

## COMMERCIAL AGENTS ACT

### Principal Act

Act. No. 1994-09	<i>Commencement (LN.1997/060)</i>	5.6.1997
	<i>Assent</i>	6.10.1994

### Transposing:

Directive 86/653/EEC

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## Commercial Agents

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### **SCHEDULE.** Secondary Activities.

AN ACT TO TRANSPOSE INTO THE NATIONAL LAW OF GIBRALTAR COUNCIL DIRECTIVE 86/653/EEC RELATING TO SELF-EMPLOYED COMMERCIAL AGENTS.

## **Title and commencement.**

1. This Act may be cited as the Commercial Agents Act 1994 and shall come into effect on such day as the Governor may, by notice in the Gazette, appoint and different days may be so appointed for different purposes.

## **Interpretation.**

2. In this Act, unless the context shall otherwise require—

“commercial agent” means a self employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person (the “principal”) or to negotiate and conclude such transactions on behalf of and in the name of the principal, but shall be understood as not including, in particular,—

- (a) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association;
- (b) a partner who is lawfully authorised to enter into commitments binding on his partners;
- (c) a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy;

“commission” means any part of the remuneration of a commercial agent which varies with the number or value of business transactions;

“restraint of trade clause” means an agreement restricting business activities of a commercial agent following termination of the agency contract.

## **Application.**

3.(1) This Act governs the relations between commercial agents and their principals and subject to subsection (2), applies in relation to the activities of commercial agents in Gibraltar.

(2) Sections 4 to 23 do not apply where the parties have agreed that the agency contract is to be governed by the law of another member State or of the United Kingdom.

(3) This Act does not apply to—

- (a) commercial agents whose activities are unpaid;
- (b) commercial agents when they operate on commodity exchanges or in a commodity market;
- (c) the Crown Agents for overseas governments and administrations, as set up under the Crown Agents Act 1979, or its subsidiaries.

(4) The provisions of the Schedule to this Act have effect for the purpose of determining the persons whose activities as commercial agents are to be considered secondary and this Act shall not apply to such persons.

#### **Duties of a commercial agent to his principal.**

4.(1) In performing his activities, a commercial agent shall look after the interests of his principal and act dutifully and in good faith.

(2) In particular, a commercial agent shall—

- (a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
- (b) communicate to his principal all the necessary, information available to him;
- (c) comply with reasonable instructions given by his principal.

#### **Duties of the principal to his commercial agent.**

5.(1) In his relations with his commercial agent a principal shall act dutifully and in good faith.

(2) In particular a principal shall—

- (a) provide his commercial agent with the necessary documentation relating to the goods concerned;
- (b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular, notify

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the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.

(3) A principal shall in addition, inform his commercial agent within a reasonable period of his acceptance or refusal of and of any non-execution of a commercial transaction which the commercial agent has procured for him.

## **Prohibition on derogation from sections 4 and 5 and consequence of breach.**

6.(1) The parties may not derogate from sections 4 and 5.

(2) The law applicable to the contract shall govern the consequence of breach of the rights and obligations under sections 4 and 5.

## **Form and amount of remuneration in absence of agreement.**

7.(1) In the absence of any agreement as to the remuneration between the parties, a commercial agent shall be entitled to 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 and, if there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

(2) This section is without prejudice to the application of any enactment or rule of law concerning the level of remuneration.

(3) Where a commercial agent is not remunerated (wholly or in part) by commission, sections 8 to 13 shall not apply.

## **Entitlement to commission on transactions concluded during agency contract.**

8.(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract—

- (a) where the transaction has been concluded as the result of his actions; or
- (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

(2) A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group.

**Entitlement to commission on transactions concluded after agency contract has terminated.**

9. Subject to section 10, a commercial agent shall be entitled 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 section 8, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

**Apportionment of commission between new and previous commercial agents.**

10. (1) A commercial agent shall not be entitled to the commission referred to in section 8 if that commission is payable by virtue of section 9 to the previous commercial agent unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.

(2) The principal shall be liable for any sum due under sub-section (1) to the person entitled to it in accordance with that sub-section and any sum which the other commercial agent receives to which he is not entitled shall be refunded to the principal.

**When commission due and date for payment.**

11.(1) Commission shall become due as soon as, and to the extent that, one of the following circumstances occurs—

- (a) the principal has executed the transaction; or
- (b) the principal should, according to his agreement with the third party, have executed the transaction; or

(c) the third party has executed the transaction.

(2) Commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction as he should have.

(3) The commission shall be paid not later than the last day of the month following the quarter in which it became due, and, for the purposes of this Act, unless otherwise agreed between the parties, the first quarter period shall run from the date the agency contract takes effect, and subsequent periods shall run from that date in the third month thereafter or the beginning of the fourth month whichever is the sooner.

(4) Any agreement to derogate from sub-sections (2) or (3) to the detriment of the commercial agent shall be void.

### **Extinction of right to commission.**

12. (1) The right to commission can be extinguished only if and to the extent that—

- (a) it is established that the contract between the third party and the principal will not be executed; and
- (b) that fact is due to a reason for which the principal is not to blame.

(2) Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.

(3) Any agreement to derogate from sub-section (1) to the detriment of the commercial agent shall be void.

### **Periodic supply of information as to commission due and right of inspection of the principal's books.**

13. (1) The principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has become due and such statement shall set out the main components used in calculating the amount of the commission.

(2) A commercial agent shall be entitled to demand that he be provided with all the information, and in particular an extract from the books, which

is available to his principal and which he needs in order to check the amount of commission due to him.

(3) Any agreement to derogate from sub-sections (1) or (2) shall be void.

(4) Nothing in this section shall remove or restrict the effect of; or prevent reliance upon, any enactment or rule of law which recognises the right of an agent to inspect the books of a principal.

**Right to signed written statements of terms of agency contract.**

14. (1) The commercial agent and the principal shall each be entitled to receive from the other, on request, a signed written document setting out the terms of the agency contract including any terms subsequently agreed.

(2) Any purported waiver of the right referred to in sub-section (1) shall be void.

**Conversion of agency contract after expiry of fixed period.**

15. 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.

**Minimum periods of notice for termination of agency contract.**

16. (1) Where an agency contract is concluded for an indefinite period, either party may terminate it by notice.

(2) The periods of notice shall be—

- (a) one month for the first year of the contract;
- (b) two months for the second year commenced;
- (c) three months for the third year commenced and for the subsequent years,

and the parties may not agree on any shorter periods of notice.

(3) If the parties agree on longer periods than those laid down in sub-section (2), the period of notice to be observed by the principal shall not be shorter than that to be observed by the commercial agent.

(4) Unless otherwise agreed by the parties, the end of the period of notice shall coincide with the end of a calendar month.

(5) The provisions of this section shall also apply to an agency contract for a fixed term where it is converted under section 15 into an agency contract for an indefinite period, subject to the proviso that the earlier fixed period shall be taken into account in the calculation of the period of notice.

### **Savings with regard to immediate termination.**

17. This Act shall not affect the application of any enactment or rule of law which provides for the immediate termination of the agency contract—

- (a) because of the failure of one party to carry out all or part of his obligations under that contract; or
- (b) where exceptional circumstances arise.

### **Entitlement of commercial agent to indemnity or compensation on termination of agency contract.**

18. (1) This section has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with sub-sections (2) to (4) or compensated for damage in accordance with sub-sections (5) and (6).

(2) Subject to sub-section (8) and to section 19, the commercial agent shall be entitled to 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.

(3) The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's 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.

(4) The grant of an indemnity as mentioned in sub-sections (2) and (3), shall not prevent the commercial agent from seeking damages.

(5) Subject to sub-section(8) and to section 19, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.

(6) For the purposes of this Act such damage shall be deemed to occur particularly when the termination takes place in circumstances which—

- (a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities; or
- (b) have not enabled the commercial agent to amortize the costs and expenses that he has incurred for the performance of the agency contract on the advice of his principal.

(7) Entitlement to the indemnity or to compensation for damage as provided for under sub-sections (2) to (6) shall also arise where the agency contract is terminated as the result of the death of the commercial agent.

(8) The commercial agent shall lose his entitlement to the indemnity or to compensation for damage in the instances provided for in sub-sections (2) to (7) if within one year following the termination of his agency contract he has not notified his principal that he intends pursuing his entitlement.

**Grounds for excluding payment of indemnity or compensation under section 18.**

19. The indemnity or compensation referred to in section 18 shall not be payable to the commercial agent where—

- (a) the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to section 17; or
- (b) the commercial agent has himself terminated the agency contract unless such termination is justified—
  - (i) by circumstances attributable to the principal; or
  - (ii) 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

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

## **Prohibition on derogation from sections 18 and 19.**

20. The parties may not derogate from sections 18 and 19 to the detriment of the commercial agent before the agency contract expires.

## **Restraint of trade clauses.**

21.(1) A restraint of trade clause shall be valid only if and to the extent that—

- (a) it is concluded in writing; and
- (b) it relates to the geographical area or to the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract.

(2) A restraint of trade clause shall be valid for not more than 2 years after the termination of the agency contract.

(3) Nothing in this section 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.

## **Disclosure of information.**

22. Nothing in this Act shall require information to be given where such disclosure will be contrary to public policy.

## **Service of notice etc.**

23. Any notice, statement or other document given or supplied to a commercial agent or to be given or supplied to the principal under this Act, may be so given or supplied—

- (a) in the case of a body corporate, by being given to or served on the secretary or clerk of that body;
- (b) in the case of a partnership, by being given to or served on any partner or to or on any person having the control or management of the partnership business.

**Transitional provisions.**

24. (1) Notwithstanding any provision in any agency contract made before the date on which this Act shall come into effect, this Act shall apply to that contract after that date and accordingly any provision which is inconsistent with this Act, shall have effect subject to this Act.

(2) Nothing in this Act shall affect the rights and liabilities of a commercial agent or a principal which have accrued before the date on which this Act shall have come into effect.

## SCHEDULE.

Section 3(4)

### SECONDARY ACTIVITIES

1. The activities of a person as a commercial agent are to be considered secondary where it may reasonably be taken that the primary purpose of the arrangement with his principal is other than that as set out in paragraph 2.

2. An arrangement falls within this paragraph if—

- (a) the business of the principal is the sale, or as the case may be, purchase of goods of a particular kind; and
- (b) the goods concerned are such that—
  - (i) transactions are normally individually negotiated and concluded on a commercial basis, and
  - (ii) procuring a transaction on one occasion is likely to lead to further transactions in those goods with that customer on future occasions, or to transactions in those goods with other customers in that same geographical area or among the same group of customers, and

that accordingly, it is in the commercial interest of the principal in developing the market in those goods to appoint a representative to such customers with a view to a representative devoting effort, skill and expenditure from his own resources to that end.

3. The following are indications that an arrangement falls within paragraph 2 and the absence of any of them is an indication to the contrary—

- (a) the principal is the manufacturer, importer or distributor of the goods;
- (b) the goods are specifically identified with the principal in the market in question rather than, or to a greater extent than, any other person;
- (c) the agent devotes substantially the whole of his time to representative activities (whether for one principal or for a number of principals whose interests are not conflicting);

(d) the goods are not normally available in the market in question other than by means of the agent;

(e) the arrangement is described as one of commercial agency.

4. The following are indications that an arrangement does not fall within paragraph 2–

(a) promotional material is supplied direct to potential customers;

(b) persons are granted agencies without reference to existing agents in a particular area or in relation to a particular group;

(c) customers normally select the goods for themselves and merely place their orders through the agent.

5. The activities of the following categories of persons are presumed, unless the contrary is established, not to fall within paragraph 2–

(a) mail or the catalogue agents for consumer goods;

(b) consumer credit agents.