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.

CZECH REPUBLIC

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?

The EC Commercial Agents Directive (86/653) was implemented into the Czech legislation by the Act No. 370/2000 Coll. that came into force on 1 January 2001. This Act amended the Czech Commercial Code which regulates the contract for the commercial agency in its provisions § 652 – 672a.

Czech law implemented EC Directive by choosing the indemnity principle.

The indemnity is due (Section 669) when the following conditions are met:

- the agent has brought (introduced to the principal) new customers or has considerably increased business with the existing customers and the principal continues to derive substantial benefits from the business with such customers and
- the payment of such indemnity is equitable having regard to all the circumstances and in particular the commission lost by the agent on the business with such customers; these circumstances also include the application or non application of a restraint of trade clause in the meaning of Section 672a C.C.

Besides that the Commercial Code expressly stipulates that granting of indemnity does not prevent the agent from seeking damages.

As regards the approach and practice of the national courts it has to be said at the beginning that the Czech courts unfortunately decide in agency matters rather rarely. The judicature therefore is not too extensive and not all questions raised in the questionnaire can be easily responded.

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?

As the number of customers introduced to the principal by the agent is the essential condition for the claim to indemnity, the Czech courts should evaluate this number in comparison with the number of customers that the principal had at the beginning of the contractual relationship. The agent has to prove that it was him who introduced new customers.

Of course the agent can claim indemnity arguing with fulfilment of further condition - that he has considerably increased business with the existing customers. Even in such case the comparison of numbers of customers can be relevant and evaluated.

In any case the courts will consider thoroughly whether the principal continues to derive substantial benefits from the business brought by the agent. The increase of customers will be taken in the account at the court's discretion, with other relevant issues (considering all the facts of the case).

This approach has not been always correctly applied in practice. It can be found in the recent judgment of the Supreme court *32 Cdo 3359/2011* that the courts sometimes ruled only on the basis of the assumption that the business was increased and principal continued to derive benefit without detailed evaluation (including comparison of numbers of customers) relying only on declaration of parties (which do not disputed this fact). This judgment made clear that this practice was not correct and underlined that it is up to the court legal assessment whether or not the conditions for the claim to indemnity were met. It seems that now we can expect more detailed analysis (including such comparison) made by the courts.

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

As already shown above the increase of business with existing clients is the condition for the claim to indemnity and the courts will 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.

Again, the courts will consider thoroughly whether the principal continues to derive substantial benefits from the business with such customers (and all other aspects of the case).

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

A list of the existing customers to be included as an annex to the contract with the principal should always facilitate to the agent its duty to prove that all conditions for his claim to indemnity have been fulfilled. It can serve as one of proofs which the agent can use at the court (besides other means like hearing of witnesses, invoices, accounts, other documents, correspondence etc.) to show that the number of customers increased or that the turnover with existing customers increased comparing with the situation at the time of execution of the contract. It would be also helpful if information on turnover is included in such list but in practise it is rather exceptional.

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?

If the principal is able to prove to the court that some customers have been reported to the agent by the principal it is of course helpful. It can lead to the conclusion that the agent is entitled only to a reduced amount of the indemnity or is not entitled to any indemnity at all. It will depend on the court how this fact will be assessed but it could be of considerable importance. On the other side it does not automatically mean that the claim for indemnity did not arise.

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?

This criterion (the principal continues to derive substantial benefits from the business with such customers) is stipulated in the Commercial Code and the courts have to consider whether it is fulfilled. In one case however the court left even this criterion aside and only assessed that in view of the amount of the commission paid to the agent it was clear that the business was substantially developed and that the agent´s activity was beneficial for the principal. The Supreme court cancelled this decision and made clear that this was incorrect and that all aspects of the case including the substantial benefits for the principal from business with those customers after the end of the contract has to be considered. However there is no case law explaining what "substantial benefits" means or what is the period relevant for consideration of such benefits and therefore these questions are still opened (unclear). So far there is no case and/or literature clarifying whether the benefits can be assumed on the basis of reasonable forecasts like in some other countries.

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?

The Czech law is unfortunately bit formalistic and therefore it really may be a serious problem for the agent to prove that the principal remained keeping commercial relationships with customers the agent brought him. Any party may ask or propose in the civil procedure that the other party produce the necessary documents but if it is not done it is still problem for the agent. The court of course will consider all aspects and other proofs in context and the agent may propose other proofs like hearing witnesses, testimony of accountants, other documents etc.. Very useful evidence can be the final accounts which the companies have to deposit at the Companies Registry.

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?

There is no case law in the Czech Republic addressing this issue. The courts will consider all aspects of mutual relations but in view of rather formalistic approach one can imagine that they will find the lack of one of condition for the claim to be granted - the substantial benefits for the principal from business with customers after the end of the contract. .

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?

There is no case law in the Czech Republic addressing this issue. This question will be assessed by the courts in each case individually depending on relevant conditions.

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?

The Czech law implemented this criterion saying that the payment of such indemnity must be equitable having regard to all the circumstances and in particular the commission lost by the agent on the business with such customers. On top of that it clarified that these circumstances also include the application or non application of a restraint of trade clause.

This was probably the reason why the courts earlier considered the existence of the non competition clause as the main (and sometimes the only) criterion. In some cases the courts simply decided that the agent is entitled to maximum indemnity allowed by the law due to the fact that the contract contained the clause. In another case where such clause did not exist the court ruled that the maximum amount of indemnity can be granted only if such clause exists and simply reduced the indemnity to 50% percent (without considering other aspects of the equity).

Only recently (in the judgment of the Supreme court 32 Cdo 3359/2011) the court made clear that not only the amount of the commission and/or the existence of the non competition clause is relevant for assessment of the claim to indemnity but also all other relevant aspects have to be considered. Consequently the Czech courts should carefully consider all circumstances.
In another recent case the indemnity was not granted by the court saying that also the condition of equity was not met namely due to the fact that the agent was subsequently employed at the principal, his salary was higher than earlier paid commission and the non competition clause was not agreed (besides that the agent did not prove the substantial increase of the business).

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)

I am not aware of any other circumstances taken into consideration by our courts and believe that such circumstances do not exist.

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.)

The Commercial Code provides for that the indemnity is not due (Section 669a):

- if the principal terminates the contract for a breach by the agent of such importance that would justify withdrawal from the contract;
- if the agent terminates the contract, unless termination is justified by circumstances for which the principal is responsible or by circumstances regarding the agent, such as age or illness, under which he cannot be reasonably requested to continue his activity;

- where, by virtue of an agreement with the principal, the agent assigns his rights and duties under the agency agreement to a third party.

The legal practice did not bring other reasons.

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?)

When calculating the goodwill indemnity the courts take into account the increase of the volume of business and the increase of new customers. For this purpose the agent can propose evidence by his invoices to the Principal as well as the accountancy. Also the hearing of witnesses, like e.g. the accountant of the principal can be proposed. In complicated matters the expert opinion can be proposed by any party and the expert will be appointed by the court.

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 of the indemnity cannot exceed a sum equal to a yearly (one year) indemnity calculated on average of the commissions earned in the last five years. If the contract has not lasted five years then the indemnity shall be calculated on the average for the respective period.

There is not too much court cases regarding the indemnity disputes in the Czech Republic and therefore it is not easy to identify the average amount of indemnity normally granted. It rather seems that so far the Czech courts tend to grant the maximum amount provided in the EC Directive unless there is a reason for reduction like for example the lack of the non competition clause.

The court granted one year commission even for example in case where the agency contract lasted 12 months (and non competition commitment was agreed for 18 months). In some other cases the courts simply reduced the maximum amount to 50% as a result of the lack of non competition clause without considering other aspects of the case. As mentioned above the recent judicature of the Supreme court will probably change such approach of the courts.

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