



International Distribution Institute

# Setting-off the clients' portfolio with the goodwill indemnity

**Christine Borfiga**, Vatier, Paris

**Dr. Raimond Emde**, GvW Graf von Westphalen, Hamburg; IDI  
agency country expert for Germany

**Petr Mrazek**, Vítek Mrázek Kramný s.r.o., Prague, IDI agency and  
distribution country expert for Czech Republic, Chair of the session

# Right to indemnity/compensation



- Art. 17-19 of the Directive 86/653 EEC relating to self-employed commercial agents
- French law - Art. L134-12 and L134-16 of the French Commercial Code (deriving from Art. 17(3) of Directive 86/653):
  - In case of termination of the relationship with the principal, the commercial agent is entitled to compensation for the damage suffered.
  - Any clause to the contrary is deemed to be “non-written”.

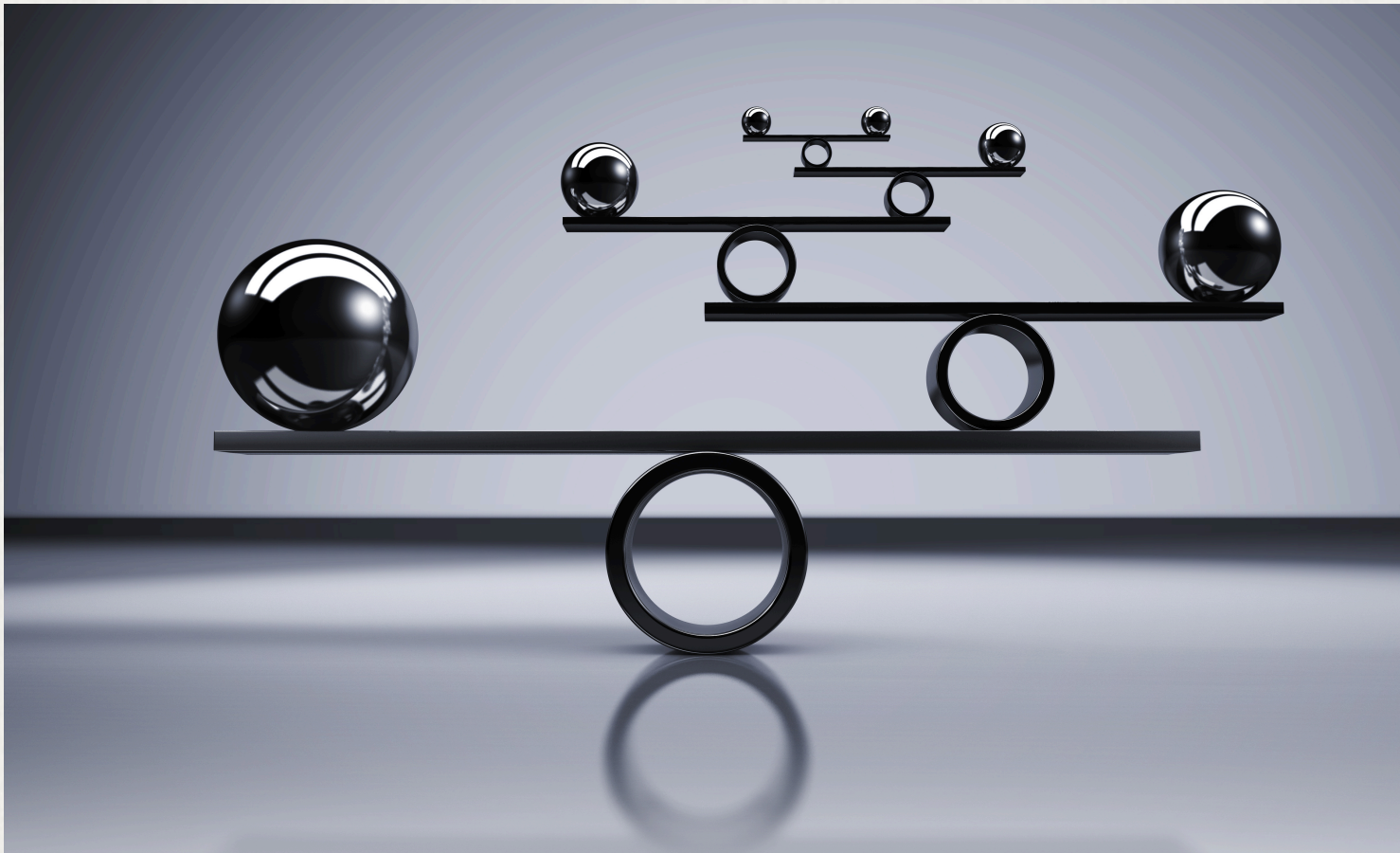
# Right to indemnity/compensation



- German law - § 89b Section 4 sentence 1 HGB (German Commercial Code):
  - The indemnity claim may not be waived in advance
- Art. 17(2)(a) of Directive 86/653: The commercial agent shall be entitled to an indemnity if and to the extent that:
  - he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and
  - the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.



# What can be set off against the indemnity?



# Client portfolio

- **Established French case law (TSO):**
  - Supreme Court, 21 February 2012 (Cass. Com. 11-13.395)
  - Court of Appeal of Pau, 23 November 2021 (No. 19/03937)
- **Set off permitted between:**
  - the indemnity due to the agent at the end of the agency agreement, and
  - the price to be paid by the agent for the client portfolio made available to it by the principal at the beginning of the relationship.

# Conditions of the set-off provisions

- List of **active customers**, generating a given turnover [€289,856.79] upon signature of the agency agreement, made available to the agent, together with a list of passive customers and prospects.
- Fixed sum [€40,579.95] due by the agent corresponding to **2 years of commission equal to 7% of the turnover** excluding all transport costs and price reductions.
- The payment of the above fixed sum is to be made **by set off against the indemnity payable to the agent in case of termination of the agreement by the principal.**



# Legal arguments for the set-off

- French law on commercial agents does not prohibit the principle of a remuneration for making a customer list available to the agent, which is **not inherent to the obligation of the principal to communicate to the agent the information necessary to the performance of the agreement.**
- The customer list contains **stable customers** on the agent's territory, and therefore **has an economic value, existing prior to the execution of the agency agreement.**
- The **purpose** of the sum payable against the customer list is **not to exclude or reduce the indemnity due at the end of the contract** and such sum, according to the contract, **could have been paid by set off against the commission owed to the agent during the performance of the agreement.**

# Legal arguments against set-off

- **Significant unbalance** between the obligations of the parties (Art. L.442-6, I, 2° of the Commercial Code and Art. 1171 of the Civil Code).
- Adds a condition that the agent can only benefit from the **indemnity for the clients that it brought or developed**.
- The indemnity must take into account **all of the agent's remuneration** during the performance of the contract without distinguishing whether such remuneration comes from existing customers or customers brought by the agent (Cass.com., 10 February 2009, No.07-21.937).
- Transfer of the customer list vs **transfer of a business as a going concern**.
- The principal must put the agent in a position to perform the contract (Art. 134-4 of the Commercial Code).



Under German law the clause in question in the “French” decision may be disregarded as not existent, it is well possible to wage possible advantages and disadvantages under the principle of equity, which is accepted by Article 17, Section 2, lit. (a) Council Directive:

- “a) The commercial agent shall be entitled to an indemnity if and to the extent that:
- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and
  - the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20”



It may well be discussed whether a customer list is valuable for the agent.

It is especially not valuable if the agent does not continue its work as an agent for the products for which the list might be valuable. Furthermore, parties had to free the agent from the restrictions of secrecy law, as the agent had, according to § 90 HGB (German Commercial Code) the obligation to keep the customer list secret after termination of the agreement.

The burden of proof for the value of the list lies with the principal.

# What about an entry fee?

A more promising way is to ask the future commercial agent for an entry fee in the amount in which the indemnity after termination of the agreement is expected. If the entry fee is really cashed in there is probably only a remote chance to have it returned, as German law knows the acceptance of such entry fees and furthermore, even if the entry fee could not be claimed, a statute of limitation applies at December 31st three years after the entry fee was cashed in.

More complicated is the way that an entry fee is claimed by the principal but the payment is postponed to the date of determination of the agency agreement. As this is a circumvention of the prohibition to the indemnity is highly disputed. It brings at least a position of uncertainty into a possible legal battle about the indemnity, so that such entry fee might, seen it from the principals viewpoint, be a good way to make it more difficult for the commercial agent to cash his or her indemnity.



# Would it work in France?

- Payment of a fixed monthly fee to the principal as a counterpart for an exclusive territory: NOT VALID
  - Court of Appeal of Paris, 26 June 2019 No.16/23435
- Payment of an entry fee as a counterpart of the exclusivity which can be set off against the indemnity: VALID
  - Court of Appeal of Rouen, 30 March 2023 No.22/00992
- Clause stating that the agent waives its right to an indemnity at the end of its agreement in compensation with the possibility for the agent to keep at the end of the contract its customer portfolio, developed as a result of its partnership with the principal: NOT VALID
  - Court of Appeal of Paris, 26 January 2023 No.20-02826

# GDPR compliance

- Transfer may be null and void in case of non-compliance of the transfer of the client portfolio with GDPR if the clause contains personal data (French case-law prior to GDPR: Cass.com., 25 June 2013).
- Recommendations from the CNIL of 5 December 2022:
  - Only active customers.
  - Data of customers which are only kept for administrative purposes cannot be transferred (accountancy, litigation, etc.).
  - Customers who opposed or did not consent to the use of their data for prospection purposes upon collection of their data must be removed from the customer list.
  - The purchaser of the customer list must inform the data subjects of the transfer within one month as from the receipt of the information.
  - The purchaser must verify consent for prospection operations by electronic means.