



International Distribution Institute

IDI Conference 2023 – Workshop 2

Termination for cause as a mean for avoiding indemnity

DISCUSSION PANEL

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Termination for cause as a means for avoiding indemnity

1. Overview of the legal situation in Italy/Croatia/UK/Switzerland
2. Typical examples / cases and how they are dealt with in Italy/Croatia/UK/Switzerland
3. Learning from points 1 and 2: strategies to be applied by principals/suppliers/franchisors to avoid goodwill indemnity.

Italy: What are the conditions for an agent to lose his claim for goodwill indemnity in case of termination?

Art. 1751, § 2-1 c.c.:

*«The indemnity is not due if the principal terminates the contract for a breach of the agent's contractual obligations **so serious, that it does not allow the continuation, even temporarily, of the relationship**»*

- the serious reason must exist at the time of termination
- Serious reason can occur during the notice period in such a case the principal may terminate for serious reasons and the agent loses the right to indemnity

If the Trade Union Agreements s.c. AEC are applicable:

FIRR indemnity (AEC Industria) is not due only if

- if the agent unduly withholds amounts from the clients
- unfair competition or infringement of the exclusivity for a sole principal

Further indemnities are not due

if the agreement is terminated for a fact imputable to the agent

Agency rules are not applicable to distribution/franchise

Croatia: What are the conditions for an agent to lose his claim for goodwill indemnity in case of termination?

Art. 831 Croatian law of obligation

«The Principal is not obliged to pay the goodwill indemnity:

- If the agent has withdrawn from or has terminated the contract, but the agent can claim the goodwill indemnity if the reason for the termination or the withdrawal from the contract is on the side of the principal or if he has withdrawn from or terminated the contract because of his age or illness that prevents him from continuing the contractual relationship
- **If the principal has terminated the contract because of faulty behaviour by the agent**
- If on the basis of the agreement with the principal the agent has transferred the agreement on someone else. «

Directive on Commercial Agents = „default attributable to the commercial agent which would justify immediate termination of the agency contract under national law „

Croatia = „faulty behavior by the agent“ only

Agency rules are not applicable to distribution/franchise

UK: Restrictions on the freedom of contract

Termination for cause as a means for avoiding indemnity/compensation

1. The Commercial Agents Regulations and the EU Directive (86/653/EU).
2. Retained EU law (Revocation and Reform) Bill – an affront/affront/Beleidigung/affront to the rule of law.
3. Goodwill indemnity v compensation under the Regulations.
4. Loss of indemnity:
 - 4.1 repudiatory breach
 - 4.2 material breach (in some situations)
 - 4.3 agent walk away.
5. The principal differences for distributors and franchisees:
 - 5.1 no statutory equivalent to the Regulations
 - 5.2 application of the Regulations to distributors by case law?

Switzerland: Overview of legal situation

Conditions for an agent to lose his claim for goodwill indemnity in case of termination

Switzerland (art. 418u para. 3 CO):

*No claim exists where the agency relationship has been dissolved for a **reason attributable to the agent***

EU Council Directive (art. 18):

The indemnity or compensation [...] shall not be payable

*(a) where the principal has terminated the agency contract because of **default attributable to the commercial agent which would justify immediate termination** of the agency contract under national law;*

(b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal [...]

Swiss law less strict: no breach (justifying immediate termination) required

Same rules applicable to distribution/franchise

Italy: Non-attainment of minimum turnover obligation and loss of right to indemnity

Termination without notice and loss of right to indemnity are strictly connected

Art. 1456 c.c. allows the parties to agree that the contract will terminate if a certain obligation is not performed. In such a case termination occurs when the other party declares that it wishes to avail itself of such remedy.

Can the judge question the seriousness of the non attainment?

Agent lost right to indemnity

- Non attainment of 50% or 70% of the minimum turnover agreed
- Non attainment of minimum which were considered congruent and legitimate in view of the results of previous years the relationship between the parties

Agent was recognized a right to indemnity

- unrealistic minimum turnover
- non-attainment justified by the excessive price increase challenged by the agent during the course of the relationship
- automatic increase of 10% of the minimum turnover every year and non-achievement tolerated over several years

Croatian case law

Any „faulty behavior” of the agent sufficient for denying goodwill indemnity?

No specific case law. Croatian doctrine considers that the provision shall be interpreted in light of the Commercial Agency Directive.

General attitude of Croatian courts is to strictly follow the wording of the national law and of the contract.

Faulty behaviour \implies non fulfilment of obligations

- Failure to attain minimum turnover = yes
- Failure to provide reports / information to the principal =yes
- Violation of non competition obligation = yes

Notice of termination for breach to be given without delay.

Previous written demand to correct behaviour in reasonable term required.

UK: Restrictions on the freedom of contract

Termination for cause as a means for avoiding indemnity/compensation

Example 1:

- non-attainment of minimum sales by agent?
 - very difficult

Example 2:

- failure to provide market reports
 - material breach of contractual provision?
 - possible ground for termination
- failure by agent to comply with Regulation 3/Article 3 of Directive
 - possible ground for termination
 - breach of common law fiduciary duty

Example 3:

- violation of non-compete
 - breach of contractual provision/breach of Regulation 3/common law breach of fiduciary duty

Case examples Switzerland

Conditions for an agent to lose his claim for goodwill indemnity in case of termination

Example 1: Non-attainment of turnover / targets leads to termination:

- Qualifies as reason attributable to agent (unless principal's behaviour caused non-attainment of turnover / targets)
- No definition as "material obligation" or "material breach" required
- No non-attainment of agreed upon targets required (no breach required) – poor performance or refusal to increase activities sufficient if agent previously put on notice

Example 2: Insufficient / delayed reporting leads to termination

- Qualifies as reason attributable to agent
- Breach of contractual reporting obligation would be required
- Previous warnings would be required