

The right to goodwill indemnity and its gradual extension to distributorship and franchising agreements

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„I do not ask, what are the laws, I am asking, how are the judges.“



Montesquieu

What is goodwill indemnity?

- **new customers or significant increase of existing** customers;
- **substantial benefits**, which principal continues to derive **after** the contract termination;
- **equity** (in particular: lost profits)

What is goodwill indemnity? (or rather: compensation)

- **damage** as a consequence of **termination**;
- **lost commission**;
- substantial **benefits** of the principal;
- **non-amortization of the costs** and expenses on principal advice

Can the rules on goodwill indemnity/compensation due to an agent after the contract termination be applied by analogy to distributors?



Germany

Conditions:

- ✓ distributor is **tightly integrated** into the supplier's distribution network;
- ✓ distributor is obliged to provide the supplier with information on his **customer base**;
- ✓ distributor has brought the **new customers** or **increased** and enhanced the **business with existing** customers.

Austria

Is distributor's position similar to agent's position?

(**transfer of database**, obligation to safeguard the interests of the supplier, territory, non-competition, sales promotions, minimum turnover, recommended prices, after-sale/spare parts, duty to report, too low margin)

If yes: **customers & equity** rule.

Switzerland

(Exclusive) distributor has a mandatory claim for goodwill indemnity, if he is „**quasi-agent**” and had been fully **integrated** in the supplier's distribution system.

If yes: **customers**, substantial **benefits & equity**.

Portugal

What are the **consequences of the distribution contract termination?**

(e.g. duration, evolution of the distributor's turnover, nature of the products, reputation of the trademark, investments, termination circumstances, new customers).

Conditions of the indemnity: **customers, substantial benefits, equity.**

Spain

Why the goodwill indemnity for distributor can be justified?

1. investments made, frustrated expectations and unfair enrichment;
2. Remuneration is due - agency rules.

Conditions? **Customers**, substantial **benefits**, **existence of some limitations**, **integration** in the network.

Other jurisdictions

- **Australia:** goodwill indemnity as a part of the compensation, but not separately;
- **Chile:** part of a broader legal action (important: law of the contract, termination circumstances, share of the supplier's goods in the distributor's portfolio, investments made, duty to repurchase of the stocks, long term contracts between distributor and third parties).

Can the distributors be entitled to goodwill indemnity statutory?



Belgium

– supplementary indemnity

- ✓ Specific type of the distribution contract;
- ✓ Concluded for indefinite period of time;
- ✓ Terminated by the supplier or by the distributor because of supplier's fault.

If yes: **all the relevant circumstances**
(clientele indemnity is one of the elements)

Belgium

- clientele indemnity

- substantial increase of clientele, which
- has been created by the distributor (contributed), and which
- remains attached to the supplier after termination of the contract;

Trademark is the key factor.

Resume:

- ❖ distributor is not entitled to claim indemnity, if he has terminated the contract or the supplier has terminated the contract for reasons for which the distributor is liable;
- ❖ the conditions for awarding clientele goodwill indemnity to the distributor are identical to those for the agent;
- ❖ the courts in the various jurisdictions have developed additional conditions that must be met in order for the rules on agents to apply.

Can the franchisee be entitled to goodwill indemnity?



Austria

Is franchisee's position similar to agent's position?

(obligation to safeguard the interests of the supplier, to maintain a capable sales and after-sale-service organization, territory, non-competition, sales promotions, minimum turnover, recommended prices, spare parts, report/control the books, transfer customers' data, inspection)

Brasil

Court decision: based upon **fairness** and allegations of **unjust enrichment**, recognized the existence of **local goodwill**, developed through the **efforts and expenditures of the franchisee** and, as a result, have granted such franchisees compensation in amounts corresponding to **half of the value of the goodwill**.

Other jurisdictions

- **Spain:** indemnity awarded, but without deeper analysis of the contract's nature;
- **Turkey:** Article 122 of the Turkish Commercial Code may be applied by analogy;
- **USA:** accepted in Hawaii, Delaware, Mississippi and Missouri
- Germany, the Netherlands, Portugal and Switzerland?

Thank you for your attention!

