



# German-Australian-Pacific Lawyers Association

## The Commercial Agent's Claim for Goodwill Indemnity in German Law

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For foreign companies wishing to enter the German market, the regular question arises as to what form distribution should take in Germany. Sales via salaried employees are - not only because of the very employee-friendly German legislation - not attractive for many foreign companies. In addition, personnel employed abroad is a not inconsiderable cost factor, which is not desirable for the entrepreneur, especially at the beginning of a sales activity abroad.

For this reason, many foreign companies decide to sell their products through a German commercial agent. The advantages of such a distribution are obvious: the commercial agent earns commissions only, if he also successfully promotes business for the entrepreneur. Costs therefore only arise for the entrepreneur, if he can successfully sell his goods in Germany. The cost risk for distribution therefore appears to be much lower by usage of commercial agents than for distribution via employees.

Experience shows, however, that foreign companies are often unaware that commercial agents are well protected under German law. In particular, very few people are aware that the commercial agent has a right to the so-called goodwill indemnity upon termination of the agency agreement. This claim for goodwill indemnity is a compensation for the loss of commission, suffered by the commercial agent as a result of the termination of the commercial agency agreement. Since, according to the law, the commercial agent's right to goodwill indemnity can amount to an annual commission, this represents an economic factor for the principal, which he must "price in" when designing his distribution system.

The following overview is intended to illustrate the main features of the goodwill indemnity claim under German law for the foreign entrepreneur.

### **I. Legal requirements for the right to goodwill indemnity**

The commercial agent's claim for goodwill indemnity is regulated in section 89b of the German Commercial Code (GCC). The following prerequisites must be met for it to arise:



# German-Australian-Pacific Lawyers Association

## 1. Termination of the agency agreement

The basic prerequisite for the claim to arise is that the agency agreement has been terminated. The termination of the contractual relationship is therefore both, the first prerequisite for a claim and the decisive point in time for the calculation of the goodwill indemnity. Why the contractual relationship is terminated (e.g. by limitation or termination) does not initially matter for this condition. However, the commercial agent's own notice of termination may, under certain circumstances, result in the loss of his claim regarding the goodwill indemnity (see II).

## 2. Advantages of the entrepreneur

The claim for goodwill indemnity also presupposes that the principal continues to derive considerable advantages from the business relationships established by the commercial agent even after termination of the contractual relationship. This is because the entrepreneur should only be obliged to pay the compensation if, in return, he has also acquired a sustainable customer base through the performance of the commercial agent. The case law therefore requires that the commercial agent has acquired new customers for the entrepreneur, who will presumably continue to do business with the entrepreneur even after the commercial agent has ended his contract.

It is therefore important, whether the commercial agent has acquired new customers for the entrepreneur. This refers to all customers who were not customers of the principal before the agent was appointed. In addition, existing customers of the entrepreneur are also treated as new customers, if the commercial agent has succeeded in doubling the turnover with these customers.

However, the advertising of new customers alone is not enough. The entrepreneur only receives a relevant advantage in the sense of the law when a business relationship has been established with these customers. This is the case if the customer has repeatedly concluded business transactions with the entrepreneur, i.e. if the customer is a so-called "multiple customer".



### 3. Equity of the compensation claim, in particular losses of commission

The third and final condition of the compensation claim is what is known as equity. When examining equity, a decision must be made on a case-by-case basis as to whether, taking into account all circumstances, the payment of goodwill indemnity corresponds to it. In particular, it must be taken into account whether the commercial agent suffers commission losses as a result of the termination of the agency agreement. In the context of equity, it must therefore be assessed to what extent the commercial agent would have earned commission and follow-up commission for a period of between 2 and 5 years, if the agency agreement would have continued to exist.

The so-called "pull effect of the trademark" must also be taken into account within the framework of equity. Case law assumes that branded goods sell better than no-name products. A branded product makes it much easier for the commercial agent to open up a market. With regard to branded products, case law therefore regularly applies an equity deduction of 15 % - 30 % to the goodwill indemnity claim.

## **II. Exclusion of the goodwill indemnity claim**

If the conditions set out in point I are met, the commercial agent shall in principle be entitled to a payment of a goodwill indemnity. However, the law also provides grounds for exclusion in section 89 b subsection 3 GCC.

### 1. Exclusion in case of termination by the agent

Thus, the goodwill indemnity claim does not exist, if the commercial agent terminates the contractual relationship himself. However, this does not apply if the conduct of the principal has given reasonable cause for termination, or if the commercial agent cannot reasonably be expected to continue the activity due to his age or illness. If the commercial agent reaches retirement age, he can terminate the agency agreement without losing his right to goodwill indemnity. The same applies if the commercial agent has terminated the contract for a justified reason, e.g. because the principal has stopped paying commission.



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## 2. Exclusion due to justified termination by the principal

The claim for compensation is also excluded if the principal justifiably terminates the commercial agent relationship for good cause. This can be the case, for example, if the commercial agent violates his contractual non-competition clause, or if there is another material breach of contract by the commercial agent.

### **III. Analogous application for authorised dealers?**

It is also important that, under certain circumstances, authorised dealers may also be entitled to a payment of a goodwill indemnity. German case law applies the provision of section 89b GCC analogously to authorised dealers under certain conditions. The prerequisite for this is, on the one hand, that the authorised dealer is obliged to transfer his customer base to the entrepreneur upon termination of the contract. On the other hand, the authorised dealer must be integrated into the sales organisation of the entrepreneur in the same way as a commercial agent, which can be done, for example, by means of territorial protection clauses and prohibitions on competition.

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