



International Distribution Institute

# **IDI ANNUAL CONFERENCE 2016**

## **CONSEQUENCES OF NON ATTAINMENT OF GUARANTEED MINIMUM TURNOVER**

**Prof. Dr. H. Ercüment Erdem**

**Senior Partner, Erdem-Erdem Law Office  
Professor (E.), Galatasaray University Law Faculty  
Vice Chair, ICC CLP Commission**

[ercument@erdem-erdem.av.tr](mailto:ercument@erdem-erdem.av.tr)

**Torino 3-4 June 2016**

# Introduction

## ■ **Principal/Supplier Friendly Contracts**

- In case of non-attainment of the guaranteed minimum turnover, guaranteed minimum turnover clauses usually entitle the principal or supplier to:
  - ✓ Terminate the contract without notice period,
  - ✓ Cancel the agent's/distributor's exclusivity,
  - ✓ Reduce the territory allocated to the agent/distributor, and
  - ✓ Claim damages.

## Introduction (cont.)

### ■ **Balanced Contracts**

- Principal or the supplier is entitled to the same rights as principal/supplier friendly contracts.
- The existence of objective reasons prevents the principal/supplier to exercise its rights.
  - ✓ which caused the non-attainment of the guaranteed minimum turnover, and
  - ✓ which the agent/distributor could not foresee and for which he is not responsible.
- Further, a right to catch-up may be granted to the agent/distributor in subsequent year(s).

### ➤ **Agent/Distributor Friendly Contracts**

- Agent/distributor friendly contracts do not consider non-attainment as breach of the contract at all.

# Damages

## ■ Loss of Profit

- Contract may provide for the principal/supplier's right to claim for damages.
- Damages would be in the amount of the missing minimum turnover target.
- If the contract is silent for the damages but the
  - ✓ Other consequences of the non-attainment such as termination are expressly specified, one could argue that the parties intended to cover only the specified consequences.
- Applicable law to decide whether loss of profit may be claimed.
- It is advisable for principals/suppliers to include their right to damages in the contract.



## Damages (cont.)

- Although damages are specified under the contract, if agent/distributor was not at fault?
  - ✓ In some jurisdictions, *e.g.* Turkey, the agent/distributor will be released if the agent/distributor was not at fault.
  - ✓ Irrespective of the fault, damage claim can be made if regulated as a «penalty» under the contract.

### ■ Profit of which Period?

- In case of definite term contracts:
  - ✓ For the time period until the end of the term of the contracts
- In case of indefinite term contracts:
  - ✓ For the time period until the end of the applicable notice period for the termination of the contract

## Damages (cont.)

### ■ Loss of Profit for the Past Years

- The principal/supplier continues with the contract although being aware of the reason for termination.
- The applicable law will decide whether or not loss of profit for the past years may be claimed.
- Concrete facts of the specific case should be evaluated. In most cases:
  - ✓ Can be considered as violation of the good faith principle.
  - ✓ Can be deemed to have waived the right to terminate the contract due to such year's non-attainment.
  - ✓ Cannot claim for the loss of profit of the preceding years.
  - ✓ Can claim for the damages only in the amount of the profit for the period in which it terminated the contract.

## Damages (cont.)

### ■ Loss of Profit for the Past Years (cont.)

- The principal/supplier would have the right to terminate the contract and claim for the past years' loss of profit, if it proves that
  - ✓ it tolerated such breach in the past year trusting that the agent/distributor would remedy,
  - ✓ it notified the agent/distributor to cure the breach and explicitly reserved its rights arising from such breach,
  - ✓ that the relationship became unbearable, such as agent/distributor not making any efforts to reach the targets, making less turnover than before, etc.

## Damages (cont.)

### ■ Loss of Profit for the Past Years (cont.)

- In case of «no waiver» clause?
  - ✓ Concrete facts of the specific case will be evaluated by the judge.
  - ✓ If the principal/supplier remains silent for a long time towards the violation, «no waiver clause» will not be effective.
  - ✓ It may be accepted that «no waiver clause» itself was waived.
  - ✓ General no waiver clauses are usually not deemed valid as they are against the principle of good faith.
  - ✓ If specifically regulated that non-termination by the principal/supplier in case of non-attainment would not constitute waiver:
    - It is possible that it is considered valid by the courts.



## Conclusion

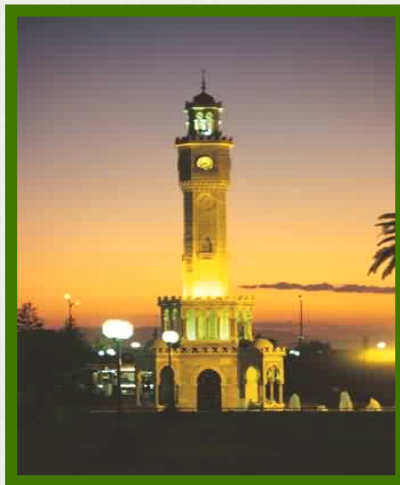
- Most agency/distribution contracts entitle the principal/supplier to terminate the contract due to non-attainment of the minimum turnovers.
- Principal/supplier is entitled to claim for damages in the amount of the missing profit.
- When other consequences of the non-attainment such as termination are expressly specified but not the damages, it is arguable that the parties intended to cover only the specified consequences. It is advisable for principals/suppliers to explicitly include their right to damages in the contract.
- In principle, principal/supplier will not be entitled to claim for the loss of profit of the past years, unless it is clearly reserved. Concrete facts of the specific case will be evaluated by the judge.

## Contacts



### **ISTANBUL OFFICE**

Valikonadı Caddesi No. 21/1-3  
34367 Istanbul - Turkey  
Telephone: (212) 291 73 83  
Fax: (212) 291 73 82  
Email: [istanbul@erdem-erdem.av.tr](mailto:istanbul@erdem-erdem.av.tr)



### **IZMIR OFFICE**

Kültür Mahallesi 1476 Sokak No. 2  
Aksoy Plaza K: 10 D: 27 Alsancak -  
Izmir  
Telephone: (232) 464 66 76  
Fax: (232) 466 01 21  
Email: [izmir@erdem-erdem.com](mailto:izmir@erdem-erdem.com)

**Web: <http://www.erdem-erdem.av.tr>**