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.

NORWAY

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?

Commercial agency agreements are governed by the Commercial Agents Act (LOV-1992-06-19-56 which came into force on January 1st 1993. Art § 28-31 implements the indemnity model of the EC Directive 86/653/EEC.

Commercial Travellers (persons who are employed by the principal but paid by commission) are covered by the act.

The preparatory works of the Agency law advise that unless Norwegian or EU law give necessary guidance - German case law should be observed when interpreting the law.

The specific calculation of indemnity will be made on the basis of section 28 of the Agency Act ("*if and to the extent, he has provided the principal with new customers or has significantly increased trade with the existing group of customers, and the principal will derive a significant advantage form such development"*…..").

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 activity/assistance required to fulfil the criteria "brought by the agent" is very low – all new customers will in practice be attributed to the agent. Thus whether new customers are the main result of the principal's effort is rarely discussed in this context. However (as described below) - if the principal has substantially contributed by marketing efforts advertising etc. the indemnity will be reduced under the "equitable criteria"

Reactivated customers will also be regarded as "new customers. We have no clear case law as to the "gap in time" required before the customer is regarded as "reactivated". Scholars have pointed out that this should probably be resolved on the same basis as the "expected life time of customer relationship".

If "distinctly different products" have been introduced to an existing customer (eg coffee to a customer that previously only was buying bread). The customer will be regarded as new with respect to such turn over.

The factual situation – especially in long term contracts may be difficult to establish. Accounting material is to be kept (only) for 10 years.

There are no formalistic requirements as to the proof to be presented before a Norwegian court and verbal and indicative evidence are often submitted. In cases were the facts are hard to establish 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?

The Supreme Court in its 1999 decision ("Rishaug") adopted the "net system". In short this method calculates the turn over on existing customers (as a group) prior to the start of the agency agreement, and compares this with the turn over (on this group) in the last 12 months of the agency. There might be exceptions from this – eg. If the parties have decided not to prioritize certain customers. In the Rishahug case a 25% increase in turnover (nominal value) was considered *significantly.*

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

Such list may be informative and prevent discussions. However the list should be more detailed:

- In order to make the distinction towards Customers that is "reactivated" or has been buying different and new products.
- In order to make the "net system" calculation – turn over on the existing customers must be included.

Unless such annex is produced the (detailed statements) of commission to be provided by the principal will serve as a reference. This may be less favourable for the principal – eg existing customers that did not place orders the first year of the agency will show up as "new customers"

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 – but again such letters must be put in a context to be effective.

The threshold "brought by the agent" is low – in practice will all new customers that contract with principal be regarded as "brought" by the agent e.g through "assistance and follow up".

However the Supreme Court has in one instance reduced the indemnity by 50% under "*the indemnity being equitable*.." requirement. In this case all customers of the agent were franchisees of retail chain(s) contracted by the principal. The agents work was to follow up towards the different shops, participate on trade fairs etc.

Thus the efforts of the principal are relevant and should be recorded in detail. As in other cases it is often useful to record both the facts and the common understanding of the parties before a conflict 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?

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?

Such information (turnover /sales) will be available through "depositions" – obligation of the parties to provide information to the court. After the law was passed there were a few cases regarding the obligation of the principal to produce eg. accounting material. Unless such material contain trade secrets or the request is purely a "fishing expedition" the principal has been order to provide such material.

The preparatory works of the Act as well as case law has also cited that there is a "presumption of continued benefits" for the principal – thus the burden of proof will in practice be on the principal.

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 (in theory rebuttable) presumption is that the customer base represent "a permanent possibility for further sales".

Scholars have indicated that if the principal abstain from further dealings due to "objective and business-like reasons «indemnity should not be paid. However this question has not been put to the test before the courts.

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?

This is an individual assessment, which will take the nature of the business and the product in question into consideration. The courts have not been very scientific in their approach. 2 years has been used in cases where the agent traded fashion/clothing – (these products change every year the effect "advantage duration" is short lived). On more stable products (like kitchenware) 3 years has been applied. This issue seem to be resolved by the courts on a very "broad and discretionary basis" - with sporadic references to German practice and littrature.

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?

According to the preparatory works of the Norwegian law "under normal circumstances payment of indemnity must be considered equitable" – and only where it is unreasonable that indemnity is paid by the principal (this part of the law) will limit the right of the agent…

This seems different from e.g Danish/Swedish preparatory works (which make a reference to a "global assessment of the relevant facts") However in practice this criteria is very much fact based. As mentioned above - if the principal has been instrumental in securing the customer relationship this will be taken into consideration.

The preparatory works of the law is not very specific on this issue. They mention the time of the agency relationship as a relevant factor, as well as the fact that the agent might have to pay indemnity to his subagent.

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 the preparatory works there is a reference that might be interpreted to also open up for goodwill indemnity if the agent has used "extraordinary efforts" to keep up the trade with the existing customer base. As of today we have no cases were indemnity has been claimed or granted on this basis.

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.)

A. According to the law - no indemnity will be due if:

- The principal has ended the agency agreement due to a material breach attributable to the commercial agent

- The commercial agent has terminated the agency agreement, unless this termination was justified by circumstances attributable to the principal or due to age or illness
- The commercial agent assign the agency agreement (or the rights and obligations hereunder);
- A claim will be time barred – unless brought forward within a year.

B) The circumstances used to limit the agents right to indemnity has mainly been the promotional efforts by the principal. In many industries marketing/promotional efforts are divided between the agent and the principal. In one of the first supreme court decisions – the court stated that the customer relationship is created partly by the agent and partly by "the assets and work of the Principal" (Supreme court 2001– "Hunter Textile decision") .The court reduced the indemnity by 50%.

In addition following factors could also be relevant:

- If the agent refuses to continue a time limited contract

- If he is entitled to pension arrangements paid by the principal (note that our law also extend to commercial travellers)

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

i. Fix the amount to be calculated from new and intensified customers (NOK X).
ii. Fix the advantage duration (Y years).
iii. Fix the migration rate (Z %)Adjust by factors stated above
iv. Adjust with equity

The steps (i) to (iii) are fact based and will require specific knowledge. Also (iv) may contain fact based issues (eg the effect of marketing efforts by the principal). The parties have in some cases presented expert witnesses to provide guidance on such issues.

Under Norwegian law the parties may request that expert judges are appointed. This is common eg in cases involving complex technical matters. In agency matters such expert judges have not been appointed or requested. Probably because the main issue before the courts have been the "equity adjustment".

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 a limited amount of cases – the trend is that if indemnity is granted it is usually stipulated between 6 – 12 months.

- 12 months – "No specific maters to observe"
- 4 months: sharp decline in sales – low efforts from the agent.
- 12 months. Principal terminated all agency agreements as a "cost reduction"
- 8 months. Fashion clothes – heavy competition, however the agent had done an extraordinary job.

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