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Commercial Agents (Council Directive) Regulations 1993: English and Scottish commercial courts interpretations of the law reflect reality

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Abstract

This article seeks to analyse whether the ways Regulations have been interpreted prove that English and Scottish commercial courts understand commercial law as a mirror to the changing nature of commercial practices. This article is divided into two parts. The first part will examine those main confusions that arise from the Regulations. Furthermore, the article will discuss whether the English and Scottish commercial courts have clarified its scope of application and ensure its efficiency in protecting commercial agents by their interpretation of the Regulations.

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I. Introduction

Since the fifteenth century, the English and Scottish commercial courts have interpreted commercial law in such a way so that it reflects commercial reality¹. *Maitland* identified that a division between the common law and the law of merchant have already hindered commerce before 1750². *Lord Irvine* acknowledged that those commercial rules that existed in the United Kingdom (UK) are entirely integrated into the general practice of the English law³. Prior to the Commercial Agents (Council Directive) Regulations 1993 ('the Regulations')⁴ coming into force, there was no statutory law in the UK dealing especially with an agency. The Regulations are taken almost verbatim from the Council Directive 86/653/EEC, which contained to the English common law system both unknown and ambiguous legal terminology at English common law system. Therefore, the Regulations need to be coordinated with the pre-existing English and Scottish legal framework. To a large extent, the courts' interpretations of the Regulations proved that both the English and Scottish commercial courts have interpreted the law according to the changing nature of commercial reality. The courts saw the need to clarify certain aspects of this difficult legislation.

This article is divided into two parts. The first part will examine those main confusions that arise from the Regulations. Furthermore, the article will discuss whether the English and Scottish commercial courts have clarified their scope of application and ensure their efficiency in protecting commercial agents by their interpretation of the Regulations.

II. Main Confusions That Arise from the Regulations 1993

The commercial agent is recognized as a separate category from other commercial intermediaries⁵ and part of an identified social group in need of a special protection^{6 7 8}. Unlike other traditional types of agents, which are governed by common law, the commercial agent is regulated and protected by the Regulations. The UK implemented the Directive⁹ via the Regulations, which came into force on January 1, 1994. The Regulations are a major step forward to provide greater protection to commercial

¹ Frederic Rockwell Sanborn, *Origins Of The Early English Maritime And Commercial Law* (Century Co 1930)

² Frederic William Maitland, *Select Pleas In Manorial And Other Seignorial Courts Volume 1; Vol. 1. Reigns Of Henry III And Edward I* (RareBooksClubcom 2012) 132

³ Lord Irvine, 'The Law: An Engine For Trade' (2001) 64 *Modern Law Review* 333

⁴ SI 1993/3053, as amended

⁵ Severine Saintier, 'A Remarkable Understanding And Application Of The Protective Stance Of The Regulations By The English Courts' (2001) 90 *Journal of Business Law* 540

⁶ Caterina Gardiner, 'The EC (Commercial Agents) Directive: Twenty Years After Its Introduction, Divergent Approaches Still Emerge From Irish And UK Courts' [2007] *Journal of Business Law* 412

⁷ *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656, per Staughton LJ at 660

⁸ Commercial Agents (Council Directive) Regulations 1993, Regulation 2 (1)

⁹ Directive 86/653 OJ 1986 L382/17

agents. As the UK has implemented the civil-law-based Directive¹⁰ (the Law Commission has emphasized that [the fact that new notions based on French and German Law are included], for example, in its report¹¹) by copying it almost verbatim, and there was no specific legislation in the UK governing the relationship between agents and principals before the implementation of the Regulations, confusions arose from the Regulations. Therefore, the Regulations have been subjected to numerous criticisms and comments by both scholars and practitioners¹². For instance, *Randolph and Davey* argued that the implementation of the Regulations made the common law notion of freedom of contract no longer a priority in agreements between commercial agents and principals¹³.

As the Regulations have come into force more than twenty-one years ago, cases from both English and Scottish commercial courts showed that those confusions raised by the unexplained directive¹⁴ have been clarified. There are mainly three confusions raised by the Regulations. The first confusion is about the scope of the definition of commercial agents, as the Regulations created the notion of categorization, which was a completely new concept to the traditional common law rules of agency. As the law that governed commercial agents was merely based on the freedom of contract, there was no particular category of agent for special protection. The second confusion is related to the concept of good faith. The concept essentially is a civil law notion (e.g. France¹⁵, Germany¹⁶, and the United States¹⁷) and it did not exist as a governing principle in the English legal system. The third confusion is about the termination rights, which is a concept different from the traditional English notion¹⁸. Therefore, it is necessary to scrutinize the decisions made by the English and Scottish commercial courts in relation to three areas: the definition of commercial agents, good faith, and termination rights.

III. Scope of the Definition of Commercial Agents

The notion of categorization is created by the definition that is stated in the Regulations¹⁹ and provides commercial agents with a proper status²⁰. This notion was a completely new concept to the traditional

¹⁰ Law Commission No 84, 1977, 11

¹¹ Fergus Randolph and others, *Guide To The Commercial Agents Regulations* (2nd edn, Hart Pub 2003) 123-138

¹² William Bowstead, F. M. B Reynolds and William Bowstead, *Bowstead And Reynolds On Agency* (20th edn, Sweet & Maxwell 1996) 688-706

¹³ Randolph F and others (n 12) 582.

¹⁴ Directive 86/653 OJ 1986 L382/17

¹⁵ Civil Code of France, Article 1134-4

¹⁶ Civil Code of Germany, Paragraph 242

¹⁷ Uniform Commercial Code of United States, Section 1-201(9)

¹⁸ Severine Saintier, 'Good Faith: Commercial Agents Regulations 1993' (1998) 19(8) *Company Lawyer* 248

¹⁹ Commercial Agents (Council Directive) Regulations 1993, Regulation 2 (1)

²⁰ Saintier S (n 5)

common law rules of agency. Since the scope of the definition of commercial agents stated in the Regulations is unclear, therefore, several problems emanated.

(a) The Scope of ‘Negotiation’

First, in relation to the problem of unclear scope of the definition, the case of *Parks v Esso Petroleum Co Ltd*²¹, which later applied by *Invicta UK v International Brands Ltd*²², illustrated the seriousness of the problem. The main debate for this problem is related to the word ‘negotiation’. The judgment of *Park*²³ has been subjected to a few criticisms^{24 25}. For instance, *Saintier* commented that both of the High Court and the Court of Appeal in *Parks*²⁶ have misunderstood the meaning of ‘negotiation’²⁷, as both Courts did not focus on the marketing abilities of a commercial agent. Instead, the Courts merely focused on the issues of whether Mr. Park has negotiated with those customers over the transaction of the fuel. *Saintier* stated that the interpretation of the case made by both Courts did not reflect the commercial reality; most commercial agents cannot negotiate the price of the goods/services with the customers on behalf of their principals. However, the court did agree that the word ‘negotiation’ should be understood in a broader sense. Furthermore, *Sellhorst and O’Brien* argued that this case attempted to remove protection of the Regulations from agents in other aspects. However, *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd*²⁸ gave a wider interpretation to the meaning of ‘negotiation’, so as to allow more agents to benefit from the Regulations. In this case, the court held that marketing activities were considered as activities of commercial agents within the context of the Regulations. *Invicta UK*²⁹ confirmed the view made by *Justice Morrison* in *Tamarind International Ltd*³⁰ that the meaning "negotiate" should be construed widely.

(b) The Scope of the Definition of Commercial Agents

The central problem for the scope of the definition of commercial agents is about who can be a commercial agent. There are two main debates concerning this problem. Firstly, it is being discussed whether natural persons can be regarded as commercial agents in a legal sense. *AMB Imballaggi*

²¹ [2000] ECC 45

²² [2013] EWHC 1564 (QB)

²³ [2000] ECC 45

²⁴ Ute Sellhorst and Jennifer O'Brien, 'English Court Of Appeal Rejects German Case Law But Applies Article 81 To Commercial Agency Contract' (2000) 28 *International Business Lawyer*. 320

²⁵ Randolph F, Davey J, Sainter S and Aretz A, *Guide to the commercial agents regulations*. (2nd edn, Hart Pub 2003) 47

²⁶ [2000] ECC 45

²⁷ *Saintier S* (n 19)

²⁸ [2000] CLC 1397

²⁹ [2013] EWHC 1564 (QB)

³⁰ [2000] CLC 1397

*Plastici SRL v Pacflex Ltd*³¹ held that corporate agents are covered by the Regulations along with individual agents, which clarified this issue. The decision has been applied and reaffirmed by *Sagal (t/a Bunz UK) v Atelier Bunz GmbH*³².

Secondly, there is no clear definition of the concept of ‘secondary activity’ that is performed by commercial agents. In England, *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd*³³ emphasized that there is no uniform definition for the concept of ‘secondary activity’. *AMB Imballaggi Plastici SRL*³⁴ provided that secondary activity refers to the primary business of the agent but is not the business that an agent conducted usually but some other kind of businesses. In Scotland, *McAdam v Boxpak Ltd*³⁵ clarified the problem of whether the Regulations will be applied to secondary activities performed by a person as a commercial agent. The Court of Session held that the Regulations would not apply to persons whose activities are to be considered as a secondary activity.

Therefore, both the English and Scottish commercial courts have clarified the scope of the definition of commercial agents by various judgments, which operate within the commercial context. For instance, the judgment of *Tamarind International Ltd*³⁶ provided a wider definition of the word ‘negotiation’, which proved that the Regulations has been adapted to reflect the changing nature of commercial practices.

IV. Good Faith

After the Regulations were implemented, good faith became a relatively general principle, which governed the relationship between agents and principal throughout the contract (including the performance stage) as a mandatory duty³⁷.

*Page v. Combined Shipping and Trading Ltd*³⁸ is one of the key cases concerning the duty of good faith. This case recognized that the Regulations give rise to a single obligation for both commercial

³¹ [1999] 2 All ER (Comm) 249

³² [2009] EWCA Civ 700

³³ [2000] CLC 1397

³⁴ [1999] 2 All ER (Comm) 249

³⁵ [2006] CSIH 9

³⁶ [2000] CLC 1397

³⁷ *Saintier S* (n 19) 248-251

³⁸ [1997] 3 All ER 656

agents and principals and it stated that both of them are subjected to the duty to act ‘dutifully and in good faith’^{39 40} during the performance of the commercial agency.

Some commentators asserted that there is no concept of good faith in the English legal system; rather, any similar outcome obtained in the UK was based on equity⁴¹. As there is a fundamental difference in the philosophical approach between the civil law and common law⁴², therefore, the notion of good faith has never taken root in English common law as a general principle. However, according to *Carter v Boehm*⁴³, *Lord Mansfield* suggested that good faith is a governing principle that applies to all contracts and dealings⁴⁴. Therefore, the notion of good faith is not a new concept for English scholars.

Those judgments in the UK, especially the case of *Page*⁴⁵, have reflected the changing nature of commercial practices. This is because the ways of application for the notion of good faith have changed from time to time, so as to reflect the commercial reality.

V. Termination Rights

The concept of termination rights is one of the notions from the Regulations, which bring radical changes to the English principle of contractual damages for loss. There are two main issues concerning termination rights, which required the courts to clarify, which included the meaning of termination and compensation for commercial agents.

(a) Definition of Termination

The Regulations fail to define what constitutes termination. Therefore, one of the central issues for the termination rights is whether or not the actual mechanism of closure and liquidation of the principal would cause contractual damage. In relation to the actual mechanism of closure, once the commercial agents accept the repudiation of the contract made by the principals, s/he can terminate the contract and claim termination rights⁴⁶. Furthermore, commercial agents’ termination rights will be denied if

³⁹ ‘In performing his activities a commercial agent must look after the interests of his principal and act dutifully and in good faith.’ (Commercial Agents (Council Directive) Regulations 1993, Regulation 3 (1))

⁴⁰ ‘In his relations with his commercial agent a principal must act dutifully and in good faith.’ (Commercial Agents (Council Directive) Regulations 1993, Regulation 4 (1))

⁴¹ Nathalie Hofmann, ‘Interpretation Rules And Good Faith As Obstacles To The UK’s Ratification Of The CISG And To The Harmonization Of Contract Law In Europe’ (2010) 22(1) *Pace International Law* 164

⁴² Lord Swynn, ‘The Role Of Good Faith And Fair Dealing In Contract Law: A Hair-Shirt Philosophy?’ (1991) 6(1) *The Denning Law Journal* 132

⁴³ [1766] 3 *Burr.* 1905

⁴⁴ ‘The governing principle (Good faith) is applicable to all contracts and dealings.’ (ibid, per Mansfield LJ at 1910)

⁴⁵ [1997] 3 *All ER* 656

⁴⁶ Commercial Agents (Council Directive) Regulations 1993, Regulation 18 (b)(1)

s/he resigns without notice⁴⁷. Although commercial agents can claim termination payments after the liquidation of the principal's business, which is considered as a repudiation of contract under the Regulations⁴⁸, in reality, commercial agents are unlikely to receive termination payment as they are unsecured creditors. Therefore, the position of commercial agents is weakened⁴⁹. *Singleton* stated that in France and Germany commercial agents are still able to receive termination payment even though the principal's business is in a state of insolvency⁵⁰. From their point of view, there is no reason to assume that they are subjected to less protection. Thus, academics asserted that the changing nature of commercial practices has not been reflected by the case law from English and Scottish commercial courts.

(b) Compensation for Commercial Agents

Both English and Scottish commercial courts have clarified the concept of compensation (termination payments), which is a principle that was not known in UK agency law prior to the implementation of the Regulations. Thus, the introduction of a compensation remedy caused substantive interpretational difficulties.

In Scotland, the decision of the Court of Session (Supreme civil court in Scotland) in *King v T Tunnock Ltd*⁵¹ is the only Scottish appellate case that discusses how compensation should be calculated. *Lord Caplan* in the case of *King*⁵² emphasized and applied the protective stance of the Regulations, which reaffirmed the aim of the Regulations that commercial agents should be protected.

In England, the case of *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Limited*⁵³ took an alternative view on the notion of compensation, which set out a clear precedent that the entitlement of an agent to compensation is based upon the value of goodwill in the business of the agent at the date of termination. This case doubted the outcome of the case *King*⁵⁴, which stated that the term 'notional' should be carefully examined. The view from *Lonsdale*⁵⁵ can be seen as highly persuasive for both English and Scottish commercial courts, given that the legislation that is interpreted in this case is the

⁴⁷ *ibid*, Regulation 18(a)

⁴⁸ *ibid*, Regulation 18(b)

⁴⁹ Saintier S (n 19) 248-251

⁵⁰ Susan Singleton, *Commercial Agency Agreements* (2nd edn, Tottel 2005) 78

⁵¹ [2000] Eu LR 531

⁵² *ibid*

⁵³ [2007] UKHL 32

⁵⁴ [2000] Eu LR 531

⁵⁵ [2007] UKHL 32

same piece of legislation that needs to be interpreted by the Scottish courts. Therefore, the case of *Lonsdale*⁵⁶ has a significant impact on the valuation on the basis of compensation.

VI. Conclusion

In conclusion, to a large extent both the English and Scottish commercial courts' interpretations of the Regulations proved that the courts have interpreted the law according to commercial reality. For example, *McAdam v Boxpak Ltd*⁵⁷ clarified that the Regulations did not apply to persons whose activities are to be considered as a secondary activity. Furthermore, *Lonsdale*⁵⁸ has clarified the approach to be taken when assessing the compensation in case the commercial agent terminates his/her agreement. Therefore, to a large extent, those interpretations of the Regulations made by the English and Scottish commercial courts have reflected the changing nature of the commercial practices.

⁵⁶ *ibid*

⁵⁷ [2006] CSIH 9

⁵⁸ [2007] UKHL 32