

The Commercial Agents Regulations 1993 in a post-Brexit world

Commercial analysis: Stephen Sidkin, partner, and Emma Roake, legal director, at Fox Williams, considers the Commercial Agents (Council Directive) Regulations 1993 (Commercial Agents Regulations 1993) and what changes commercial agents can expect after the end of the Brexit transition period at 11 pm on 31 December 2020.

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Do the Commercial Agents Regulations 1993 have a future in Great Britain after IP completion day?

Yes. The Commercial Agents Regulations 1993, [SI 1993/3053](#), are EU-derived domestic legislation made under [section 2\(2\)](#) of the European Communities Act 1972. [Section 2](#) of the European Union (Withdrawal) Act 2018 (as amended by [section 25](#) of the European Union (Withdrawal Agreement) Act 2020) provides that EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day as retained EU law.

As such, the Commercial Agents Regulations 1993 will continue to apply after the end of the Brexit transition period, unless and until the UK Parliament decides to modify or repeal them.

Is there any real change in the way that commercial agents will be treated in UK and EEA territories following IP completion day?

For commercial agents (agents) whose agreements are governed by English law, there will not be any significant change in the short term. If the UK Parliament decides to modify or repeal the Commercial Agents Regulations 1993 in the future, then this could affect how agents whose agreements are governed by English law will be treated. Similarly, this will be the case if the Commercial Agents Regulations 1993 change by operation of case law.

In addition, for as long as the Commercial Agents Regulations 1993 remain unchanged, in any commercial agency disputes which are heard by courts in Great Britain after IP completion day, most British courts will be bound by principles laid down by, and any decisions of, the Court of Justice, as they had effect in EU law immediately before IP completion day (retained EU case law). The courts which may depart from retained EU case law are the higher courts in Great Britain, including the Supreme Court, the Scottish High Court of Justiciary in certain circumstances, and the Court of Appeal and equivalent courts across the UK. These higher courts must, in deciding whether to depart from any retained EU case law, apply the same test as they would apply in deciding whether to depart from their own case law (or, in the case of the Court of Appeal and equivalent courts, they must apply the same test as is used by the Supreme Court).

Finally, British courts will not be bound by any Court of Justice decisions made on or after IP completion day, although they may 'have regard to' such decisions so far as they are relevant to the matter before the court. This means that there will be uncertainty for agents and principals which want to rely on Court of Justice decisions made after IP completion day as to the extent to which the relevant British court will have regard to such decisions.

What law will apply to agents appointed in respect of both UK and EEA territories?

The substantive rules of Rome I and the Rome Convention will continue to apply in all parts of the UK after IP completion day, with appropriate changes made by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (UK Exit) Regulations 2019, [SI 2019/834](#), which will come into force on 31 December 2020.

Consequently, it is to be expected that:

- UK courts will still uphold governing law clauses (subject to the application of mandatory rules) providing for the choice of law other than the law of one of the UK countries; and
- the courts of EU Member States will uphold governing law clauses providing for a choice of law of:
 - England and Wales, or
 - Scotland in accordance with Rome I

Where, prior to IP completion day, agreements with agents in EEA countries were agreed to be subject to the law of England [and] Wales or Scotland, will the courts apply the Commercial Agents Regulations 1993 to such appointment (under regulation 1(3))? Will these agreements be upheld after IP completion day?

For commercial agency agreements entered into prior to IP completion day, our expectation is that courts of Member States will apply the Commercial Agents Regulations 1993 on the basis that when the parties entered into the agreement, England, Wales and Scotland were all part of an EU Member State.

However, if the Commercial Agents Regulations 1993 are amended by the UK Parliament to weaken the protections given to agents, or if interpretation of the Commercial Agents Regulations 1993 by British courts results in considerable divergence from the case law of the Court of Justice, we can foresee commercial agents in EEA countries with agreements subject to the law of England and Wales or Scotland seeking to rely on mandatory laws of their home countries—where it suits them to do so.

After IP completion day, can agents operating in EEA countries exclude the application of the relevant implementing legislation of Council Directive 86/653/EEC (the EU Commercial Agents Directive) applying to their appointment by agreeing that their agency appointment is subject to the law of England [and] Wales or Scotland?

This will depend upon the extent to which the relevant Member State law implementing the EU Commercial Agents Directive which would otherwise apply to their appointment is mandatory. We can foresee there being uncertainty in this area, and EEA-based agents may be wary of agreeing to their agreements being governed by the laws of England, Wales and Scotland.

Is there any benefit to the UK in revoking the Commercial Agents Regulations 1993?

In our view, while UK principals might foresee advantages if the Commercial Agents Regulations 1993 were revoked, any loss of protections for agents is likely to result in agents demanding contractual protections equivalent to those which they previously had under the Commercial Agent Regulations 1993, or alternatively demanding higher commission rates to compensate for increased risk.



How likely are amendments to the Commercial Agents Regulations 1993, and what are these likely to be?

We consider that amendments to the Commercial Agents Regulations 1993 are very unlikely in the short term. If the UK government was minded in the medium to long term to amend the Commercial Agents Regulations 1993 to make them less favourable to agents, we expect agents to respond by demanding contractual protections in their agreements.

Interviewed by Barbora Kozusnikova

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