2013 IDI Annual conference, workshop 1, Saturday 15 June 2013.

Panel: The amount of goodwill indemnity generally granted to commercial agents in some European countries: an overview.

BELGIUM

1) How do your national Courts normally appreciate the main criteria provided by the EC Directive, i.e. the increase of the clientele and/or of the business with the existing customers?

Under the law dated 13th April 1995 (M.B. 2nd June 1995), Belgium has implemented the EC-Directive 653/86 dated 18th December 1986. The law became effective on 12th June 1995. It has been modified by the law dated 4th May 1999 and then further by the law dated 21st February 2005.

This law has implemented art .17.2. of the European Directive.

In fact, according to Article 20 of the law of 1995, the agent is entitled to an indemnity for goodwill if and to the extent that it is proved by the agent that:

1. he or she has introduced new customers to the principal or has significantly increased the volume of business with existing customers, and also that
2. the principal continues to derive substantial benefits from the business with such customers.

The burden falls on the agent to prove that the conditions for obtaining a goodwill indemnity are met.

In this respect it is important to mention that the law contains two presumptions in favour of the agent whenever the agency agreement contains a non-competition clause that has effect after the contract be it valid or not):

- the first is that the commercial agent has indeed introduced new customers to the principal (art. 24§3 of the law);
- the second is that the principal continues to derive substantial benefits from the business with such customers (art. 20,2 of the law).

As these two presumptions are refutable, the principal may try to prove the opposite. It is insufficient to prove that the agent has not suffered any damage: as a matter of fact, as seen above, this is inconsequential.

Moreover, the goodwill indemnity is not to be considered as reparation of damages, but instead is considered compensatory. It is a compensation for the clientele, i.e. the price of the increase in clientele, for the clients who continue to place their orders with the principal. It follows that the agent does not have to prove that he has suffered any damage.

a) Do they normally make an in depth evaluation of the number of customers brought by the agent, in comparison with the number of customers that the principal had at the beginning of the contractual relationship?

According to the first condition (i.e. that the commercial agent has indeed introduced new customers), it is in fact required that the agent has brought in new customers or has significantly increased the volume of business with existing customers. They may be existing clients of the agent. As mentioned before, whenever the agency agreement contains a non-competition clause (be it valid or not), the commercial agent will be presumed to have introduced new customers to the principal (art. 24§3 of the law).

It is clear that the increase of customers must be the consequence of the activity of the agent. In fact, if the increase of the sales is the exclusive consequence of the principal's advertising policy, the condition will not be fulfilled. However, the agent may prove that the increase in sales is due to the significant increase of customers or of the volume of business with existing customers thanks to his efforts and his activity by any means of proof. It is, in fact, necessary that the agent has played a significant role in the conclusion of the sale and that he has effectively contributed to the creation or the development of the clientele. The courts have, therefore, recognized the right to a goodwill indemnity e.g. even when the agent's work had been facilitated (without being the exclusive consequence) by the reputation and the advertising of the products by the principal.

Therefore, the comparison between the number of customers brought by the agent and the number of customers that the principal had at the beginning of the contractual relationship will be taken into account by the courts but will not be the only criterion systematically used by the courts. The increase of customers will be assessed at the court's discretion, considering all the facts of the case.

b) What about the increase in the turnover of existing customers?

As far as the significant increase of business with existing clients is concerned, one could also make a comparison between the turnover of the principal before the agreement with the agent and the turnover at the end of the agreement with the agent.

However, the stagnation or the decrease of the turnover the last years of the contract does not necessarily exclude the granting of a goodwill indemnity. The increase of the turnover with the existing customers could still represent a substantial economical value at the end of the contract.

On the other hand, it has to be emphasized that it is possible that the decrease of the turnover may impact the amount of indemnity granted, and in such case the judge could decide to grant less than the maximum indemnity. Moreover, the decrease of the turnover can be so important that a judge could consider that there were no substantial benefits for the principal from the business with the customers of the agent at the end of the contract. In such case, no indemnity will be granted.

c) Pros and cons for the principal of including, as an annex to the contract, a list of the existing customers.

Very often, the agent will provide the judge with:

- an updated list of the principal's customers at the end of the contract specifying which of the customers he has brought to the principal,
- and documents showing the increase of turnover from the beginning of the contract.

Therefore, including a contractual document providing a list of customers and also, mentioning the turnover in the sector of the agent, may be very helpful in determining which clients existed already and with respect to which clients an increase of turnover had been reached at the end of the contract.

However, providing a list of existing customers could mislead the judge if some of the customers were only occasional buyers of the principal, but who later became regular customers due to the efforts of the agent. Further, the agent could also have facilitated the sales of the principal's new products to existing customers. Such efforts of the agent will not appear from the list of the existing customers of the principal at the beginning of the contract alone but must be proven by the agent through other documents. Therefore, when adding a list of existing customers to the contract it is important to not only mention the customers, but also the turnover gained from the existing relationship with the customer and perhaps specifying the product as well.

d) Would it be useful, from the principal's perspective, to provide documents in the Court proceeding (e.g. letters sent to the agent), proving that – during the contractual relationship – some of the customers have been reported to the agent by the principal?

As mentioned above, the increase of customers or the development of the business with existing customers will be assessed at the courts discretion, considering all the facts of the case. Providing such documents could help the principal to demonstrate that the agent is not entitled to a goodwill indemnity or to a limited indemnity amount; as a matter of fact, proving that the principal has sent clients to the agent might prove that, depending on all the circumstances of the case, the clientele increase or the increase of the business is exclusively due e.g. to the principal's efforts and not the agent's.

2) How your national courts normally appreciate the other criteria provided by the EC Directive, i.e. the substantial benefits for the principal from business with those customers after the end of the contract?

According to the second condition to be fulfilled by the agent in order to be granted a goodwill indemnity, it is required that the principal continues to derive substantial benefits from the business with these customers. According to the case-law, this condition consists only of a possibility for the principal to continue to derive substantial benefits from the business increased by the agent. It is not required to prove the effective continuity of benefits. For this purpose, Courts can take into account all the relevant circumstances known until the day of the decision.

This has been reiterated very clearly in a recent decision of Belgium's highest court, the Court de Cassation in a decision dated 15.05.2008. It is however not sufficient that the possibility be merely theoretical; there should be a reasonable expectation.

According to the case-law, the possibility for the principal to continue to derive substantial benefits from the business of the agent may be direct or indirect. For example the principal may continue to derive substantial benefits from the business of an agent: through another agent, by a transfer of business or branch to a third party, or by orienting the customers to another branch of his company where he will distribute similar products and therefore would not need to "re-convince" the customers.

a) How can the agent fulfil his burden of proof, considering that – after the end of the relationship – he does not normally have access to any information concerning the relationships between the principal and the customers he brought to him?

As mentioned before, whenever the agency agreement contains a non-competition clause (be it valid or not), the principal will not only be presumed to have brought clientele (art. 24.3), but also to continue to derive substantial benefits from the business with the customers brought by the agent (art. 20,2 of the law).

In the absence of a non-competition clause, the agent has the burden of proving that the principal will be keeping commercial relationships with customers the agent brought him. It is indeed quite difficult for the agent given that the principal is the only one that has access to the documents concerning the clientele. However, according to article 16.2 of the law, the agent has the right to ask the judge to order the principal to produce all the relevant documents in order to calculate the commissions (like accounting documents). This is also applicable regarding the commissions that the agent would be entitled to for sales concluded within six months after termination and it could also help to know that the principal is continuing business with the customers of the agent.

Moreover, presumptions may be used as proof. For example, the agent could invoke:

- The loyalty of the clientele and the consistency of sales before the termination of the contract;
- The stability or the increase of the turnover of the principal in the agent's sector after the termination;
- The recruiting of another agent to continue the agent's business with his clientele;
- The fact that the agent gave up the promotion of similar products;
- The fact that the principal takes over the agent's clientele;
- The judge may also take into account the principal's reputation and the specificity of the products. More generally, the judge may also take into account the fact that, usually, customers are more loyal to the principal's brand than to the agent since the principal has a direct relationship with the customers when he directly delivers the products and directly charges the customers.

b) Would the agent's right to indemnity be limited in its amount, if – following the end of the agency contract – the principal loses its customers for reasons which do not stem from the agent?

The courts have a very broad power of appreciation regarding the amount of the indemnity. They can take into account the development of the business and the increase of clientele, the substantial benefits for the principal, and all the revelant circumstances of the case (even the circumstances occurring after the termination of the contract). There are some examples in case law where circumstances that did not depend on the agent but that affected the benefits gained by the principal, from the business with the customers brought by the agent, have been taken into account.

For example:

- The duration of the contractual relationship indicates whether the principal had been satisfied by the work of the agent;
- The non-competition clause inserted in the contract reinforces the possibility of keeping the clientele;
- The specificity of the products which is an indicator for loyalty of the customers;
- The amount of investments made by the principal to launch the products into the market provides the court with an idea of the contribution of each party. If the investments of the principal are high and those of the agent are low, the amount of the indemnity could be lowered by the judge;
- The judge might also take bad market conditions into account in the assessment of the amount of the indemnity. An assessment based on such criterion will be justified by equity which is the subjet-matter of question 3.

In other cases, the benefits of the principal have been considered insufficient and therefore the indemnity has not been granted for reasons that did not depend of the agent e.g. amongst the 55 clients of the agent, only 3 of them had been taken over by the new agent.

c) What is the period of time taken into consideration by your national Courts, in order to evaluate if and to what extent the principal continues to derive substantial benefits from the business with customers brought by the agent?

In the aforementioned decision of the Court of Cassation (15.05.2008) the court stated that the fulfilment of this condition should be verified at the moment that the contract ends. The judge will have to evaluate the possibility of deriving substantial benefits as it exists at the end of the contract.

Facts arising after the termination that could obstruct the fulfilment of the condition may not be taken into account whenever they are attributable to the principal. To the contrary, facts arising after the termination that are attributable to the activities of the agent may be taken into account (e.g. competing activities by the former agent). This seems obvious since the goodwill indemnity is the price paid in return for the likelihood of gaining contracts. Therefore, the judge can take into account the evolution of the turnover of the principal after the termination in order to assess by which measure he continues to derive benefits from the agent's activity.

3) How is the third criterion provided by the EC Directive (i.e. the indemnity being equitable, in regards to all the circumstances and in particular the commissions lost by the agent on the business with such customers), taken into account in respect to the other above mentioned criteria?

It is important here to mention that Belgian law does not declare equity as being a condition for the existence of the right to a commission. The judge will however have to decide according to equity when evaluating the amount of the indemnity. Nevertheless, the judge cannot create or annihilate the right to the indemnity when it does not fulfil the legal conditions. Taking equity into account can only lead the judge to moderate or adjust the amount of the indemnity according to certain circumstances such as: the grounds for termination, the ability the agent has to change activity, the high rate of commissions paid during the contract, the granting of commissions for customers that the agent was not taking care of, investments by the agent, the indemnities the agent had to pay to his employees, etc.

4) Are there other circumstances taken into consideration by your national Courts in order to grant the goodwill indemnity to commercial agents, besides the once mentioned above? (e.g. the simple increase of the turnover; in Italy, the Collective Agreements)

No, however, in addition to this indemnity for goodwill, the agent may be entitled to compensation for further damages whenever he or she is able to prove the occurrence of this further damage and whenever the indemnity for goodwill does not fully cover the loss suffered (art. 21 of the law of 1995). In this case there is no limit to the amount that can be recognized by the courts.

To be entitled to the additional indemnity it is a prerequisite that the agent be entitled to a goodwill indemnity. Should this not be the case, he may not claim any indemnity.

The agent has to prove the amount of the damage suffered. The amount of this compensation consists of the difference between the goodwill indemnity received and the greatest damage suffered, which the agent has to prove.

As far as the characteristic of this compensation is concerned, jurisprudence is not unanimous. The Court of Appeal of Antwerp (11th October 2004) estimated that the compensation provided for by art. 21 is a complementary indemnity to the goodwill indemnity and therefore only concerns the damages suffered for the loss of clientele. In contrast, the Court of Appeal of Brussels (29th April 2002) and the Court of Appeal of Ghent (8th April 2005) estimated that this compensation concerns other damages than those for the clientele; for example a loss of investment or debts to outside parties were calculated as damages. Case-law will have to be closely followed to see which interpretation is best applicable.

5) What are the circumstances eventually considered by your national Courts, in order to limit or exclude the agent's right to goodwill indemnity? (e.g. the promotional efforts made by the principal in the agent's country; well known trademark in the agent's country; etc.)

According to the law, no indemnity is due in the following cases:

- when the principal has ended the agency agreement due to a breach attributable to the commercial agent which justifies immediate termination of the agency agreement under article 19 of the law of 1995 (*serious breach*);
- when the commercial agent has terminated the agency agreement, unless this termination was justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent as a consequence of which the agent cannot reasonably be required to continue agency activities;
- when, with the agreement of the principal, the commercial agent or his or her heirs assign the rights and duties of the agent under the agency agreement to another person;
- finally, the agent loses the right to indemnity for goodwill if he or she does not inform the principal of his or her intention to make use of this right within one year after the termination of the agency agreement (art. 20,6 of the law).

6) What are the tools normally used by your national Courts, in order to calculate the goodwill indemnity? (e.g. an expertise made on the financial books of the principal: what are the main problems arising out of such an expertise in your experience?)

The amount of the indemnity is calculated taking the increase of the volume of business and the increase of new customers into account.

Should the parties not agree on the amount, this amount will be established by the judge. The judge will decide bearing in mind the increase in the volume of business and of new customers, as well as other circumstances such as, for example, the advantages that the principal will continue to derive.

The judge is only bound by the maximum of the indemnity as provided for by art. 20 of the law. In fact, in any case, the amount of the indemnity may not exceed a figure equivalent to the indemnity of one year calculated on the commercial agent's average annual remuneration over the preceding five years, even if the commissions have been lower at the end of the contract. In case the contract has been performed for less than five years the indemnity shall be calculated on the average for the period in question (art. 20(4)).

The courts take into account the gross remuneration before taxes (all the commissions or types of commissions and including professional charges).

Some decisions are based on expertise but most of them are based on the documents of the parties. It is true that in some cases, the expertise is not avoidable but given the costs of expertise in time and money, courts try to avoid it most of the time.

7) What is the average amount of indemnity normally granted to commercial agents, compared with the maximum amount of one year’s commissions, provided in the EC Directive?

The amount granted ranges from 1 month to 12 months for the average remuneration e.g.

- 1,5 month has been granted when the agent, during 20 months of contractual relationship, has closed important sales regarding works of art and because the principal kept in touch with some of the customers the agent brought regarding public sales;
- 2 months for an agent in the retail sector with a limited turnover that has decreased during the last year of the contract;
- 3 months for an agent that has worked for the principal for 5 months, but without committing any breach or reproach during the performance of the contract;
- 4 months for an agent that has worked for the principal for 2 years and whose contract contained a non-competition clause,
- 5 months for an agent that has worked for the principal for only 2 years but that has concluded 5.681 contracts and made a high turnover;
- 6 months when the increase of clientele has been stable and loyal for more than 10 years, considering the reputation of the Italian shoes and their position on the market;
- 7 months for an agent that has doubled the turnover with the existing clientele during the 4 contractual years;
- 12 months for an agent that has introduced the principal on the market, that has developed an important clientele and made a high and stable turnover and when the clientele has been entirely taken over by the principal given the specificity of the products and that the agent could not continue his activity for other productions.

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