Damages in case of unlawful termination

1. Termination for good cause and contractual termination

All jurisdictions distinguish between the termination for good cause without notice and the contractual termination with notice period.

The difference is important:

- for the notice period; and
- in commercial agency law and often applied by analogy in Distributorship and Franchise Law for the indemnity, which is for instance excluded in case of a termination for good cause which is attributable to the commercial agent (Art. 18 Commercial Agency Directive, § 89b Section 3 No. 2 HGB (German Commercial Code)).

2. What is a “unlawful” termination?

“Unlawful” termination is a termination which is not in accordance with the codified law or the contract.

Examples:

- No good cause for termination exists; or
- the mandatory termination periods of Art. 15 Section 2 Commercial Agency Directive, § 89 HGB (German Commercial Code) are disobeyed.

3. Cases in which damages for unlawful termination could be due are therefore:

I. Cases in which the agreement was terminated for good cause but no good cause for termination exists; and

II. Cases in which the agreement was terminated with notice but the notice period was too short.

Examples for II. are for instances:

- Cases in which the termination period is longer than expected by the terminating party;
- if a fixed contractual period was agreed;
- the contract was terminated for instance with a shorter period as six months; or
- the contractual termination period is extended by mandatory law, due to an extensive investment of the agent or distributor that needs to be amortized.

4. Termination Provisions in the Commercial Agency Directive

The termination with notice and for good cause is regulated in Art. 15, 16 Commercial Agency Directive.

The wording of the Directive is as follows:

"Article 15

1. *Where an agency contract is concluded for an indefinite period either party may terminate it by notice.*
2. *The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice.*

3. *Member States may fix the period of notice at four months for the fourth year of the contract, five months for the fifth year and six months for the sixth and subsequent years. They may decide that the parties may not agree to shorter periods.*

4. *If the parties agree on longer periods than those laid down in paragraphs 2 and 3, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.*

5. *Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.*

6. *The provisions of this Article shall apply to an agency contract for a fixed period where it is converted under Article 14 into an agency contract for an indefinite period, subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.*

Article 16

Nothing in this Directive shall affect the application of the law of the Member States where the latter 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;

(b) where exceptional circumstances arise."

Conclusion: Termination with notice is only allowed with the notice period stipulated in Art. 15 Commercial Agency Directive. Member States may only provide law regarding the termination for good cause in the cases mentioned in Art. 16 Commercial Agency Directive.

5. German Law

German law is probably in accordance with the borders set by the Directive.

The wording of § § 89, 89a HGB (German Commercial Code) is as follows:

"Section 89

(1) Where the agency contract is entered into for an indefinite period, it can be terminated during the first year of the contract by giving one month's notice of termination, during the second year of the contract by giving two months' notice of termination and during the third to the fifth year of the contract by giving three months' notice of termination.

After a contract period of five years, the agency contract can be terminated by giving six months' notice of termination. Notice of termination is only permitted with effect to the end of a calendar month, unless otherwise agreed by the parties.

(2) The periods of notice under subsection (1), first and second sentences, can be extended by agreement; the period of notice to be observed by the principal may not be shorter than that to be observed by the commercial agent. If a shorter period of notice for the principal is agreed upon, the period of notice for the commercial agent shall apply.

(3) An agency contract entered into for a fixed period which continues to be performed by both parties after such agreed period has expired shall be deemed to be extended for an indefinite period. As regards the determination of the periods of notice under subsection (1), first and second sentences, the total duration of the agency contract shall be determinative.

Section 89a

(1) Both parties can terminate the agency contract for a compelling reason without observing a notice period. Such right cannot be excluded or limited.

(2) Where termination is caused by conduct for which the other party is to blame, such party shall be obliged to pay compensation for damage arising from the termination of the agency contract."

6. Damage in case of unlawful termination

Any termination which exceeds the termination rights stipulated in the EU Directive or national law would constitute a breach of contract and therefore cause a damage right. However, either intent or negligence needs to exists. In Germany the right for a damage claim is stipulated for in § 280 Section 1 BGB (German Civil Code).

The wording of § 280 Section 1 BGB is as follows:

"Section 280

Damages for breach of duty

(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty."

7. Jurisdiction of the ECJ

The ECJ decided in Quenon (Judgement of 03.12.2015 - C-338/14, marginal note 30):

"[30] It follows … that damages may be granted to commercial agents in addition to the indemnity and that they are not subject to the conditions laid down in Article 17(2)(a) of the directive or to the maximum limit laid down in Article 17(2)(b) of that directive.

[31] As the Advocate General observed in point 32 of his Opinion, the harmonisation of conditions for compensation under Article 17(2) of the directive relates only to the indemnity for customers, laying down the conditions to which the award of that indemnity is subject. The harmonisation measures, therefore, are not intended to standardise all the possible means of reparation for loss which commercial agents may claim under the national law when that provides for the principal's liability in contract or tort.

[32] Therefore, given that the directive does not give any clear guidance as to the circumstances in which a commercial agent may claim damages, it is for the Member States, in the exercise of their discretion, to determine those circumstances and the procedural rules.

[33] That conclusion is confirmed by the Court's case-law in accordance with which Member States may offer greater protection to commercial agents by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive (see, to that effect, judgment in Unamar, C-184/12, EU:C:2013:663, paragraph 50).

[34] However, as the Commission rightly points out and as the Advocate General noted in point 43 of his Opinion, the discretion which Member States may exercise when implementing Article 17(2)(c) of the directive is circumscribed by the requirement to choose one of the two compensation schemes laid down in paragraphs 2 and 3 of that article, respectively, without being able to aggregate them.

Consequently, the award of damages may not result in double recovery by combining the indemnity for customers with the compensation for loss resulting, in particular, from the loss of commission following termination of the contract.

[35] In the light of the foregoing, the answer to the first question must be that Article 17(2) of the directive must be interpreted as not precluding national legislation providing that a commercial agent is entitled, on termination of the agency contract, both to an indemnity for customers limited to a maximum of one year's remuneration and, if that indemnity does not cover all of the loss actually incurred, to the award of additional damages, provided that such legislation does not result in the agent being compensated twice for the loss of commission following termination of that contract."

Conclusion: According to EU Law, it is up to the national law to determine the amount of damage, provided that such legislation does not result in the agent being compensated twice for the loss of commission followed by the termination.

Remark: On first sight it seems to be unclear why the national law may not grant “double” compensation for the loss of the customers. Art. 17 Commercial Agency Directive gives a right to a minimum indemnity but does not exclude national regulations which stipulate a right for a higher indemnity. On the other hand, Art. 17 Section 2 lit. b Commercial Agency Directive confirms that only the maximum amount named there needs to be paid by the principal. This is a provision protecting the principal. Therefore, it could well be said that no damage exceeding the maximum amount of Art. 17 Section 2 lit. b Commercial Agency Directive may be claimed under the title “damage claim” if it is indeed an indemnity which is limited by the maximum amount stipulated in Art. 17 Commercial Agency Directive.

Therefore, it can be concluded from the judgement being made by the ECJ that no damage for unlawful termination may be granted if the damage claim is indeed an indemnity claim or – more general – a compensation for the loss of customers.

8. How can the Damage Claim be separated from the Indemnity Claim?

The answer might be less complicated than one might assume, taken into consideration the complicated reasoning made by the ECJ.

The amount of the indemnity does not limit the amount of the damage claim if the same amount of an indemnity could be claimed if the termination was not unlawful. A typical example in which the indemnity does not limit the damage claim is the case in which the termination period was too short: The agent may claim the indemnity in the same amount as it would be given if the termination period was correct. He or she may also claim loss of profit for the time for which the termination period was unlawfully short.

Frankly spoken: There is hardly a case in which the indemnity may limit the damage claim.

9. Amount of the Damage Claim

The ECJ has set no further limitations to the amount of a damage claim besides that being stipulated in the judgment of the ECJ.

9.1 Time for which a damage claim will be paid

Each damage caused by the unlawful termination needs to be reimbursed.

The party which was terminated must be brought into a position in which she/he would be placed if the termination was not issued.

According to the majority opinion under German Law each termination for good cause or termination with a termination period which is too short would be construed or understood as a termination with the correct termination period (German Superior Court, BGHZ 122, 9 (15)).

However, that is a point which could be discussed.

One could also assume that an unlawful termination is simply void and cannot be “replaced” by a lawful termination with the correct notice period. Assuming that the majority opinion under German Law is correct then each damage period is limited by the contractual notice period. No damage can be claimed for a period which exceeds the contractual termination period.

That means: The damage period could be long if no short-term contractual termination period exists. The damage period is especially long if the contract was a long lasting contract with a fixed period or the notice period is an extensive one.

If different termination periods for both parts exists then the notice period for the party which is the recipient of the termination limits the damage period.

Even if a franchise agreement was concluded for 20 years without the possibility of termination then the damage period lasts for 20 years.

If a termination was caused by the recipient of the termination and the recipient of the termination had no right to terminate with notice then the damage period is unlimited (BGH Judgment of 16.07.18 – VIII ZR 151/05).

It could only be discussed whether it is limited by bona fides.

9.2 Amount of the Damage Claim

The person causing the unlawful termination has to reimburse every profit which could be gained by the other party. In Germany this is stipulated in § 252 BGB (German Civil Code)).

The wording of § 252 BGB is as follows:

"Section 252
Lost profits

The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected."

It could be expected that the profit of a typical time of the past would also be received during the relevant time in which the agency or distribution agreement would be continued so that this profit could be claimed (for instance OLG (Higher Superior Court) Köln, Judgement of 20.09.2013 – 19 O 33/13; OLG Düsseldorf, Judgement of 28.09.2012 – I-16 U 124/11).

Examples:

It could be assumed that the profit of the last contractual year could be achieved until the end of the termination period (BGH (German Superior Court), Judgement of 16.07.2008 – VIII ZR 151/05).

After the agent terminated the agreement without good cause, the principal may calculate his lost profits out of the previous past 18 months (BGH German Superior Court), Judgement of 13.05.2001 – VIII ZR 70/00).

The 18 month period was also used when a commercial agent claimed damages (KG, Judgement of 21.05.2007 – 23 U 87/05).

It is sufficient in a court proceeding if a car dealer claims the profit from each purchase of a unit and furthermore claims that his saved expenses are 80 Euros per unit (BGH (Higher Superior Court), Judgement of 22.03.2006 – VIII ZR 173/04).

It is probably acceptable if the average annual remuneration of the five year period according to Art. 17 Section 2 lit. b Commercial Agency Directive is used as reference period.

Cost for the search for a new contract party will also be reimbursed, furthermore the possible costs which were created because a party was not bound by a non-compete obligation.

The agent or the distributor can also claim damage for an reduced indemnity due to the early termination (BGH (German Superior Court), Judgement of 12.01.1970 – VII ZR 191/76, BGHZ 53, 150; Emde Distribution Law, 3. Edition 2014, § 89a marginal note 70).

Higher profits which have been gained by the creditor because the agreement was terminated will be credited in favour of the debtor (BGH (German Superior Court), Judgement of 01.03.1984 – I ZR 13/280; Emde, Distribution Law, 3. Edition 2014, § 89a marginal note 70).

The debtor of the damage claim is obliged to give information about all relevant circumstances which are important for the damage claim.

If it is clear that a damage claim exist and the only uncertainty is the amount of that claim, then a court may not dismiss the claim but has to examine what minimum amount could be granted (BGH (Higher Superior Court), Judgement of 30.05.2001 – VIII ZR 70/00).

9.3 Burden of Proof

In Germany, § 252 BGB (German Civil Code) is applicable (see cited wording above). Therefore, except in exceptional cases it will be assumed that past profits are an indication for future profits and for the amount of damage. No full evidence of the damage is necessary. A high probability of such damage is sufficient.

9.4 Contributory Negligence (§ 254 BGB – German Civil Code)

If both parties caused the unlawful termination, then the damage claim has to be reduced (Emde, Distribution Law, 3. Edition 2014, § 89a marginal note 72).

10. Termination clause

A clause permitting lawful termination without notice (or before the expiry date) by paying a fixed amount (termination indemnity) based on previous earnings could have the following wording:

"Even in the absence of a good cause, both parties may terminate this agreement without notice if the terminating party reimburses the other party for its lost profits which could have possibly be earned during the termination period by the terminated party. The lost profit is calculated out of the profit of a typical past period. It should be assumed that such typical period is a five year period of the past. If the agreement had a shorter duration then this shorter period is the typical period."

I would assume that such clause would be void as the Commercial Agency Directive as well as German Law provides for a minimum termination period between one to six months and a termination without notice is only permissible under the conditions named in Art. 16 Directive or in case of good cause (§ 89a HGB – German Commercial Code). The same result might be archived by terminating with the contractual termination period and the agent/distributors is released from its obligation to act for the principal (“Freistellung”). In cases in which the agent/distributor is released from its obligation to act for the principal then a compensation calculated out of the remuneration of a typical period has to be paid by the principal.

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