



## APPOINTING A COMMERCIAL AGENT IN SPAIN

### AFTER BREXIT

Appointing a commercial agent can help you grow your business, particularly if you are looking to expand into foreign markets.

#### WHAT IS A COMMERCIAL AGENT?

A commercial agent is an individual or legal entity committed, in a continuous or stable way and for a remuneration, to another individual or legal entity (principal) to carry out commercial transactions and operations on his behalf or to promote those acts, as an independent intermediary, without, unless otherwise provided, assuming any risk of those operations.

Therefore, a commercial agent is not an employee, but an independent professional with self-employed status.

This definition does not extend to:

- a) an officer of a company empowered to enter into commitments binding on a company or association.
- b) a partner lawfully authorised to enter into commitments binding on his partners.

#### THE MAIN BENEFITS OF USING A COMMERCIAL AGENT TO SELL YOUR GOODS OR SERVICES ARE:

- ✓ Knowledge of the local market: The agent has contacts and local knowledge that make easier break into the overseas market.
- ✓ Appointing an agent can save the company the expense of hiring employees in Spain.
- ✓ The company can also use the agency as a 'trial run' for their products before deciding whether to fully commit themselves in the Spanish market.

## I AM RUNNING A BRITISH COMPANY AND I WOULD LIKE TO APPOINT A COMMERCIAL AGENT IN SPAIN: WHAT LEGISLATION APPLIES AFTER BREXIT?

As we are aware, the United Kingdom (UK) is no longer a member of the European Union (EU). However, UK has retained part of the European rules as domestic legislation, being Rome I one of this regulations, which will still apply in the UK after Brexit.<sup>1</sup>

Broadly, in matters concerning contractual obligations, Rome I<sup>2</sup> gives effect to the parties' choice of law and provides rules to determine the applicable law where no choice has been made.

Therefore, under the Rome I regulation, principal and agent could agree which legislation (English Law or Spanish Law<sup>3</sup>) would apply to their International commercial agency contract.

REGULATION (EC) No 593/2008 (Rome I) Article 3 1: *“A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract”*

As indicated below, the parties' freedom to choose the applicable law has its limits:

REGULATION (EC) No 593/2008 (Rome I) Article 3.3: *“Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement”*

In other words, due to the agent performing his activities in Spain, if the international commercial agency contract is drafted under English Law, there are provisions of Spanish law which cannot be derogated or modified, such as the Spanish rules referring to the indemnity and compensation to the agent when the agency agreement is terminated.<sup>4</sup>

---

<sup>1</sup> <https://www.legislation.gov.uk/ukxi/2019/834/made>

<sup>2</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>

<sup>3</sup> Principal and agent could agree their contract under different legislation from Spanish law and English law, following the limits established by Regulation Rome I article 3.3

<sup>4</sup> Articles 28 and 29 of Spanish Law 12/1992. <https://www.boe.es/buscar/act.php?id=BOE-A-1992-12347>

## INTERNATIONAL COMMERCIAL AGENCY CONTRACT: SPANISH LAW & ENGLISH LAW

As we mentioned before, under Rome I Regulations the parties have the freedom to choose the applicable law (Spanish law or English law).

It is important to note that The Commercial Agents (Council Directive) Regulations 1993<sup>5</sup> which regulates the commercial agency contract in the UK, is a transposition of the European Commercial Agents Directive 86/653. Therefore, the European legislation related to commercial agents continues to be effective in the UK until modified or repealed under the UK Parliament.

Also, Spanish Law 12/1992, May 27, about commercial agency contracts, has transposed the European Commercial Agents Directive 86/653 into Spanish Law.

The purpose of the European Directive is to coordinate the rights of European Member States as regards to self-employed commercial agents.

## MAIN OBLIGATIONS OF BOTH PARTIES UNDER THE COMMERCIAL AGENT CONTRACT WHETHER SPANISH OR ENGLISH LAW APPLIES

Agent's duties:

- ✓ Look after the interests of the principal and stick to the terms of the agreement.
- ✓ Communicate to the principal all necessary information available to him.
- ✓ Receive on behalf of the principal any type of third party claim on the promoted operations, even if they have not been concluded.
- ✓ To comply with the reasonable instructions of the principal.

Principal's duties:

- ✓ To act dutifully and in good faith when dealing with the agent.
- ✓ Provide the agent with the necessary documentation relating to the goods concerned and information necessary for the performance of the agency contract.
- ✓ Pay the agent as set out in the contract.

## REMUNERATION AND COMMISSION

---

<sup>5</sup> <https://www.legislation.gov.uk/ukxi/1993/3053/made>

The remuneration of the agent may consist of a fixed amount, a commission or a combination of both. The usual way of remuneration of the commercial agent is remuneration on commission, i.e. remuneration which depends on the value of the business conducted by the agent.

The agency contract must clearly set out what commission is payable to the agent and when.

Laura Gallego Herráez.

## **The Brexit Law**

Operated by Scornik Gerstein LLP - london@scornik.com - (0) 207 831 707