

Commercial Agency Contract: GERMANY



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1 Indemnity and Compensation by German Law

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1.1 Introduction

The relationship between the commercial agent and its principal is governed by the Arts. 84 - 92 c HGB (German Commercial Code).

Even in its primal version of 1897, the German Commercial Code – as worldwide the first Commercial Code dealing separately with commercial agents – already comprised special regulations for them. However, at that point in time it did not grant the commercial agent any claims for indemnity or compensation.

In its current version, the agent's right to indemnity is stipulated in Art. 89 b HGB (Commercial Code), which was introduced by the fundamental amendment of 1953, following in principal the examples of Austrian and Swiss Law, although with quite a few deviations in the details.

The **EU Directive 86/653/EEC** from December 18th 1986 (EC Directive on Commercial Agents, hereinafter referred to as “the Directive”), was transformed into German Law by the federal “Law of Implementation of the EC-Directive to Coordination of the Commercial Agent's Law” from October 23rd 1989, which came into force in January 1990. The trans-

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formation of the Directive caused some changes to the Arts. 84 - 92 c HGB (Commercial Code), which basically tend to grant the commercial agent more protection and provide him with more compulsory rights.

However, the Directive only generated rather minor changes of the Arts. 84 and following HGB, since those matched the Directives content to great extent even in their prior version. Nevertheless the Directive is of considerable importance for the prevailing federal law, since for its appliance the commandment of consistent and compliant interpretation regarding the Directive has to be taken into account even for the regulations which were not altered by the transformation of the Directive. As a result, the handling of the Arts. 84 and following HGB (Commercial Code) is subject to the so called “competence of first decision” or “Vorabentscheidungskompetenz” (Art. 234 EU Treaty) of the European Court of Justice regarding any kind of question related to the interpretation of the Directive.

According to Art. 84 HGB the commercial agent is a natural or legal person, who is and acts as an independent contractor and is constantly entrusted by a principal with the procurement or conclusion of transactions in the name and for the account of the principal.

1.2 Claims of the agent after termination of the contract

The commercial agents **right to indemnity** stipulated in Art. 89 b HGB is compatible and consistent with Art. 17 (2) and Art. 18 of the Directive. The commercial agent is entitled to claim an adequate indemnification from its principal under certain circumstances.

Furthermore Art. 89 a (2) stipulates that either party is entitled to compensation for damages if the contractual relationship was terminated due to improper behaviour of the other party. This regulation is in accordance with Art. 17 (3) and Art. 18 of the Directive.

Accordant to Art. 92 b HGB (Commercial Code) however the claims under Art. 89 b and several other claims are not to be considered if the commercial agent is exercising only a sideline activity.

Moreover, following Art. 87 d HGB (Commercial Code) a commercial agent may as well be entitled to compensation for certain expenses, but only if this is customary in trade.

Under Art. 90 a (1) 3 HGB (Commercial Code) the commercial agent is coercively granted a compensation in case a post contractual non competition agreement is struck.

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2.1 Indemnity

2.1.1 Termination of the contract

The Agency contract may be terminated for the following reasons: Occurrence of a condition subsequent, expiration in case of limitation in time, termination with notice according to Art. 89 HGB (Commercial Code) and termination without notice according to Art. 89 a HGB (Commercial Code), death of the commercial agent, insolvency of the principal, consensual cancellation of the agreement and termination of a defective agency contract.

The agent's right to indemnity under Art. 89 b HGB (Commercial Code) exists in principle independently of the reasons for the termination of the contract. However, this right to indemnity is excluded accordant to Art. 89 b (3) HGB, if

- > the agent has terminated the agreement, unless the principal has given sufficient cause by negligent conduct for the agent to terminate the contract or the agent cannot be expected to continue his activity due to illness or age (n°1),
- > the principal has terminated the contract and the agent has given sufficient cause by negligent conduct to terminate the contract prematurely (n°2) or
- > a third person enters into the contractual relation between the principal and the agent on the grounds of an agreement convened between the principal and the agent

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replacing the latter. Such an agreement cannot be struck before the finalisation of the contractual relationship (n° 3).

N° 1:

The agent is not obliged to declare the reason for the termination of the agency contract under Art. 89 b (3) n°1 when terminating it. The agent may mention the “good reasons” in course of the legal proceedings first due to ruling of the Bundesgerichtshof (BGH) or German Supreme Court [BGHZ 40, 14]. Hereby the requested „good reasons“ fall short of the „important reasons“ required for an termination without notice under Art. 89 a HGB. It is sufficient if the agent has been dragged into a situation intolerable for him due to the conduct of the principal [BGHZ 40, 15]. This might even be the case if the principal bears no fault at all or his actions have been completely right-ful according to the corresponding ruling of the German Supreme Court (BGH) [BGHZ 52, 8].

N° 2:

Both the termination with notice and the termination without notice might apply in this case. However a “good reason” has to be at hand in both cases, which needs to be based upon a wrongful conduct of the agent himself. This “good reason” furthermore has to be causal for the termination in accordance with a proper interpretation on the grounds of Art. 18 a of the Directive.

Such a sufficient cause or “good reason” to terminate the contract might be set by the agent by committing all kind of contractual infringements, such as illegitimate competition or insulting the principal.

2.1.2. Acquiring new clientele, benefits for the principal and other preconditions of the right to indemnity

The agent is only entitled to indemnity under Art. 89 b (1) HGB (Commercial Code) if and in so far as

the principal benefits substantially from the business relationships acquired or extended significantly by the agent even after the finalisation of the agency contract (n°1).

> the agent loses claims for commission as a result of the finalisation of the agency contract, which in case of continuance of the contractual relationship he would have had on the grounds of future or already signed commercial operations with clients acquired by him (n°2), and

> the payment of indemnity - taking into consideration all circumstances - goes along with the principle of equitableness and no reasons of equity make necessary an adjustment (“Billigkeit”)(n°3).

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N°1 (business relationships with new clientele):

The **acquisition of new clients** by the agent requires that new regular clients have been bonded to the principal by the agent. A sufficient business link is only established, if within a clear period of time the principal may realistically count on reorders by the client. However, a possible benefit for the principal is sufficient. He does not necessarily need to have already benefited from the further business relationship.

Coequal to the acquisition of new clients **is the essential extension of existing business relationships** (89 b 1 S. 2 HGB), measured by the sales volume or the extension of the range of products.

Both the acquisition of new clients and the extension of existing business has to be originated by the agent. However joint causation is sufficient even in case of an only minor participation of the agent.

The requisite substantial benefit of the principal basically is to be seen in the further utilisation of the business relationship with the clients acquired by the agent, which implies a prospect of profit without the need to pay any commission to the agent. Regarding the prediction, if and for how long reorders might be placed by the client once the agency contract has been finalised, the specific particularities of the business sector as well as the experiences during the application of the contract are to be taken into account.

Zur N°2 (losses of commission for the agent):

The **loss of commission** generally is the downside of the principals benefits and their size are calculated on the grounds of what the agent would have received if the agency contract had not been finalised.

N°3 (equitableness or **reasons of equity** – „Billigkeit“):

This condition matches and corresponds to Art. 17 (2) lit a of the Directive. All circumstances related to the particular contractual relation are to be taken into account, such as the duration of the contract, the economical and social situation of the parties or their age and capacity to earn an income. The agents right to indemnity may under no circumstances exceed his losses of commission or the potential benefits of the principal. The payment on grounds of indemnity however may be reduced on a case to case basis, should the agent have committed any infringement of the agency contract, committed suicide, should the principal have granted special voluntary payments and benefits to the agent or should the attraction of the principals trademark be the fundamental cause for the persisting benefits (“Sogwirkung der Marke”).

2.1.3 Preclusion period

According to Art. 89 b (4) S.2 HGB (Commercial Code) the agent is obliged to assert his claim for indemnity within a period of 1 year after the termination of the contract in order to avoid that his right to indemnity is precluded.

2.1.4 Modification of contract

The right to indemnity under Art. 89 b (4) S.1 HGB (Commercial Code) is compulsory and cannot be excluded or modified as long as the contract still is in force. In particular it is not allowed to exclude or even reduce the right to indemnity. However, a voluntary renouncement of the agent is possible, if such a diverging agreement is struck at or after the finalisation of the contract.

2.2 Compensation for damages

According to Art. 89 a (2) HGB the agent is entitled to compensation for damages if he has terminated the contract prematurely due to improper behaviour or negligent conduct of the principal, such as undue reduction of commission, non or delayed payment or any other breach of essential contractual provisions, or if the contract has been cancelled consensually [BGH NJW 82, 2432].

2.3 Compensation for investments and expenditures

The German Commercial Code - unlike for instance its Austrian counterpart - does not provide any special stipulation concerning compensation for investments. Art. 87 d HGB only applies for the reimbursement of expenses incurred by the agent. Since the activities of the agent are remunerated with the corresponding commission, he in principle has to take on his expenses himself, at least as far as they are generated in the regular course of his task. For exceptional services rendered or costs incurred the agent however may resort to Art. 670 BGB (German Civil Code). This provision implies that the agent could take the special expenditures for necessary after the evaluation of all corresponding circumstances. Otherwise a compensation for expenditures will only have to be granted under Art. 87 d HGB in case of being customary in trade or an existing special agreement on this behalf.

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3 Calculation of indemnity and compensation

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3.1 Indemnity

As far as the specific amount of the right to indemnity is concerned, Art. 89 b HGB in first place stipulates, that the agent is entitled to claim an „adequate compensation“. On the grounds of repeated rulings of the German Supreme Court (BGH), such **“adequate compensation”** is calculated on the basis of a two-step scheme. In the frame of a first step, the presumable losses of commission as well as the benefits for the principal are estimated for a certain period of time. The figures obtained should basically correspond with each other. The estimated amount is called **„Rohausgleich“**. Additionally, in the frame of a second step, Art. 89 (2) HGB limits any possible compensation to a maximum amount called the **„Höchstbetrag“**, which amounts to an annual commission based on the average amount of the remuneration of the agent during the last 5 years preceding the termination of the contract. Should the contractual relation not have lasted for 5 years, the average annual amount is to be calculated on the grounds of the actual duration of the contract. As the maximum the agent might receive, the **“Höchstbetrag”** caps a potentially towering **“Rohausgleich”**.

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3.1.1 Two-step scheme

3.1.2 Calculation of the „Rohausgleich“

The „Rohausgleich“ is calculated according to Art.89 b (1) S.1 Nr. 1-3 HGB on the base of the assumption, that the losses of commission suffered by the agent are equal to the benefits obtained by the principal. After assessing the cited losses and benefits it has to be checked, whether an adjustment has to be carried out for reasons of equity or equitableness („Billigkeit“).

The **benefits of the principal** have to be assessed on the grounds of a turnover forecast. The forecast has to include all profits the principal presumably will generate with future business operations during the forecast period concerning the clients acquired by the agent. Furthermore it has to include all indirect advantages such as a possible growth of „goodwill“. In practice the calculation of the „Rohausgleich“ is based on the refutable assumption, that the losses of commissions suffered by the agent are equal to the benefits of the principal.

The **losses of commission** suffered by the agent are calculated the following way: The assessment base for the calculation are the commissions the agent has received within the last 12 months preceding the termination of the contract. In case the turnover of the relevant year was extraordinarily high or low compared to the turnover the years before, the calculation can be based exceptionally on the average amount of commission of a longer period of time. The amount calculated this way however needs to be adjusted by subtraction of the following positions:

- Commissions for business with customers not acquired by the agent and with whom the agent has not extended the business notably,
- Commissions for administrative work for the principal,
- Commissions for business with customers with whom no new business is to be expected after the termination of the contract,
- „Diminution“ resulting from the so called „Migration Rate“ or „Abwanderungsquote“, the rate of customers who will terminate the business relationship with the principal during the period of forecast. Calculating with an annual Migration Rate of 10 % and a turnover of EUR 100.000,- achieved by the agent, the loss of commission will be

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that of EUR 9.000,- during the first year, EUR 81.000,- during the second year (10 % of EUR 90.000,-) and EUR 72.900,- during the third year (10 % of EUR 81.000,-).

Finally the calculation of the “Rohausgleich” on the base of mere figures might need to be adjusted for reasons of equity. Quite a few reasons may be taken into account, such as the agent working for a competitor of the principal, benefiting from the acquired customer on his own or even enticing customers away. Furthermore possible voluntary contributions of the principal to a pension fund or similar in favour of the agent or a powerful and popular trademark used by the principal, able to attract customers on its own without the need of noteworthy support by the agent.

3.1.3 Calculation of the “Höchstbetrag” (maximum)

According to Art. 89 b (2) HGB, the „Höchstbetrag“ or maximum of indemnity has to be calculated on the base of the average yearly remunerations obtained by the agent during the 5 years preceding the termination of the contract. Should the contractual relationship not have lasted for 5 or more years, the complete duration of the relationship is to be taken into consideration.

Other than at the calculation of the „Rohausgleich“, the commissions as well as all other remunerations the agent might have received by the principal have to be taken into account.

As a last step the “Rohausgleich” has to be confronted with the “Höchstbetrag” or maximum. If the first exceeds the latter the indemnity is equal to the maximum. Should that not be the case, the indemnity is equal to the “Rohausgleich”.

3.1.4 Calculation of indemnity in certain business sectors

The calculation scheme outlined above is applicable to a diverse range of business sectors. However, it is not suitable to all of them and special regulations have to be observed regarding some of them.

This is the case for instance with **insurance agents**. The contractual relationship between the insurance agent and the insurer in principle is governed by

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Art. 89 b HGB as well, but due to Art. 92 HGB some minor modifications have to be observed. Beside the insurance agents, that same regulation also applies for **home savings and loan associations** and **their agents**.

Both types of agents are only entitled to claim commissions for business which has been acquired through their activity. Different to the general rule of Art. 87 (1) S.1 variation 2 HGB they are not entitled to commissions for reorders or follow up orders. Furthermore they do not enjoy any customer or sector protection deviating from Art. 87 (2) HGB.

According to Art. 89 b (5) HGB the right to indemnity of insurance or savings and loan associations agents is based on either the acquisition of a new contract or the essential extension of an already existing contract to an extent that economically corresponds with a new contract. The right to indemnity of the insurance and the savings and loan associations agent amounts to a maximum of three average yearly remunerations, differing from the usual one yearly remuneration under Art. 89 b (2). The reason behind this noteworthy deviation is the rather special approach followed by insurance and savings and loan associations agents. Other than the common commercial agent in other sectors or branches, these agents usually procure unique transactions on products and do not create business relationships like other agents. As a result, the principal regularly does not benefit from the business relationship acquired by the agent by making new deals with these customers, but from insurance contributions paid from a customer acquired by the agent for a long time after concluding the insurance contract. Once the contract between the insurer or principal and the agent comes to an end, so do habitually the subsequent commissions the latter usually receives on behalf of the erstwhile contract, making the stipulated farer reaching right to indemnity reasonable.

Since the calculation of the right to indemnity for insurance agents has turned out to be rather complex and difficult, the Central Association of the German Insurance Industry and the Head Organization of Independent German Insurance Salesmen have developed and agreed on so called “principles for the calculation of the right to indemnity of insurance agents”.

As far as petrol stations are concerned, the maximum amount is calculated on the grounds of the average of the last year [BGH NJW-RR 2002,1548].

3.2 Compensation for damages

If the agent terminates the contract because the principal has given him sufficient cause by negligent conduct or improper behaviour to terminate the contract, he is entitled to compensation for damages on the ground of Art. 89 a (2) HGB. In that case according to Art. 249 and following BGB (German Civil Code), the agent has to be put into a position which corresponds to the position he would have held, had the contract been duly executed by the principal. The calculation of the compensation for damages therefore has to be carried out assuming that the contract would have lasted until the first day it could have been terminated according to the corresponding contractual or statutory terms of termination. The compensation for damages in the sense of lost profits may be calculated abstractly, whereas regularly it is enough to present evidence of a certain probability that a profit would have been generated and obtained in the size of the demanded compensation.

However, the agent has to deduct any advantage he might have obtained due to the premature termination of the contract, such as the amount of money he might have saved by not working for the principal any more and the amount of money he might earn by doing other business during this period of time. Furthermore possible contributory negligence of the agent has to be taken into account, leading possibly to a further deduction. The agent's duty to avert or minimize loss might commit and oblige him to start another activity maybe even in another sector or branch of business without waiting for the regular contractual term to expire.

A demand of disclosure may precede the claim of compensation for damages in the frame of its preparation. Nevertheless a claim for compensation for damages is excluded in case the principal could have terminated the contract himself as well as well as in case of improper or undue behaviour of the agent.

4. Indemnity for distributors and franchisee?

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German law provides basically two different forms of distributors, the “Kommissionsagent” and the “Vertragshändler”.

Kommissionsagent

The „Kommissionsagent“ acts towards third parties in his own name but on account of the „principal“. He does not necessarily have to disclose the business of the „principal“. The German Supreme Court (BGH) has cautiously approved the appliance by analogy of the right to indemnity of the commercial agent under Art. 89 b HGB to the “Kommissionsagent” [BGH BB 1964, 823].

Vertragshändler

An independent tradesman is regarded to be a „Vertragshändler“, if he has been permanently assigned and entrusted to distribute the products of another business in his own name and on his own account and to further their sale and distribution in a way similar to that of an commercial agent or a “Kommissionsagent”. The German Supreme Court (BGH) approves the appliance by analogy of the right to indemnity of the commercial agent under Art. 89 b HGB to the “Vertragshändler” in those cases, in which the “Vertragshändler” is performing functions similar to those of a commercial agent. Therefore the “Vertragshändler” has to be integrated into the distribution organisation of the „principal“ similar to a commercial agent and has to be obliged to leave the data of the customers to the principal at the end of the contract at the latest. The required integration into the distribution organisation “similar to that of an agent” might for instance be assumed after a thorough check on a case to case basis, if some of the following indications are existent: The “Vertragshändler” is not allowed to distribute products of a competitor, he has to follow the principals directives, he has to report to the “principal” on a regular basis or he is obliged to order a minimum charge of products.

4. Indemnity of distributors and franchisee?

Otherwise the German Supreme Court (BGH) denies the appliance by analogy of the right to indemnity of the commercial agent under Art. 89 b HGB to the “Vertragshändler” [BGHZ 29, 83, 89; BGH NJW-RR 2003, 895 and BGH NJW 2000, 1413].

Franchisenehmer (franchisee)

Franchisees or „Franchisenehmer“ unfold their business activities in their own name and for their own account, but banking on the organisational and publicity concept of the franchisor, for the utilisation of which a certain fee is paid. The German Supreme Court (BGH) has rather recently joined the overwhelming opinion of German scholars, affirming in principle the appliance by analogy of the right to indemnity of the commercial agent under Art. 89 b HGB to the franchisee [BGH NJW RR 2002,1554], after having left that question pending for years before [BGH NJW 1997, 3308].

However, here again it depends on the specific legal framework of the contractual relationship between franchisor and franchisee, whether the latter is entitled to indemnity on the grounds of analogy. The scheme outlined above for the “Vertragshändler” is to be observed here as well.

Therefore the franchisee as well needs to be integrated into the distribution organisation of the „principal“ in a way similar to that of a commercial agent and has to be obliged to leave the data of the customers to the principal at the end of the contract at the latest. Those premises set out by the Supreme Court (BGH) nevertheless should habitually be observed at least the way they tend to be fulfilled by the „Vertragshändler“. Generally the franchisee is pretty much integrated into the distribution organisation and obliged to hand over to the franchisor all customer data at the end of the contractual relationship.

Even so, the amount of a potential right to indemnity in many cases might be a rather minor one, since usually the trademark provided by the franchisor will be very attractive to the costumers („Sogwirkung der Marke“) and therefore reduce the due „Rohausgleich“, since the popularity of the trademark makes it much easier for the franchisee to acquire new customers. Therefore the causality of the franchisee for newly acquired customers often should be negligible if any.

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