

Commercial Contracts in Germany

Mann

2. Auflage 2024
ISBN 978-3-406-80991-0
C.H.BECK

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IV. Return of customer addresses

Pursuant to § 667 BGB, the commercial agent is under the obligation to hand over to the principal all customer lists showing the contact details of all customers, irrespective of whether they are existing or new customers. Despite this obligation, the commercial agent may contact the customers and compete with the principal unless the parties have validly agreed on a post-contractual competition prohibition.⁵⁹ If the commercial agent uses the customer data after the termination of the commercial agency relationship, this does not eliminate the commercial agent's claim for termination compensation pursuant to § 89b HGB (but may reduce it). However, pursuant to § 90 HGB, the commercial agent may not give the customer data to third parties (in particular, the principal's competitors).⁶⁰ 79

V. Claim for continued supply

Under very rare and exceptional circumstances the commercial agent has a claim against the principal for continued supply of goods (in particular, spare parts) pursuant to §§ 19 et seqq. GWB. Courts have stated that a commercial agent who – in addition to soliciting transactions – provides after-sales service in his own name and for his own account may have a claim against the principal for continued supply with spare parts for a reasonable transitional period after the termination of the commercial agency agreement.⁶¹ 80

VI. Limitation

1. General

Claims arising from or in connection with the commercial agency relationship are subject to limitation according to §§ 195 et seqq. BGB and, consequently, lapse three years after the end of the year in which: (i) the claim arose and (ii) the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence. As an example, for all monthly commission claims due in the period from January to December 2022, limitation starts to run on 1 January 2023. After three years' time (i.e. at the end of 31 December 2025), the commission claims for the year 2022 lapse, meaning that on 1 January 2026 the commercial agent's commission claims would become statute-barred. 81

2. Claim for book excerpt

Limitation of the commercial agent's claims for information pursuant to § 87c HGB does not start at the time when the commercial agent first had the opportunity to request the information but rather at the end of the year in which the commercial agent actually demanded such information (e.g. a book excerpt or inspection of the principal's books).⁶² 82

⁵⁹ Cf. BGH I ZR 28/06, NJW 2009, 1420; with further reference, Martinek/Semler/Habermeier/Flohr VertriebsR-HdB/Semler § 23 mn. 16.

⁶⁰ OLG Koblenz 6 U 604/86, NJW-RR 1987, 95 (98).

⁶¹ BGH KZR 3/88, NJW-RR 1989, 1310; OLG Frankfurt/Main 6 U (Kart) 197/88, WuW 1991, 623.

⁶² BGH I ZR 7/77, NJW 1979, 764.

3. Agent's misapprehension

- 83 Courts have considered claims of the commercial agent not to be statute-barred if the commercial agent had no knowledge of the fact that the respective contractual agreement (e.g. a reduction of commission, a limitation period of six months) was invalid due to mandatory law.⁶³ This legal assessment is wrong and must be rejected. The commercial agent can easily avoid any misapprehension about the existence of a claim by simply seeking legal advice. The commercial agent is responsible for assessing whether regulations in the commercial agency agreement are valid or violate mandatory law. An avoidable legal misapprehension may therefore not constitute an excuse for the commercial agent.⁶⁴ Moreover, the approach taken by the Higher Regional Court of Karlsruhe severely undermines the law of limitation.

H. Claim for termination compensation

I. Basic principles

- 84 The commercial agent may claim reasonable compensation from the principal upon the termination of the commercial agency relationship pursuant to § 89b HGB (termination compensation). The commercial agent's claim for termination compensation is not compensation for damage but instead contractual compensation for the advantages to the principal from the customer base built up by the agent.⁶⁵ As a future claim, the commercial agent's claim for termination compensation may be assigned, pledged, or expropriated even before the end of the commercial agency relationship.⁶⁶
- 85 The following persons, among others, are entitled to termination compensation: sub-agents, incorporated agencies, commercial agents who are authorised to contract, those who are authorised to solicit business, district agents, exclusive and non-exclusive agents, and the commercial agent's successors. Distributors⁶⁷, commission agents, insurance agents, franchisees, and licensees can, under certain (additional) conditions, also have a claim for termination compensation. In contrast, part-time commercial agents (§ 92b HGB), non-self-employed agents, sales employees or lessees are not entitled to claim termination compensation. The legal form in which the commercial agent organises his agency (e.g. freelancer, GmbH, non-incorporated company) is of no relevance for the question of whether he has a claim for termination compensation against the principal.

II. Conditions

- 86 The claim for termination compensation is triggered only when the following five conditions are fulfilled, whereby the first four are discussed in the following:
- The commercial agency agreement has to be terminated,
 - the commercial agent has solicited new customers or materially expanded the business relations with existing customers,

⁶³ OLG Karlsruhe 8 U 64/73, BB 1974, 904.

⁶⁴ For the strict approach of German courts in legal misapprehension in capital investment law, see – as a comparison – BGH II ZR 224/91, NJW 1992, 3296.

⁶⁵ BeckOK/Lehmann HGB vor § 89b.

⁶⁶ OLG Hamm 14 W 179/78, BB 1979, 1579 (1580).

⁶⁷ BGH I ZR 146/80, NJW 1982, 2819.

- the principal retains substantial advantages from the business relations with the new customers,
- the payment of certain termination compensation is just and equitable, and
- the claim for termination compensation was made within one year after the termination of the commercial agency relationship.

1. Termination

The commercial agent's claim for termination compensation requires the termination 87 of the commercial agency agreement. The reason for termination is of no relevance. Therefore, notice of termination⁶⁸, partial termination, expiration of the agreement (even after a probation period), termination by mutual cancellation agreement, and termination due to insolvency of the principal all fall under § 89b HGB. The expiration of a consecutive or 'chain' agreement does not constitute a termination if upon expiration of the agreement a new agreement is concluded and the entire business relationship appears as one unified contractual agreement.

2. Solicitation of new customers or material expansion of existing business relations

The purpose of a claim for termination compensation is to compensate the commercial 88 agent's efforts in building up a client base. Therefore, only business with new clients (solicited by the commercial agent) and business with existing customers with whom the commercial agent significantly expanded the business relations are considered when calculating the termination compensation.

3. New customer

New customers are those who did not have a business relationship with the principal 89 before the commercial agency agreement was concluded. If a customer has ordered products with the principal and later, due to the commercial agent's solicitation, orders other products, this person is considered a new customer.⁶⁹ If the commercial agent solicits largely independent subsidiaries of a company group, and the group or other subsidiaries of the group already order products from the principal, the independent subsidiary will most likely be considered a new customer. Regular customers of the commercial agent that he transfers to the principal are, from the principal's perspective, new customers if there was no prior business relationship between such customers and the principal. A mere change of the customer's name, corporate setting, or legal form does not make an existing customer new. To avoid dispute about which customers are solicited by the commercial agent and are therefore new, it is advisable to name all existing customers in an annex to the commercial agency agreement when concluding the contract.

4. Material expansion of existing business relations

Solicitation of new customers also includes the material expansion of business relations 90 with existing customers, which corresponds economically to the acquisition of a new customer. Courts have acknowledged a material expansion in cases where the turnover with

⁶⁸ This generally includes extraordinary and ordinary notice of termination → 40 et seqq.

⁶⁹ BGH VIII ZR 354/97, NJW 1999, 2668 (2670).

an existing customer was doubled (an increase of 100 %).⁷⁰ This is rightly considered to be the minimum necessary, as the law requires a *material* expansion that corresponds economically to the acquisition of a new customer. The commercial agent bears the burden of proof when it comes to demonstrating that an expansion of the business relations (e.g. the turnover) was caused by him. However, since a mere turnover increase in the territory is generally an indication of the commercial agent's causal activity, it will ultimately be the principal who must substantially demonstrate that external circumstances – and not the commercial agent – have caused the turnover increase.⁷¹

5. Soliciting by the agent

- 91 The commercial agent's activity must be causal for soliciting the new customer or for the expansion of the business relationship. A customer from the commercial agent's contractual territory who orders products on the recommendation of a third party, due to the principal's internet presence, or to a unique market position, is not considered to have been solicited by the commercial agent. This is true even in cases where a customer – who has only decided to buy on the recommendation of a third party – contacts the commercial agent to complete the purchase order.⁷² Concurrent causality (*Mitursächlichkeit*) is sufficient.⁷³ In cases where the customer had knowledge of the principal's product but was ultimately convinced by the commercial agent to place an order, the commercial agent's activity is considered causal. If the commercial agent successfully prevents an existing customer from buying from the principal's competitor, such customer is neither a new customer nor is such activity of the commercial agent itself an expansion of business relations.

6. Principal's substantial advantages

- 92 The commercial agent has a claim for compensation only if the principal is able to gain substantial advantages from the customer base solicited by the commercial agent. This is the case only if the principal can use and develop the client base after termination of the commercial agency relationship.

a) Regular customers

- 93 **aa) Principal's future gains.** When calculating the termination compensation, only regular customers are considered as the principal will presumably not draw future profits from one-time customers or customers who have occasionally ordered products. Courts consider customers to be regular only if their buying behaviour is reasonably continuous (e.g. multiple refuelling stops at the petrol station during a calendar quarter, repeated orders at regular intervals).⁷⁴ The continuity naturally depends on the type of contract products and is consequently assessed on a case-by-case basis. As an example, order intervals are normally lower in the car industry (two-time car purchase required⁷⁵) than in the pharmaceuticals industry. A customer who has ordered only once prior to the termination of the commercial agency relationship cannot automatically be excluded from the calculation if he could become a regular customer in the future. In such a

⁷⁰ BGH VII ZR 23/70, NJW 1971, 1611; BGH VIII ZR 354/97, NJW 1999, 2668 (2670).

⁷¹ Cf. BGH VII ZR 23/70, NJW 1971, 1611.

⁷² OLG Karlsruhe 2 U 144/58, BB 1960, 381.

⁷³ BGH VIII ZR 322/09, NJW 2011, 1143 (1144).

⁷⁴ BGH VIII ZR 194/06, BB 2007, 2475.

⁷⁵ BGH VIII ZR 272/95, NJW 1997, 1503.

case, the commercial agent must provide sufficiently concrete indications of subsequent transactions. On the other hand, there are also industries where no second order can usually be expected and therefore the principal has no substantial future advantage (prefabricated houses, windows, encyclopaedias, gravestones, large farm machinery).⁷⁶

bb) Use of the customer base. Whether the principal makes use of the customer base is irrelevant. It is sufficient if the principal is potentially able to make use of the customer base built up by the commercial agent. 94

b) Churn rate

The principal must compensate the commercial agent for regular customers only in so far as they were newly solicited by the commercial agent and the principal can therefore do business with them in the future. It is common even for regular customers to change their supplier from time to time. Therefore, a deduction has to be made for regular customers migrating to competitors in the future. This deduction does not require a forecast, as the migration of regular customers during the years prior to the termination of the commercial agency relationship indicates the rate that must be deducted for future customer migration, also known as the 'churn rate'. If the recent contractual years provide no indication, the churn rate is subject to the court's discretion and assessment. Courts have determined that a churn rate of 20% is appropriate for each contractual year that the principal will presumably benefit from the customer base.⁷⁷ A party claiming a different churn rate must present and furnish proof of indicators that demonstrate a lower or higher migration of regular customers. For example: if the commercial agent's commissions with regular customers during the last contractual year amounted to EUR 100,000, a churn rate of 20% for the first forecast year would amount to EUR 20,000, thereby reducing the fictive commission to EUR 80,000; for a second forecast year, the reduction would amount to EUR 16,000 (20% of EUR 80,000); and for a third forecast year, it would amount to EUR 12,800 (20% of EUR 64,000) and so forth.⁷⁸ 95

c) Agent's administrative activity

The commercial agent may merely claim termination compensation for the formation of a customer base and the principal's economic advantages associated with the chance to use such customer base in the future. However, this is the result of the commercial agent's soliciting and promotional activity only, and not of administrative activities, warehousing, or debt collection. Consequently, commissions or other payments which the commercial agent has received from the principal for administrative activities, or extra payments for office equipment, etc. are excluded when calculating the termination compensation.⁷⁹ 96

d) No substantial advantage

The courts have acknowledged further cases that exclude or significantly reduce the commercial agent's compensation claim. This might be the case if the principal's factory was shut down due to insolvency⁸⁰ or even voluntarily in case the principal decides to 97

⁷⁶ For a detailed overview, see Staub/Emde HGB § 89b mn. 82.

⁷⁷ BGH VIII ZR 13/05, NJW-RR 2009, 824 (827–828).

⁷⁸ BGH VIII ZR 58/00, NJW-RR 2002, 1548 (1553).

⁷⁹ BGH I ZR 79/82, NJW 1985, 860 (861); BGH VII ZR 36/71, NJW 1972, 1662; BGH II ZR 81/57, NJW 1959, 1430.

⁸⁰ For a discussion of exceptions, see Staub/Emde HGB § 89b mn. 104–106.

discontinue his business activities or parts thereof.⁸¹ In such cases where neither the principal nor any third person continues to use the customer base, no substantial advantage exists. This is not the case, however, if the principal sells his company and as a result may have achieved a higher selling price due to the expanded customer base. If the commercial agent successfully entices customers after termination of the commercial agency agreement, no substantial advantage for the principal exists.⁸² No substantial or reduced advantages of the principal remain in cases in which customers migrate to competitors just because the commercial agent quits his job.

e) Forecast

98 At the time of termination, the principal's advantages have not yet materialised and therefore cannot be precisely denoted. As the principal's advantages are commonly realised in the future, a forecast of transactions with the new customers solicited by the commercial agent is necessary. When making such a forecast, the crucial question is how long and to what extent the principal may benefit from the relationship with the new customers. The length of the forecast period depends on how long the business relations with the new customers will presumably last. This in turn depends on the order intervals of the new customers. There is no general answer to the question of how frequently customers order products. Therefore, the courts must use a case-by-case approach, taking into account (i) the special features of the respective industrial sector, (ii) the market, as well as (iii) the competitive conditions, (iv) customer fluctuation, and (v) the type of commercial activity.⁸³ Long-lasting industrial products (e.g. pallet transporters or cars) commonly have far longer order intervals than, for instance, consumable goods (e.g. medical or cosmetic products, calculators, office equipment). Courts have determined an average period of two years to be an appropriate length. However, pursuant to § 287 ZPO, courts have broad discretion and may find significantly shorter or longer periods to be appropriate. The following catalogue provides an overview of how long the business relationship is expected to last in specific industrial sectors and products:

- Fashion agency: 3 years⁸⁴
- Frozen food: 3 years⁸⁵
- Radio advertising and general advertising agency: 3–4 years⁸⁶
- Petrol station and related shops: 4 years⁸⁷
- Software products: 4 years⁸⁸
- Building society: 4 years⁸⁹
- Newspaper and journals agency: 4 years⁹⁰
- Electronic household appliances (refrigerator, vacuum cleaner, washing machine): 5 years⁹¹

⁸¹ BGH II ZR 99/58, NJW 1959, 1964. Regarding partial discontinuation cf. OLG Munich 7 U 5042/95, NJW-RR 1996, 991 (993).

⁸² OLG Celle 11 U 185/58, BB 1959, 1151.

⁸³ BGH I ZR 173/91, NJW-RR 1993, 221.

⁸⁴ OLG Munich 7 U 5118/00, NJOZ 2002, 617.

⁸⁵ OLG Düsseldorf 16 U 47/11, BB 2013, 788.

⁸⁶ OLG Munich 7 U 7270/93 (four years: radio advertising); OLG Munich 7 U 3617/97, OLGR 1998, 178 (three years: general advertising).

⁸⁷ BGH VIII ZR 150/96, ZIP 1997, 1832 (gas); BGH VIII ZR 108/09, NJW-RR 2010, 1550 (shop).

⁸⁸ BGH VIII ZR 13/05, BB 2008, 2594.

⁸⁹ BGH VII ZR 36/71, NJW 1972, 1664 (1666); OLG Celle 11 U 193/01, VersR 2002, 976.

⁹⁰ BGH VII ZR 3/71, DB 1973, 1740.

⁹¹ BGH I ZR 104/82, NJW 1985, 859; BGH VIII ZR 94/93, NJW 1994, 1350.

H. Claim for termination compensation

- Motorbikes: 5 years⁹²
- Industrial flooring: 5 years⁹³
- Insurance agency: 6 years⁹⁴
- Cars: 5–8 years⁹⁵
- Pallet transporter: 13 years⁹⁶
- Lottery agency: 20 years⁹⁷

7. Equitableness

a) Definition and identification

The commercial agent's claim for termination compensation does not apply if such compensation is not equitable. In most cases, however, equitableness (*Billigkeit*) does not eliminate the claim for termination compensation but instead reduces it. Equitableness may be comprehensively reviewed by the courts. A judge must fully determine and define all possible factors of equitableness in each individual case and, in a second step, appraise all applicable factors. In a third step, all evaluated factors must be balanced. An extensive number of court decisions make it possible to create case groups which can serve as a basis for a future court decision. 99

b) Case law

The following factors help provide an overview.⁹⁸

The following are irrelevant to the determination of equitableness:

- **Direct sales** of the principal
- Termination compensation **claimed by successor**
- **Duration** of business relationship
- Offered but rejected **replacement contract** for the commercial agent
- Additional **income opportunity** for the commercial agent
- **Lack of success** of the commercial agent, if there is no simultaneous breach of contract
- Commercial agent's **state of health**
- Commercial agent's **maintenance obligations** or his family status
- **Principal's advertising**

These factors are relevant to the determination of equitableness and can lead to a reduction or increase in termination compensation: 100

- **Malicious behaviour** of the commercial agent during the contractual relationship (reduction)
- **Culpable breach of contract** by the commercial agent or his employees (reduction)
- **Insufficient customer visits** by the commercial agent (reduction)
- **Careless and negligent behaviour** of the commercial agent (reduction)
- **Inactivity** or reduced activity of commercial agent or his employees (reduction)
- **Business activity that competes with the principal** by the commercial agent prior to or after termination (reduction) 101

⁹² OLG Cologne 19 U 169/09.

⁹³ BGH VIII ZR 322/09, DB 2011, 173 (174).

⁹⁴ OLG Hamm 18 U 148/05.

⁹⁵ Five years: BGH VIII ZR 17/09, NJW 2011, 3438 and BGH ZR 188/85, NJW-RR 1988, 42 (45); six to eight years possible: BGH VIII ZR 173/04, NJW-RR 2006, 1328.

⁹⁶ BGH I ZR 142/89, NJW-RR 1991, 1050.

⁹⁷ BGH I ZR 130/73, WM 1975, 931.

⁹⁸ With helpful overview and further reference, see Staub/Emde HGB § 89b mn. 162.

- Superior, **unusually high commission** rates or other significantly favourable contract provisions for the commercial agent (reduction)
- **Commercial agent's request for termination** of the contractual relationship (reduction)
- **Pull effect**/attraction of trademark⁹⁹ (reduction of up to 30 % in the case of strong trademarks, depending on public recognition and awareness level)

c) Comprehensive overall assessment

- 103 All aspects of equitableness are to be balanced in an overall assessment that either increases or reduces the amount of the commercial agent's compensation. The aspects of equitableness regularly reduce the compensation that stems from the pull effect of the principal's trademarks.¹⁰⁰

d) Point in time

- 104 Whether specific circumstances constitute considerable factors is to be determined by means of a forecast at the time of termination of the commercial agency agreement. It is unclear whether factors occurring after the termination (e.g. collusion or threat by one party) are to be considered when assessing equitableness. In any case, developments after termination of the commercial agency agreement may help prove or refute the parties' allegations (e.g. development of sales figures, customers buying behaviour, etc.).

e) Burden of proof

- 105 The party asserting either an increase (commercial agent) or a reduction (principal) of the termination compensation due to reasons of equitableness must demonstrate and prove any asserted factors.

III. Calculation of termination compensation

- 106 The termination compensation is calculated in two steps: First, the gross adjustment (*Rohausgleich*) is derived from the commission that the commercial agent is forecasted to lose pursuant to § 89b(1) HGB and, second, the result is capped (*Obergrenze*) by taking into account the average of the annual commission or other annual remuneration over the last five years of the commercial agent's activity (§ 89b(2) HGB). The cap pursuant to § 89b(2) HGB is merely intended to limit the amount of the commercial agent's claim for termination compensation. The law stipulates that the cap applies only if it is below the compensation calculated pursuant to the commercial agent's commission losses (§ 89b(1) HGB). However, the parties are free to agree on foregoing the calculation method of § 89b(1) HGB altogether and only depending on the far simpler method of § 89b(2) HGB, which often happens in practice.

⁹⁹ For strong trademarks in the car industry, the courts have accepted significant deductions of up to 30%. Mitsubishi: 20% (BGH VIII ZR 173/04, NJW-RR 2006, 1328 (1331)); Renault: 10 to 25% (BGH VIII ZR 272/95, NJW 1997, 1503), Fiat/Lancia: 10% (BGH VIII ZR 141/95, NJW 1996, 2298); Peugeot: 15% (OLG Saarbrücken 1 U 924/01-211, NJW-RR 2003, 900). Well-known fashion brands like BOSS or ESCADA also have a pull effect (OLG Munich 7 U 5118/00, NJOZ 2002, 617 (625)). This must also apply to the pharma industry and well-known brands and product names (e.g. ASPIRIN); the toy industry (e.g. LEGO, Playmobil, Ravensburger); the food industry (e.g. Ritter Sport, Kinderschokolade, Nutella) and many other industries, including smaller ones.

¹⁰⁰ BeckOK/Lehmann HGB § 89b mn. 67; MüKoHGB/Ströbl HGB § 89b mn. 131.