

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.

DENMARK

- 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 Agency Directive (EC Directive 653/86) was implemented into Danish law by the 1990 Agency Act ("the Act"). The Act incorporates Art. 17.2 of the Directive. This means that under the Act (Section 25):

2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and
- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

- 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?

Danish courts will carefully consider 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.

In theory it is assumed that a customer is a "new" customer brought by the agent if the order to the principal is transmitted via the agent/as a result of his action (and not transmitted directly to the principal by the customer without prior contact between the agent and the customer). Thus, a customer is quite easily considered "new" and "brought" by the agent.

"Reactivated" customers (customers not served for "some time" or previously served only for other products) may also be considered new customers.

All relevant evidence can be put forward to demonstrate which new customers the agent has brought. Quite often, the parties will each submit lists of the customers year by year. The principal may also sometimes submit correspondence, invoices etc. dating from before appointment of the agent to prove that the customer was not brought by the agent.

Relevant persons, including customers, may also give oral evidence on this matter.

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

This is also considered carefully by the courts.

What a "significant" increase is depends on a case-by-case assessment.

Again, all relevant evidence can be put forward for this purpose. Here, the parties will usually each submit extracts of their respective financial books covering the duration of their cooperation and list the turnover for each customers year by year.

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

Even though it is rarely done, annexing a(n exhaustive) list of existing customers to a contract would be strong evidence that the customers listed were not brought by the agent. The volume of business could/should also be listed.

Unless you have an interest in hiding this information, there does not seem to be any "cons".

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?

Given that it is relevant to the agent's right to compensation that the agent brought new customers, it might be useful for the principal to prove that some of the customers were referred to the agent by the principal (however, please note that a customer is quite easily considered "new" and "brought" by the agent; see 1 a above).

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?

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 second criterion is also considered carefully. However, there is a general assumption that business with existing customers will continue (for some time) and that the principal will derive substantial benefits. Thus, as a starting point, the burden of proof is not heavy to carry for the agent and the agent will point to the evidence already submitted (see 1 a and b above)

When only the financial books of the principal are relevant, accountants will usually make reports on the relevant parts of the financial books.

Further, relevant persons will give oral testimony before the court relevant to this matter.

- 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?

As a main rule, the court will focus on the situation at the time of termination. However, subsequent information as to the value of the agent's efforts to the principal may also be considered.

If the principal or the new agent is responsible for a loss of customers, this will not affect the indemnity. If a loss of customers is attributable to market conditions etc., this may influence the indemnity.

- 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?

As already mentioned, as a main rule, the court will focus on the situation at the time of termination and will try to estimate the future benefit to the principal based on that. However, in practise the courts may consider up to 1-2 years after termination.

- 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 court will consider the agent's loss of commission in particular.

The term of the cooperation is also important. Thus, a short term contract will usually also result in a limited indemnity being considered equitable (but not always). Investments made by the agent are also relevant.

If it is clear that the success of the products is not attributable to the agent (but perhaps the brand or efforts of the principal) the court will limit the indemnity. This may also be the case of the agent refuses to extend a fixed time contract, or if the agent, after termination/expiration, takes on a competing products and takes "his" customers with him.

From the preparatory works and court decisions it can be seen that the existence of a post contractual non-compete provision works in favour of indemnity being paid to the agent.

- 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)

Probably not in order to grant indemnity, but it can be assumed that the courts will consider themselves free to consider all matters that they find relevant when deciding what is equitable (see 3 above).

- 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 courts may limit the indemnity if it is clear that the agent (personally) was significant if bring new customers or increasing business with existing customers as the principal "substantial benefits" would be limited.

For the same reason, the court may limit the indemnity if the market conditions are deteriorating. If the principal's business or products are discontinued, indemnity may be excluded.

Further, the courts may limit the indemnity as a result of the fact that the agent saves operational costs.

As for exclusion of indemnity, according to Section 27 of the Act:

The indemnity referred to in Section 25 shall not be payable:

- (1) where the principal has terminated the agency contract because of material default attributable to the commercial agent;
- (2) where the commercial agent has terminated the agency contract, unless such termination is justified
 - (a) by circumstances attributable to the principal or
 - (b) on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; or
 - (c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person.

Finally, as per Section 28 of the Act, the agent shall lose his entitlement to the indemnity if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

- 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 court will consider the evidence brought forward by the parties and the matters described above. There is no "formula" you can use to calculate the indemnity.

Also, according to Section 26 of the Act, the amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial

agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.

When calculating this maximum, the court will include all types of remuneration (but not reimbursements of advertising costs etc.). Operational costs are not deducted.

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?

It is not possible to make statements on the average indemnity. However, the maximum amount is rarely awarded.

The more the agent has fulfilled the criteria for indemnity and the longer the term of the cooperation, the more likely the agent is to get maximum indemnity.

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