

# Contents

Preface	v
Table of Cases	xvii
Table of Statutes	xxii
Table of Statutory Instruments	xxiii
<b>Chapter 1 Introduction and definitions</b>	<b>1</b>
The agent and distributor	2
Who is an agent or distributor	2
Case example	2
Case example	6
Definitions	6
Relevance of application of the Regulations	8
Self-employed	9
Agents who are companies	10
Partnerships	11
Continuing authority	12
Example	12
What is negotiation?	13
<i>Del credere</i> agents	15
One-off agents	16
Case example	16
Purchasing agents	16
Non-commission agents	17
Who is the principal?	17
Case example	17
Exclusions	18
1 Officers of a company	18
2 Partners	18
3 Insolvency practitioner	18
4 Unpaid agents	18
5 Commodity exchanges	19
6 Crown agents	19
Goods and services	19
Financial services	21

## Contents

Software contracts	21
Case example	23
Sub-agents	24
Secondary Activities Schedule	26
Secondary activities in the <i>Tamarind</i> case	28
Secondary activities and the <i>Gailey</i> case	29
Secondary Activities	30
Case example	30
Case example	32
Pyramid selling	33
Internet shopping	34
Software distribution	35
Mail order and consumer credit agents	35
Jurisdictional issues	35
Northern Ireland	35
Activities in Great Britain	36
Other EU law applies	36
UK parties	36
Other EU law specified	36
No written contract	36
Draft contracts	37
Using GB law outside the UK	37
Case example	38
Agent appointed under non-EU law	39
Forum shopping	39
Agent operating in several states	39
Obtain foreign law advice	40
Transitional arrangements	40
No written contract	41
Checklist	41
Further information	42
<b>Chapter 2 Duties of the agent and principal – choosing and using an agent</b>	<b>43</b>
Choosing an agent	43
Agent to act in good faith	45
Case examples	45
Negotiation by agent – prices and terms	48
Communication of information	49
Written or oral?	49
Variation of agreements	50
Case example – changing the contract	51
Parties	52
Appointment clause	53
Exclusivity	53
Products	53
Territory	55

Commencement date	55
Obligations of the agent	55
Sales targets	57
Principal's obligations	58
Confidentiality	59
Personal performance	59
Exclusion of liability	59
General points – boilerplate	60
Signature	61
Checklist of clauses	61
Foreign agents – special points	61
Further information	62
<b>Chapter 3 Competition law and agency agreements</b>	<b>63</b>
EU competition law and agency	63
Article 101 (3) – Beneficial restrictive agreement	63
Block exemptions	64
Consequences of infringing EU competition law	65
Guidelines on Vertical Restraints	65
Case example	68
Online hotel bookings	68
Advice to ascertain if a website is an agent or not	71
Other cases	72
What to do in practice	74
Further information	74
<b>Chapter 4 Commission and other payments</b>	<b>75</b>
The Regulations	75
Form and amount of remuneration under the Regulations	75
What rates are customary?	76
Changing commission rates	76
Case example	77
On what is commission paid?	78
Commission on orders during the agency agreement	80
EU case	80
Commission after the contract is over	82
When the Regulations do not apply	85
Apportionment of commission with previous agent	85
When should commission be paid to the agent?	86
Instalments	87
Extinction of the right to commission	88
Example	89
Other commission issues	89
Rights to information and inspection of books	90
What happens if the agent takes a secret bribe?	91
Press Summary	91
Further information	94

<b>Chapter 5 Monitoring and terminating an agency agreement</b>	<b>97</b>
Monitoring	97
Meetings	100
Notice of termination of the agency	101
Example	102
Working a notice period	102
Fixed period agencies	102
Causes of termination	104
Agencies outside the Regulations	104
Breach of contract	104
When no indemnity or compensation is payable	105
Breach by the agent	106
Case examples	107
Breach of contract	107
Where the agent terminates	108
Constructive termination	109
Case example	111
Case example	111
Case example	112
Case example	112
Age	112
Illness and infirmity	115
Assignment	116
Death	117
Expiry of a fixed term	118
Case example	121
Termination on notice	121
Termination on sale of a business or sale of shares	121
Business closed	124
Resignations	125
Sub-agencies	125
Other cases	126
<b>Chapter 6 Compensation, indemnities and litigation</b>	<b>129</b>
Post termination commission and notice period damages	130
Money claims on termination	130
Case example	131
Statistics and settlements	132
Compensation or indemnity – which applies?	132
The indemnity	133
Claims within one year	133
Substantial benefits and equity	134
The one-year indemnity cap	135
<i>Lonsdale</i> and Indemnity	137
The indemnity and the Commission’s 1996 Report	138
The calculation	138
Stage 1	138

Stage 2	139
Stage 3	139
Commission's example – indemnity	139
Compensation	140
The <i>Lonsdale</i> case and compensation – Compensation for what?	140
<i>Lonsdale</i> case: Future revenue stream	141
<i>Lonsdale</i> – no other assumptions	142
Valuation and expenses	144
<i>Lonsdale</i> – Amount awarded	144
Finding and paying valuers	145
The <i>Tigana v Decoro</i> case	146
Case example	148
Net or gross?	149
Time limit	149
Substantial benefits	149
The Commission's 1996 Report and compensation	151
Estimating the loss for compensation	153
No contracting out	153
The <i>Duffen</i> case and penalty clauses	154
The facts	154
Other contract clauses	155
Claiming damages for breach of contract in addition	157
Legal costs and agents	157
Conditional Fee Arrangements	157
Reducing compensation – principals	160
Other contract provisions – indemnity or compensation	161
Restrictive covenants and agency	162
Litigating agency claims	163
Pre-action correspondence	163
Where to litigate	163
Counterclaims	164
Offers and settlements	164
Disclosure	166
Witness statements	167
Trial	167
Further information	167
<b>Chapter 7 Valuations of Commercial Agents</b>	<b>169</b>
Commission under Regulation 8	169
How compensation under Regulation 17 should be calculated	170
Valuation methodologies	170
Multiples	171
Discount rate	172
Regulation 8	172
Indemnity or compensation	173
The <i>Lonsdale</i> rules	173
Allocation of costs	174

## Contents

Issues frequently arising in commercial agency valuations	175
Type of customers and evidence in customer files	175
Restrictive covenants	176
Level of skill and experience required	176
Office costs	176
Net assets retained	177
Worked example 1:	177
Worked example 2:	178
Practical points	179
<b>Chapter 8 Foreign agency arrangements</b>	<b>181</b>
List of issues	181
Law and jurisdiction	182
Public policy and compensation	184
Case example	186
Protecting agents in non-compensation states	187
Export control	187
Foreign agents – information	188
Practical issues with foreign agents	188
Agent or distributor?	189
Summary of agency agreement contents	190
1 Appointment	190
2 Duration and notice	190
3 Duties	191
4 Targets	192
5 Commission	192
Example	193
Issues to consider in agreements – commission	193
Restrictive covenants	194
Other clauses	194
Monitoring	195
Example	195
Resolving disputes	196
Breach of contract	196
Notices of termination	197
Further information	198
<b>Appendix 1 UK commercial agency laws and materials</b>	<b>199</b>
Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053)	199
Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993 (SI 1993/483)	209
Department of Trade and Industry Guidance Notes on the Commercial Agents (Council Directive) Regulations 1993 (September 1994)	218

<b>Appendix 2 European Community materials</b>	<b>237</b>
Council Directive of 18 December 1986 (86/653) on the coordination of the laws of the Member States relating to self-employed commercial agents	237
Report on the application of article 17 of Council Directive on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)	245
Commission Notice – Extract from Guidelines on Vertical Restraints (OJ 2010/C 130/01)	264
<b>Appendix 3 Transcript of judgments</b>	<b>269</b>
<i>Lonsdale (t/a Lonsdale Agencies) (Appellant) v Howard &amp; Hallam Limited (Respondents)</i>	269
<i>Tigana Limited v Decoro Limited</i>	282
<b>Appendix 4 Sample agency agreements</b>	<b>333</b>
1. Sample agency agreement drafted from perspective of principal	333
2. Example of agency agreement drafted from principal's point of view	341
3. Short sample agency agreement written from agent's perspective	350
4. Sample letter making agency claim	352
5. Letter rejecting agent's claim	353
6. Sample particulars of claim – county court	354
7. Example of defence and counterclaim	356
8. Consent order	359
<b>Index</b>	<b>361</b>