or other relief, including an injunction\textsuperscript{15}. Regulation 16.(1) contains an express saving for any rule of English law which provides for immediate termination of an agency contract because of the failure of one party to carry out all or part of his obligations under that contract\textsuperscript{16}; or where exceptional circumstances arise. The term “exceptional circumstances” may cover matters falling within the English law doctrine of frustration\textsuperscript{17}.

\textsuperscript{13} Jackson Distribution Ltd –v- Tum Yeto Inc [2009] EWHC 982 (QB).
\textsuperscript{14} Decro-Wall –v- Practitioners in Marketing Ltd [1971] WLR 361.
\textsuperscript{15} In Bailey v Angoué’s Pty Ltd [2014] EWCA Civ 215, for example, the Court of Appeal held that an agent’s authority to receive payments due from customers for goods already supplied and owed to the principal was not ended by the termination of the agency contract where ending the agent’s authority was a breach of the agency contract by the principal.
\textsuperscript{16} This has been held in English law to refer to a repudiatory breach of contract: Crane v Sky in Home Ltd [2007] 2 All ER 599.
\textsuperscript{17} DTI Guidance Notes.
5. Indemnity or Compensation on Termination

5.1 Introduction

The introduction of the Regulations significantly strengthened the commercial agent’s position on termination of the commercial agency contract. Regulation 17.(1) requires the agent either to be indemnified or to be compensated for damage upon termination of the commercial agency contract. Neither the term “indemnity” nor the term “compensation” is defined in the Regulations. When the Regulations came into force in 1994, both were new concepts in English law. The Directive derived the concept of compensation from French law, whereas the concept of indemnity flowed from German law. While the Directive gave Member States the option of adopting either the indemnity or the compensation approach, English law adopted both. It has not yet been tested before the courts whether this constitutes effective implementation of the Directive. Unless otherwise agreed by the parties in the commercial agency contract, the commercial agent shall be entitled to be compensated rather than indemnified.18 However, the use of the term “compensation” by the parties is not necessarily in itself conclusive.19 The agent’s claim to an indemnity or compensation is mandatory and the parties may not derogate from Regulation 17 to the detriment of the commercial agent before the agency contract expires.20 This leaves room however for the parties to come to a different arrangement for the settlement of the agent’s claims after the commercial agency contract has come to an end. The claim to an indemnity or compensation does not require the principal to have acted in any way wrongfully and it arises even if the commercial agency contract had been entered into for a fixed time period and has expired through simple lapse of time; or, in the case of a commercial agency contract entered into for an indefinite period, where the principal terminated the agreement in accordance with the contractual notice provisions and adhered to the required minimum notice period; or where the commercial agency contract comes to an end as the result of the death of the commercial agent.21 Regulation 17 is a ‘no fault’ provision and the entitlement to an indemnity or compensation arises simply as a consequence of termination of the agency relationship, provided that the principal continues to derive substantial benefits from the goodwill that the agent has generated for the principal.

In practice, compensation will nearly always be more beneficial to the agent than an indemnity. Not only is there no cap on the amount of compensation payable, in order to claim compensation, the agent does not need to show that he has brought the principal new customers.

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18 Regulation 17.(2).
19 See the Scottish case of Hardie Polymers –v- Polymerland Ltd (2002) SCLR 64, where the commercial agency contract referred to “Compensation” but the court concluded that the word had been used in a non-technical sense to refer to a termination payment and that on balance the intention of the parties had been to choose indemnity rather than compensation.
20 Regulation 19.
22 Regulation 17.(8).
or has significantly increased the volume of business. The agent would have difficulty in establishing these factors, for example, where he has taken over a pre-existing customer list in a mature market based principally on repeat business but with little scope for growing the business. Valuing compensation by reference to the value of the lost agency will be much more attractive for the agent in such circumstances.

The agent’s claim for payment of indemnity or compensation can only be excluded in the circumstances of Regulation 18. Regulation 17.(9) however introduce a statutory exclusion period in that it provides that the commercial agent will lose his entitlement to an indemnity or compensation if he does not notify the principal that he intends to pursue his entitlement within one year following termination of his commercial agency contract. The agent’s claim for indemnity or compensation does not need to comply with any specific form requirements.

### 5.2 Indemnity

The Regulations deal with the agent’s entitlement to payment of an indemnity in Regulations 17.(2) to 17.(5). Where the commercial agency contract provides that the commercial agent shall be indemnified rather than compensated, the agent will 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\(^23\).

The purpose of the indemnity is essentially to recognise the value of the goodwill which the commercial agent created in the principal’s goods or business but is no longer able to exploit following termination. The term “indemnity” does however have a more limited meaning under the Regulations than it normally bears under English law in that it falls short of a complete making good of the loss suffered by the agent\(^24\). Pursuant to Regulation 17.(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. The payment of an indemnity is very unusual in England and Wales and there is little practical experience with its application. Existing case law principally addresses issues surrounding the calculation of compensation (which is the default position under the Regulations unless the parties have specifically agreed otherwise in the commercial agency contract). The grant of an indemnity does not prevent the commercial agent from seeking damages where termination of the commercial agency contract constitutes a breach of contract by the principal.

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\(^{23}\) Regulation 17.(3).

\(^{24}\) DTI Guidance Notes.
5.3 Compensation

Regulations 17.(6) to 17.(8) make provision for the agent’s entitlement to compensation. Where the commercial agency contract does not specifically provide that the agent shall be indemnified upon termination of the commercial agency contract, the agent will be entitled to compensation for the damage which he suffers as a result of the termination of his relations with the principal. Pursuant to Regulation 17.(7), 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 amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.

The agent’s claim for compensation for damage is in addition to any claim which the agent may have for damages for breach of contract against the principal since the compensation claim arises simply as a result of termination of the commercial agency contract. In contrast to the provisions on indemnity, the Regulations do not stipulate a maximum amount payable by way of compensation.

6. Calculating Compensation

The lack of further guidance on interpretation and the method of calculating compensation in the Regulations, and the absence of pre-existing English jurisprudence on the issue, initially gave rise to significant uncertainty as to the correct approach. Since the concept of compensation derived from French law, English courts initially looked to and followed the principles established by French case law, which generally tended to award the agent two times his average annual gross remuneration over the preceding three years. This approach had been endorsed, in particular, by the highest appellate court in Scotland, the Court of Session. Subsequently, English courts increasingly sought to diverge from this rule and to develop alternative approaches, which were perceived to be more suited to English market conditions. Since a ruling of the House of Lords in 2007, the question as to the correct method of calculating compensation (if not necessarily as to the application of that method) has been resolved for the time being as a matter of English law.

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25 Regulations 17.(2) and 17.(6).
27 King v Tummock Ltd 2000 SC 424.
29 Lonsdale v Howard & Hallam Ltd [2007] UKHL 32, per Lord Hoffmann; cf Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd [2008] EWHC 767 (Ch).
In *Lonsdale*, the House of Lords started from the premise that the purpose of compensation was to compensate the commercial agent for the damage which he suffered as a result of the termination of his relations with the principal, in particular, the loss of future commission income which proper continued performance of the agency contract would have procured for him or, in other words, the value of the agency. The lost income stream and goodwill which the agency would have generated for the agent going forward had to be valued on the basis of what a hypothetical purchaser would have paid for the agency in the open market at the time of termination\(^{30}\). Commission earnings had to be ascertained as net commission after deducting the expenses which the agent would have had to incur to earn his commission, and after discounting future earnings by an appropriate rate of interest. The factors which the House of Lords took into consideration in assessing the value of the agency included the question whether the market for the products in which the agent dealt was rising or declining, the earnings prospects of the agency, whether the agent had to incur expenses in earning his commission, and, in the circumstances of the specific case which the court had to consider, that the principal went out of business and therefore derived no continuing benefit from the goodwill established by the agent. Against this background, the House of Lords affirmed the decision of the judge at first instance to award the agent compensation of £5,000, based on modest net commission earnings of £8,000 per annum which had been falling prior to termination in a steadily deteriorating environment. One of the practical difficulties with this approach however is that there is no market in the UK for the sale of commercial agencies. A valuation on this basis is therefore notional and in most cases needs to rely on expert valuation evidence. In applying the *Lonsdale* principles, parties and courts have continued to seek to grapple with the factors which needed to be taken into account for the purpose of valuing the agency\(^{31}\). The English valuation method is not necessarily as beneficial to principals as may appear at first glance: a successful commercial agent in an expanding market may well recover more on this basis than pursuant to the French rule of two times average annual gross remuneration over the preceding three years. The method of calculating compensation under English law therefore clearly differs from that adopted by the French courts. While it may be open to argument whether these differences in approach aid the harmonisation of the laws of the Member States intended by the Directive, their existence was expressly acknowledged by the European Court of Justice, which observed that, although Article 17 of the Directive was mandatory and prescribed a framework, it did not give any detailed indications with regard to the method for calculating the indemnity and that, within that framework, the Member States therefore enjoyed a margin of discretion as to the choice of methods for calculating the indemnity\(^{32}\). The same margin of discretion will apply *mutatis mutandis* to the method for calculating compensation under Article 17 of the Directive.

Sub-agents who do not enjoy a direct contractual relationship with the principal, but only with the agent who appointed them, do not have acclaim for compensation against the principal\(^{33}\).

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\(^{31}\) McQuillan and another –v- McCormick and others [2010] EWHC 1112, where the court took into account the risk of termination of the principal’s contract with the ultimate manufacturer.


\(^{33}\) Light –v- Ty Europe Ltd [2003] EWCA Civ 1238.
7. Grounds for Excluding Payment of Indemnity or Compensation

While the indemnity and compensation rules in Regulation 17 are mandatory and cannot be derogated from to the detriment of the commercial agent before the commercial agency contract expires, Regulation 18 enumerates limited grounds on which the agent may lose the entitlement to payment of an indemnity or compensation. Regulation 18 is itself mandatory and the commercial agency contract between the parties cannot therefore provide for any additional grounds on which payment can be excluded.

Regulation 18 provides that the compensation referred to in Regulation 17 shall not be payable to the commercial agent where:

a. the principal has terminated the agency contract because of a default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to Regulation 16; or

b. the commercial agent has himself terminated the agency contract, unless such termination is justified:
   • by circumstances attributable to the principal, or
   • on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; or

c. the commercial agent, with the agreement of his principal, assigns his rights and duties under the agency contract to another person.

Although the wording of Regulation 18 refers only to “compensation referred to in Regulation 17”, it is generally acknowledged that this includes also the payment of indemnity pursuant to Regulation 17. Where the agent terminates the contract on the grounds of the principal’s breach in circumstances which justify such termination at common law, he remains entitled to claim compensation or an indemnity; however, the agent will lose the right to payment of indemnity or compensation if the right to termination is lost at common law, for example, on the grounds that the agent affirmed the contract following the principal’s breach. It follows from the above that where the agent terminates the agency relationship other than pursuant to Regulation 18.(b), he has no entitlement to an indemnity or compensation.

Regulation 19.

In Volvo Car Germany GmbH v Autohof Weidensdorf GmbH [2009] ECJ C-203/09 (28 October 2010), a case concerned with a claim for an indemnity, the ECJ held that, once a principal has given notice to terminate, he cannot withhold an indemnity due to the agent under Article 17 of the Directive if the principal subsequently discovers a breach that would have entitled the principal to withhold the indemnity under Article 18(a) of the Directive. However, because the indemnity alternative requires the indemnity to be paid only if equitable, the agent’s breach of contract may be taken into account when determining this. The ruling in the Volvo case runs counter to the English common law rule in Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339 to the effect that an innocent party, who purports to accept a repudiatory breach and rescinds the contract, is entitled thereafter to justify his conduct by reference to matters amounting to a serious breach of the contract which were not referred to by him at the time when he rescinded the contract.

The difficulty in applying Regulation 18 is highlighted by another case which the Court of Appeal had to consider\(^{37}\), in which the agent sold goods manufactured by different manufacturers. When one of his principals introduced a new range of goods, the agent refused to sell them on the grounds that doing so would breach the terms of the agreements with his other principals by competing with their goods. When the agent’s fixed term contract came to an end, the principal refused to offer the agent a new contract. When the agent claimed compensation, the principal sought to rely on Regulation 18.(a), arguing that he terminated the commercial agency contract because of a default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to Regulation 16. The Court of Appeal rejected this argument. Expiry of a fixed term contract may amount to termination for the purposes of the Regulations but was not termination by the principal. In order to avoid payment of compensation, the principal would have had to terminate the commercial agency contract immediately rather than to allow it to expire through lapse of time.

In order to increase the prospects of being able to avoid the need to pay indemnity or compensation in circumstances where the principal terminates the commercial agency contract due to the agent becoming insolvent or going into liquidation, the principal should insert into the commercial agency contract provisions entitling him to terminate the agreement forthwith upon such an event occurring.

### 8. Compensation Outside of the Regulations

The position at common law is much less beneficial to the commercial agent than that under the Regulations. Unless an entitlement to contractual compensation has been agreed between the agent and the principal in the commercial agency contract, the agent will not have any claim to be compensated for any loss of income or loss of his client base or goodwill due to termination of the commercial agency contract. In commercial practice this will be relevant, in particular, where the commercial agent sells services rather than goods, or where the sale of goods is secondary to the sale of services\(^{38}\). The question whether the commercial agent’s activities fall within the scope of the Regulations is therefore of much greater importance under English law than it is in some other jurisdictions with more comprehensive compensation regimes. A claim for damages may arise in addition to any contractual claim for compensation if the principal terminates the commercial agency contract wrongfully and in breach of contract (for example, because he does not adhere to the contractual notice provisions).

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38 Crane –v- Sky In-Home Service Ltd and another [2007] EWHC 66 (Ch) (goodwill held to have arisen from sale of subscriptions for satellite television rather than from sale of satellite dishes).
9. Entitlement to Commission on Transactions Concluded After Termination of Agency Contract

Independent of any claim to an indemnity or payment of compensation, Regulation 8 entitles a commercial agent to commission on commercial transactions concluded after the agency contract has terminated if:

a. the transaction is mainly attributable to his efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or

b. in accordance with the conditions mentioned in Regulation 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

The entitlement is however subject to any requirement to apportion commission between new and previous commercial agents in accordance with Regulation 9. The Regulations do not define the term “reasonable period” and the agent and principal will therefore be well advised to define in their commercial agency contract what they consider to be a reasonable period. Otherwise regard will have to be had to the time period which it would typically take for the agent’s marketing activities to be converted into a concluded contract between principal and third party.

The use of the words “mainly attributable to” in Regulation 8.(a) differs from the term “as a result of” used in Regulation 7.(1)(a) and appears to set a higher threshold. In applying both concepts, regard will also have to be had to the contributions of any new agent to the generation of business. Regulation 8 is not expressed to be mandatory and the parties are therefore free to make other provisions in their commercial agency contract.

10. Reimbursement of Expenses

There is no statutory entitlement for a commercial agent to obtain reimbursement of the expenses which he necessarily incurs in fulfilling his duties, or to be indemnified by the principal against losses incurred by the agent in the performance of lawful duties within the scope of the agent’s authority. Such an entitlement may however be agreed between the parties. Where such an entitlement has been agreed, it will normally be conditional upon the agent acting within the scope of his authority.

39 In *Tigana Ltd –v- Decoro Ltd* [2003] EWHC 23 (QB), the court found that “mainly attributable” required a causal link between the agent’s activities and the making of the contract; in *PJ Pipe and Valve Co Ltd –v- Audco India Ltd* [2005] EWHC 1904, the court found it to mean the same as the “effective cause” requirement at common law.
11. Applicable Law and Jurisdiction

11.1 Applicable Law

The Regulations themselves contain limited conflict of law provisions in Regulation 1.2 which provides that the Regulations apply in relation to the activities of commercial agents in Great Britain; and in Regulation 1.3, which gives the parties the freedom to agree that the commercial agency contract is to be governed by the law of another Member State.

The general conflict of laws rules applicable to agency contracts entered into after 17.12.2009 are those set out in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) (“Rome I Regulation”). Article 3(1) of the Rome I Regulation gives the parties the freedom to choose the law applicable to the contract. The choice must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

However, Article 3(4) makes clear that, where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of an applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, as implemented in the Member State of the forum, which cannot be derogated from by agreement. In the context of commercial agency, Article 3(4) thus prevents the parties from agreeing on the application of the laws of a non-EU Member State in an attempt to avoid the application of the Regulations (or of the Directive as implemented in other Member States) in circumstances where the agency relationship has no connection with a country outside of the EU. Article 9 of the Rome I Regulation contains a further saving for overriding mandatory provisions of law which the parties’ contractual choice of law cannot override.

On this issue, the English High Court had the opportunity to consider a case in which a commercial agency contract was subject to the law of the US state of California and held (following a reference to the European Court of Justice)\(^\text{40}\) that a choice of law clause in favour of the substantive law of a non-EU Member State could not be used to evade liabilities under the Regulations and that the commercial agency contract still provided the commercial agent with EU compensation as a matter of public policy where the agent carried out his duties in the EU\(^\text{41}\).

It follows that the parties are free to ‘contract out’ of the Regulations where the commercial agent fulfils his duties exclusively outside of the EU. Where a principal appoints an agent for a non EU territory and English law governs the commercial agency contract, the Regulations do not apply.

More recently, following a request for a preliminary ruling from the Belgian Hof van Cassatie, the ECJ went further and ruled that the courts of a Member State (here Belgium) can in limited circumstances also override the parties’ choice of the substantive law of another EU-Member

\(^{40}\) Ingmar GB (Free movement of persons) [2000] EUECJ C-381/98 (09 November 2000).

\(^{41}\) Ingmar GB Ltd –v– Eaton Leonard Inc [2001] EWHC QB 3; cf Accentuate Ltd –v– Asigra Inc [2009] EWHC 2655 (QB), where a Canadian arbitration and choice of law clause was found to be unenforceable.
State, which had correctly implemented the Directive (here Bulgaria), in favour of the *lex fori*, where the law of the Member State of the forum grants protection to the agent which exceeds that granted by the Directive and regards that protection as mandatory. However, given that the Directive provided Member States with a choice whether to adopt the indemnity or the compensation approach in its implementing legislation, and regarded both models as equally acceptable, the rules of a Member State which adopted one approach can arguably not be used to override the application of the other approach adopted by the substantive law of another Member State chosen by the parties. In *Unamar*, the ECJ did not have to deal with the question whether the Belgian courts had correctly assumed jurisdiction, an express choice of arbitration by the parties notwithstanding, based on a concern that the arbitral tribunal would apply the Bulgarian substantive law chosen by the parties and would therefore not apply the more far-reaching protection envisaged by Belgian law and regarded as mandatory by the Belgian courts.

To the extent that the law applicable to the contract has not been chosen by the parties, Article 4(b) of the Rome I Regulation provides that the law governing a commercial agency contract (agency contracts being contracts for the supply of services) shall be the law of the country where the agent as service provider has his habitual residence.


### 11.2 Jurisdiction

Court jurisdiction over cross-border disputes between agent and principal where the defendant is domiciled in a Member State is determined in accordance with the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the “Jurisdiction and Judgments Regulation”). Article 23(1) of the Jurisdiction and Judgments Regulation permits parties, one or more of whom is domiciled in a Member State, to agree that the courts of a Member State shall have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship. Such jurisdiction will be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction must be either:

a. in writing or evidenced in writing; or
b. in a form which accords with practices which the parties have established between themselves; or
c. in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Absent a choice of jurisdiction by the parties, Article 2 of the Jurisdiction and Judgments Regulation contains the general jurisdictional rule that a party domiciled (or, in the case of a

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42 *Unamar* [2013] ECJ C-184/12 (17 October 2013).
company, having its seat, central administration or principal place of business)\textsuperscript{43} in a Member State shall be sued in the courts of that Member State. Pursuant to the special jurisdictional rule in Article 5(1)(a) of the Jurisdiction and Judgments Regulation, a person domiciled in a Member State may however also be sued in another Member State in matters relating to a contract in the courts for the place of performance of the obligation in question. Article 5(1)(b) of the Jurisdiction and Judgments Regulation clarifies that in the case of the provision of services (which includes the provision of services by a commercial agent to his principal) the place of performance of the obligation in question will be the place in a Member State where the services were provided or should have been provided under the contract\textsuperscript{44}.

The Jurisdiction and Judgments Regulation also provides for the recognition and enforcement of judgments from one Member State in the courts of all other Member States. English law generally also recognises choice of jurisdiction clauses outside of the scope of application of the Jurisdiction and Judgments Regulation in an international cross-border context. Alternatively, the parties are free under English law to submit their disputes to alternative dispute resolution or arbitration. Arbitration proceedings with seat in England are governed by the Arbitration Act 1996.

\textsuperscript{43} Article 60 Jurisdiction and Judgments Regulation.

\textsuperscript{44} The ECJ considered the application of Article 5(1)(b) specifically in the context of a commercial agency contract in \textit{Wood Floor Solutions Andreas Domberger GmbH –v- Silva Trade SA} [2010] EUECJ C-19/09, establishing a three tier test to establish the place of performance were services were provided in multiple Member States.