

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.

SPAIN

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?

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?

Evidences are usually procured in a first step by the party demanding the compensation (the Agent). The judge usually does not take any special decision in order to investigate by himself. This is therefore a question of evidences procured or demanded by the Agent. If the Agent does not procure such evidences (or does not ask the Judge for the Principal to procure), the court will normally not accept his/her claim.

Evidences are normally the invoices issued by the Agent. These invoices, when the agent has done properly, include a reference to the relationship principal-client.

Normally, all new clients will be considered as brought by the agent unless the contract states otherwise (for instance specific (big) clients, or certain specified clients already existing) and usually, if the Principal wants to prove otherwise it will be necessary an evidence attesting that the client was already existing, that his activity has been essential, or other circumstances.

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

Here the question can be a bit more complicated due to the fact that it will be necessary to prove the previous turnover which is something the Agent does not necessarily know. In this case and mainly in situations in which the contract has had a duration of more than five years, an increasing of the activity during the contractual period could be seen as an indication of such evidence without the necessity of examination of the previous situation.

Here, the Agent can use public accounting information or can ask the Judge to require the Principal's accountancy in order to prove the elements involved.

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

In my opinion this could be a useful tool mainly for the Agent (and probably a difficulty for the Principal). As pros, I see to facilitate both parties to prove the already existing customers and the already existing turnover when the contract has been signed. This will help to focus the claim.

As cons: for the Principal this tool will weak his position; for the Agent this could be used as an evidence of his lack of activity if the already existing clients have been

lost or reduced or as an evidence of the general situation of the market in order to calculate its future evolution.

- 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?

All the evidences are welcomed in a procedure like this one. Letters, emails, or other evidences are important in order to justify the Principal's activities with the clients but it will be also relevant the Agent's concrete activity with these clients. The double condition "brought by the agent" and "the increase of the turnover with the existing customers", will be considered together, and the fact that the Principal has reported the clients will not exclude, by itself, the goodwill indemnity disregarding the Agent's sales.

- 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?

Spanish courts do not ask for clear and definitive evidence procured by the Agent of the future benefits of his activity but a reasonable forecast considering the market situation and other circumstances of the case.

Spanish Supreme Court has considered¹ that the Principal has to remunerate or compensate the Agent's activity creating the clientele in those cases in which the termination is followed by the benefit by the Principal of this clientele or, when it is possible a reasonable prediction on the possible evolution of the clientele and the possibility for the Principal to still benefit it.² But in order to admit this compensation is necessary to prove that this benefit for the Principal or this prediction reasonably exist (in some cases, nevertheless, it has been refused because these circumstances were not *effectively* proved).³ These circumstances have to be proved by the Agent⁴ not being necessary a complete prove of the substantial future advantages but the possibility (not certitude) of these advantages, being enough a "reasonable forecast"⁵ and according to an equitable calculation (*juicio de equidad*).⁶

¹ Supreme Court June 23rd 2005 [RJ 2005, 4930].

² See Supreme Court January 27th and April 7th 2003 and April 30th 2004.

³ In a sentence of AP Barcelona St. 231/2008 of May 5th the court did not accept the compensation because the new clientele created and the future benefits for the Principal were not effectively proved by the Agent. Also AP Madrid n. 316/2010 of June 16 [JUR\2010\297468]

⁴ See Supreme Court July 26, 2000 [RJ 2000, 6476], October 31, 2001 [RJ 2002, 227], January 28 [RJ 2002, 2350], March 18 and October 3, 2002 [RJ 2002, 9789]; January 27, 2003 [RJ 2003, 11137], November 19, 2003 [RJ 2003, 8335]; and February 10, April 26, May 4 [RJ 2004, 2786], May 20 [RJ 2004, 2786] and November 30, 2004 [RJ 2004, 7901]; March 21, 200 [RJ 2007, 4959] and AP Madrid, S. 431/2010 of June 23 [AC\2010\1197].

⁵ Supreme Court April 30, 2004 [RJ 2004, 1678]; October 3, 2004; June 3, 2005; December 19, 2005; February 9, 2006; June 22, 2007 [RJ 2007, 5427] and November 11, 2007, all mentioned in AP Madrid n. 431/2010 of June 23 [AC\2010\1197]. See also Supreme Court 359/2010 of November 25 [JUR 2011/47675] and the judgements therein mentioned.

⁶ Supreme Court, Civil Room, Section 1 sentence 341/2012 of May, 31 (RJ 2012\6549)

- 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?

Usually when the calculation is made as a reasonable forecast on the Principal's future activity, it will not depend on the loss of the customers. The question will be for the Principal to contest on what could be considered as "reasonable" according to the concrete circumstances.

On the other hand, as the claim is usually started after a period of time, the Principal can show that in fact the activity of the Agent has not had any further benefits.

- 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 not special criteria about the time. Usually an equity evaluation is made by the First Instance courts together with the rest of the circumstances of each case and the market.

- 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?

This is an important criteria and the Supreme Court has considered that court have to apply this equity evaluation of the compensation: not only its application but also its final amount.

The main element to take into account in order to calculate goodwill compensation is "equity"⁷ and this is freely appreciated by courts in each particular case. Sometimes it has been granted a fifth of the average remuneration in the previous five years.⁸ In other cases, the introduction of the products in a particular market and the short duration of the contract have been respectively considered to increase or to decrease goodwill compensation.⁹ Other elements in the agency contract such as the volume of the transactions in the territory, the duration of the contract or the exclusivity can also be considered in order to calculate the goodwill compensation.¹⁰

- 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)

Other circumstances that have been considered to grant or to moderate the compensation are:

⁷ Supreme Court Room 1^a, S 27-1-2003, n° 19/2003, rec. 1652/1997 (EDJ 2003/2539).

⁸ AP Barcelona, sec. 11^a, S 7-7-2004, rec. 662/2003 (EDJ 2004/95341).

⁹ AP Castellón, sec. 3^a, S 18-12-2001, n° 623/2001, rec. 438/2000 (EDJ 2001/69440).

¹⁰ Supreme Court Room 1^a, S 27-1-2003, n° 19/2003, rec. 1652/1997 (EDJ 2003/2539); Supreme Court Room 1^a, S 1-4-2000, n° 309/2000, rec. 1860/1995 (EDJ 2000/5228).

1. As mentioned, the “reasonable moderation” of the commissions earned, considering, for instance, an increasing of the commissions during the agreement¹¹ and a equitable calculation (*juicio de equidad*)¹²
2. Possible sales of the last six months period¹³ or additional periods that will prove that the business was not so good.
3. In case of distribution of long term objects, the circumstance that the clients will ask for their renovation not immediately but very distantly in time does not impede the consideration of the fidelity of the clientele.¹⁴
4. Well-known products, prestige of the trademark of the commercialised products¹⁵ and the intervention of the Principal in advertising will produce a decrease of the compensation for the clientele.¹⁶
5. In some cases, and depending on the products, it has been considered that “cliente” includes only “common clients”¹⁷ but in other cases it has been accepted that even with previously existing clients, the compensation was due because the Agent had obtained a special fidelity of the clients to the Principal during the life of the relationship.¹⁸

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.)

Legally, goodwill indemnity will not exist in some cases¹⁹:

- a) When the termination of the contract by the principal was due to the breaching by the agent of any legal or contractual obligation.
- b) When the termination is due to the agent will, unless it was due to reasons imputable to the principal or due to the age, infirmity or illness of the agent and in case it was not reasonable to require his continuity as agent.
- c) When the agent has assigned, with the knowledge of the principal, his rights and duties in the agency contract to a third person.

Usually indemnity is also excluded or limited in case the activity objectively cannot produce further benefits for the Principal: for instance if the principal is changing its activity or if the principal decides not to continue with such activity.

The compensation is not due in case of breaching of the agreed obligations by the Agent such as, for example, has been considered the non attainment of the minimum

¹¹ AP Vizcaya 27 January 2000 AC 2000/289

¹² Supreme Court, Civil Room, Section 1, sentence 341/2012 May, 31 (RJ 2012\6549)

¹³ AP Vizcaya 27 January 2000 AC 2000/289

¹⁴ Supreme Court 19 November 2003 RJ 2003/8335

¹⁵ Supreme Court 12-6-99; 20-5-2004; 6-11-2006; 16-5-2007 and 21.1.2009 [RJ 2009, 398], all mentioned by AP Madrid n. 431/2010 of June 23 [AC\2010\1197].

¹⁶ Supreme Court 16 May 2007 RJ 2007/4616

¹⁷ Sentence 19 November 2003 referred by Supreme Court 29 September 2006 RJ 2006/6515

¹⁸ AP Barcelona, St. 268/2008 of April 24th.

¹⁹ Article 30 Agency Act.

sales foreseen in the agreement²⁰ or in case of a “*de facto*” interruption of the Agents’ activities.²¹

- 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?)

Books that can be used by the Agent will depend on its nature as a moral person (a company) or an individual (agent as a physical person). For the first case, a copy of its accountancy is usually accepted together with a copy of the invoices to the Principal. The accountancy is usually analysed by an expert whose report is also procured to the court as an evidence and his/her presence required at court in order to ratify his/her opinion by the party interested in his/her report.

If the agent is a physical person and therefore he/she is not obliged to have the same official books, then he/she will usually use the invoices book, as well with a copy of the invoices and probably a report by the expert.

In both cases, also relevant tax declarations could be used in order to prove the correspondence between the accountancy and taxes paid.

Amongst the remunerations to be considered in order to calculate the average, courts have included not only the commissions or fixed amount agreed in the contract but also any other amount received during that period, such as bonuses, gratifications or “subventions”.²²

The problems that could arise will be usually to establish a link between, from one side, the invoices (commissions), the activities and the accountancy of the Agent (who is asking the indemnity) and, from the other side, the accountancy of the Principal (which is not known by the Agent).

- 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?

There is not an average. Although the amount has been considered not only by the Act but also by the case-law as a “maximum amount”, Agents usually tend to ask for such maximum, sometimes without too much explanation of the reasons and the reasonable forecast of the future benefits to the Principal. As mentioned before, courts tend to moderate this amount also as a consequence of the Principal’s arguments but in general we see a tendency to accept the maximum amount.

As a circumstance to increase the amount, clauses limiting the competition after the termination of the agreement or the exclusivity during the agreement are the more frequent. Recently a limitation of indemnity has been accepted by a court [SAP Salamanca nº 445/2012 July 30th] because there was not a limitation of competition after the agreement.

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²⁰ AP Madrid, St. 243/2008 of May 14th.

²¹ Supreme Court 705/2010 of November 12 [RJ 2010/8051]

²² Supreme Court n. 905 of October 21st, 2008

