

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.

POLAND

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?

The most recent jurisprudence is of the opinion that the EC Directive criterion of the “increase of volume of business” (in the Polish Civil Code “significant benefits”) does not mean that the agent claiming the goodwill indemnity is obliged to prove the “real profit” of the principal. The “significant benefits” are rather various elements gained by the principal due to the agent’s activity. The number of clients would be, however, one of the factors taken into consideration.

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

The Polish Supreme Court considers that it may not be expected from the agent that he will prove the significant benefits in the meaning of the appropriate “financial advantages”; such expectation would cause the goodwill indemnity claim legally ineffective, against the legislator’s intention.

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

In the light of the recent jurisprudence the annex with the list of the existing customers could be helpful in the future goodwill indemnity proceedings. The principal could argue that the agent did not increase the number of the customer, which is the factor influenced the evaluation of the “significant benefits”. In my opinion there are no cons (see in particular the new rules referring to burden of proof – 2.a.).

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?

Yes, for sure. It could be an argument that the agent’s activities did not influence the number of customers or did influence, but in the very limited scope only.

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 Polish Supreme Court confirmed that the Article 322 of the Polish Civil Procedure Code applies to the agent's goodwill indemnity claim. Pursuant to Article 322 of the CPC should the court in the compensation, repayment of profits or repayment of the unjust enrichment proceedings consider that the exact proving of the claim's amount is impossible or extremely hampered, the appropriate amount, according to the court's estimation, may be awarded, upon the consideration of all circumstances of the case. Should the agent be not able to prove the scope of the existing relationship between the principal and the clients he brought, but the fact that the relationships do exist and that the volume of the principal's business – beyond any doubt – has increased, the court may estimate and award the amount of the goodwill indemnification.

The courts in Poland accept every piece of evidence: the fotos, catalogues, letters, marketing materials etc.

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 jurisprudence in this matter. In my opinion, it would be unjustified.

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 jurisprudence in this matter.

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 equity criterion is the general clause and the recent jurisprudence confirmed that the both parties are obliged to present the arguments in this respect and to argue, whether the "equity" and "all the circumstances of the case" support or not the agent's claim. One of the examples, where the equity rule would apply, is the breach of the competition clause by the agent. Should the provisions of the agency contract provide the competition clause during the contract and the agent would conclude the contract with the principal's competitor, the equity rule would probably cause the dismissal of the agent's goodwill indemnity claim.

- 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)

In one of the verdicts the Appeal Court in Warsaw decided that in specific situation, in particular when the agent-claimant supervised the activities of the other agents as the so-called unit manager, the number of the contracts concluded by the agents being supervised must be taken into consideration by calculation of the goodwill indemnity of the agent-unit manager.

- 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 circumstances that could exclude or limit the agent's right to goodwill indemnity would be rather the lack of exclusivity and non-competition clauses in the agency contract, the lack of principal's access to the potential clients database preventing him to send the offers and the poor quality of agent's activities and lack of his/her involvement in the work for the principal.

- 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 Polish Supreme Court was of the opinion that the calculation of the goodwill indemnity is possible only with the help of the court's expert. It seems that now the courts are trying to calculate the goodwill indemnity on the basis of the other evidences, presented by the agent such as witnesses, notices, email correspondence. The more factors the agent presents (in the form of the various tables and specifications of the active contracts, portfolio of the clients, their quality etc.), the better result of the process.

- 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?

Should all the criteria be fulfilled, the maximum of the goodwill compensation will be awarded.

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