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Goodwill Indemnity in the Bed of Procrustes

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Abstract: Despite their social and economic importance, commercial distribution contracts lack a specific legal framework in most European countries. This silence has led to a high level of litigation, often following the termination of the contract. Goodwill indemnity has been a point of contention due to the complexity of its nature and the uncertainty as to the methods to be used to quantify it. Taking Spain as an example of the common European problem, the authors examine whether there is a reasonable basis that justifies the granting of goodwill indemnity to distributors. More specifically, the authors analyse whether and under what conditions an analogous application of the Law on agency contracts, which derives from an EU Directive that has now been transposed in all EU countries, is legitimate and how it interacts with the relevant general principles of law, namely the prevention of unjustified enrichment and good faith. Based on the legal conclusions reached, the authors stress the need to use the most appropriate and accurate financial methodology to quantify the actual monetary value of the indemnity in each case, understood as an intangible financial asset, without imposing a ceiling.

Résumé: *Malgré leur importance sociale et économique, les contrats de distribution commerciale ne bénéficient pas d'un cadre juridique spécifique dans la plupart des pays européens. Ce silence a conduit à un niveau élevé de litiges, survenant généralement après la rupture du contrat. Le droit à une indemnité de clientèle est souvent source de discussions en raison de la nature complexe de cette indemnité et de l'incertitude quant aux méthodes de calcul de son montant. Prenant l'Espagne comme exemple du problème européen commun, les auteurs examinent s'il existe un fondement raisonnable justifiant l'octroi d'une indemnité de clientèle aux distributeurs. Plus précisément, les auteurs analysent si, et dans quelles conditions, il est possible et légitime de transposer aux contrats de distribution les règles du droit applicables au contrat d'agence, qui découle d'une directive européenne maintenant transposée dans tous les pays de l'UE, et si cette transposition est compatible avec les principes généraux du droit tels que l'interdiction de l'enrichissement sans cause et la bonne foi. Enfin, sur la base des conclusions juridiques ainsi obtenues, les auteurs mettront en avant la nécessité d'avoir recours à la modalité de calcul la plus adaptée et précise pour déterminer le montant réel de l'indemnité, entendue comme un avoir économique intangible, sans qu'il puisse être imposer une limite.*

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Zusammenfassung: *Trotz ihrer sozialen und wirtschaftlichen Bedeutung gibt es für Vertragshändlerverträge in den meisten europäischen Ländern keinen spezifischen Rechtsrahmen. Dieses Schweigen hat zu einem hohen Maß an Rechtsstreitigkeiten geführt, die häufig auf die Beendigung des Vertrags folgen. Der Ausgleichsanspruch des Vertragshändlers für den Geschäftswert ist aufgrund seiner Komplexität und der Ungewissheit über die Methoden, die für seine Berechnung verwendet werden sollten, ein Streitpunkt. Am Beispiel Spaniens untersuchen die Autoren, ob es eine vernünftige Grundlage gibt, welche die Gewährung eines Ausgleichsanspruchs an Vertragshändler rechtfertigt. Genauer gesagt analysieren die Autoren, ob und unter welchen Bedingungen eine analoge Anwendung des Gesetzes über Handelsvertreterverträge, das auf eine EU-Richtlinie zurückgeht, die inzwischen in allen EU-Ländern umgesetzt wurde, legitim ist und wie sie mit den einschlägigen allgemeinen Rechtsgrundsätzen, nämlich der Verhinderung ungerechtfertigter Bereicherung und Treu und Glauben, zusammenwirkt. Ausgehend von den erzielten rechtlichen Schlussfolgerungen betonen die Autoren die Notwendigkeit, die geeignetste und genaueste finanzielle Methode anzuwenden, um den tatsächlichen Geldwert der Entschädigung in jedem Fall zu quantifizieren, die als immaterieller finanzieller Vermögenswert verstanden wird, ohne eine Obergrenze festzulegen.*

Resumen: *Pese a su importancia social y económica, en la mayoría de los países europeos el contrato de distribución comercial no goza de un régimen jurídico específico. Esto ha dado lugar a numerosos litigios, normalmente surgidos tras la resolución del contrato. El derecho a una indemnización por clientela es a menudo un punto controvertido, debido a la naturaleza compleja de esta indemnización y a la incertidumbre que rodea a los métodos de cálculo de su importe. Tomando España como ejemplo del problema común europeo, los autores examinan si existe base sólida para conceder una indemnización por clientela a los distribuidores. Más concretamente, los autores analizan si es posible y legítimo transponer a los contratos de distribución las normas jurídicas aplicables a los contratos de agencia, derivadas de una directiva europea que ha sido transpuesta en todos los países de la UE, y si dicha transposición es compatible con principios generales del derecho como la prohibición del enriquecimiento sin causa y la buena fe. Por último, sobre la base de las conclusiones jurídicas así alcanzadas, los autores ponen de relieve la necesidad de utilizar el método de cálculo más adecuado y preciso para determinar el importe real de la indemnización, entendida como activo económico inmaterial, sin que deba imponerse límite alguno.*

1. Introduction

1. As the ultimate masters of the economic process, customers make entrepreneurs rich or poor by deciding whether to buy their products.[1] Businesses prepare for this fateful moment in several ways: by going directly to the customer or by

1 L. Von Mises, *Bureaucracy* (New Haven: Yale University Press 1944), pp 20–21, cdn.mises.org/Bureaucracy_3.pdf: 'The capitalists, the enterprisers, and the farmers are instrumental in the conduct of economic affairs. They are at the helm and steer the ship. But they are not free to shape its course. They are not supreme, they are steersmen only, bound to obey unconditionally the captain's orders. The captain is the consumer'.

using an intermediary.[2] Many considerations can make the second alternative more attractive. This creates a business opportunity for entrepreneurs who specialize in bringing someone else's products to market.[3]

One of the types of arrangement designed for this purpose is the distributorship: the legal relationship arising from a contract under which one party (the supplier or 'principal') agrees to supply products to the other party (the 'distributor') on a continuing basis, and the distributor agrees to buy or take and pay for them and supply them to others.[4]

2. These agreements raise several legal issues. In many European countries, the big bone of contention, both in case law and academic debate, is indemnity for goodwill. This article is our grain of sand in the discussion. It aims at clarifying the legal bases justifying a distributor's claim to goodwill indemnity, as well as the conceptual basis for its quantification. To provide an in-depth and rigorous case study, the analysis is based on the example of Spain, but in the hope that it will stimulate reflection and perhaps inspire solutions in other jurisdictions as well, since the issues raised in Spain regarding distributors' goodwill indemnity are common to most EU countries.

We will seek reference and guidance in EU and Spanish legislation, case law and legal literature, as well as in European private soft law materials. Inspiration will also be drawn from European private law soft law instruments. Financial literature will also be used with caution.

After this brief introduction (s. 1), the article sets the scene for the research by describing the Spanish legal framework for distribution contracts and its recent evolution (s. 2). It then examines how the Spanish courts have applied this legal framework (s. 3) and offers its own critical analysis, considering whether analogy is a valid mechanism and whether European private law is a useful reference point for dealing with this type of dispute (s. 4). This is followed by some considerations on how compensation should be calculated (s. 5). The article concludes with some closing remarks (s. 6).

2. Legal framework of distribution agreements

2.1. An atypical contract

3. Parties often include in contracts comprehensive sets of clauses to deal with the vicissitudes they may foresee. Ultimately, however, no contract can stand alone.

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2 R. Pardolesi, 'La distribuzione commerciale e le regole del diritto comunitario: concorrenza comunitaria, regolamenti di esenzione, accordi verticali, importazioni parallele', LUISS working paper 2004, pp 1-2, www.law-economics.net/workingpapers/L&E-LAB-COM-06-2004.pdf.

3 DCFR, Art. IV. E. – 1:101, para. 1.

4 DCFR, Art. IV. E. – 5:101, and in Annex, Definitions. The reference to 'products' includes goods and services, as under the DCFR, Art. IV. E. – 1:101, para. 2.

All contracts unfold their effects within the wider context of a legal system with its categories, principles, and rules.[5] Since we have chosen Spain as our reference point, it is natural that our study of goodwill indemnity in distribution agreements should begin with a review of the applicable Spanish legal framework.

Despite the importance of commercial distribution and the high level of litigation surrounding the termination of these agreements, there is no law in Spain that regulates this contract. In Spanish legal terminology, distribution agreements are *atypical* in the sense that they are not characterized by a specific set of rules.

This is not to say that the Spanish legislator has not tried to establish a clear set of rules for these contracts. The first significant pre-legislative steps were taken in 2011 and have continued to this day.

2.2. The Agency Law 1992

4. The Commercial Agency Directive 1986[6] offered Member States the choice between two different forms of protection for the agent on termination of the contract: compensation for damages, following the French tradition, or indemnity for goodwill, following the German tradition.[7] The majority of countries opted for the latter and the indemnity for commercial agents' goodwill became the standard norm in the EU.[8]

Spain was not an exception and, in the Agency Law 1992[9] that transposed the Directive, essentially reproduced the Directive's wording:

Artículo 28. Indemnización por clientela	Article 28. Goodwill indemnity
1. Cuando se extinga el contrato de agencia, sea por tiempo determinado o indefinido, el agente que hubiese aportado nuevos clientes al empresario o incrementado sensiblemente las operaciones con la clientela preexistente, tendrá derecho a una indemnización si su actividad anterior puede continuar produciendo ventajas sustanciales al empresario y resulta	1. When an agency contract is terminated, either for a specific or indefinite period of time, the agent that had brought the principal new customers or has significantly increased operations with existing customers, shall be entitled to an indemnity if his previous activity may continue to garner substantial benefits to the principal and is equitable owing to the existence of

5 See G. De Nova, *Il contratto alieno* (Torino: Giappichelli 2nd edn 2010), p 3 and passim.

6 Dir. 86/653/EEC of 19 Dec. 1986 on the coordination of the laws of the Member States relating to self- employed commercial agents.

7 Dir. 86/653/EEC, Art. 17(2) and (3).

8 See M. W. Hesselink (ed.), Study Group on a European Civil Code, *Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC)* (Munich: Sellier European Law Publishers 2006), pp 141–147. See also F. Martínez, infra n. 12, pp 89–94.

9 Law 12/1992, of 27 May 1992, on commercial agency contracts.

equitativamente procedente por la existencia de pactos de limitación de competencia, por las comisiones que pierda o por las demás circunstancias que concurran.	agreements limiting competition, to commissions lost or other circumstances in place.
...	...
3. La indemnización no podrá exceder, en ningún caso, del importe medio anual de las remuneraciones percibidas por el agente durante los últimos cinco años o, durante todo el período de duración del contrato, si éste fuese inferior.	3. The [amount of] the indemnity shall not exceed, in any case, the average annual amount of remuneration received by the agent throughout the last five years, or throughout the whole duration of the contract, if such period is shorter.

Article 28 of the Agency Law – ultimately Article 17(2) of the Directive – is of paramount importance, as most courts and authors have relied on its application by analogy to resolve the issue of distributors' goodwill indemnity.

2.3. Towards a Distribution Law: when silence is better than noise

5. After several unsuccessful attempts to introduce a law on distribution agreements,[10] the first norm specifically regulating distribution agreements was established by the Sustainable Economy Act 2011.[11] This law, aimed at mitigating the effects of the recession, was far from considering distribution agreements as its main subject. However, the Spanish government felt that the crisis had placed distributors in a particular sector (the automotive industry) in a situation of distress that needed to be alleviated.[12] Therefore, considering that they deserved the same enhanced protection as commercial agents, the Law for a Sustainable Economy established a provisional, mandatory regime for distributors in the automotive industry.[13] In fact, distributors were treated even more generously than agents. Whereas for agents the average annual remuneration acted as a ceiling, a maximum, for distributors it acted as a floor, a minimum, and there was no ceiling.

10 Namely, the 2006 Proposal for a draft bill on distribution contracts and the 2008 bill on distribution contracts.

11 Law 2/2011, of 4 Mar. 2011, on a Sustainable Economy.

12 The authors had focused their analysis on the car industry. See e.g., C. Paz-Ares, 'La indemnización por clientela en el contrato de concesión', *Estudios de derecho mercantil. Homenaje al profesor Justino F. Duque*, vol. 2 (Valladolid: Universidad de Valladolid 1998), pp 1287–1304; F. Martínez, *La indemnización por clientela en los contratos de agencia y concesión* (Madrid: Civitas 1998).

13 The regime was contained in a 1st Additional Provision that was added to the Agency Law, of 27 May 1992, by virtue of the 16th Additional Provision of the Sustainable Economy Law.

An outcry from the car manufacturers, who were under too much financial pressure,[14] was not long in coming. The rule was suspended after only 38 days in force. [15]

2.4. Towards a new Commercial Code: an eloquent silence

6. The suspension was accompanied by a mandate from the legislature to the Spanish government to approve a bill on commercial distribution.[16] In accordance with this mandate, a draft law on distribution contracts was published, with provisions on goodwill compensation very similar to those in the Agency Law.[17] The bill never became law, however, because a larger project was underway: a proposal for a new Commercial Code that included an entire section devoted to distribution agreements.[18]

The proposed Commercial Code contained important innovations. For example, goodwill indemnity for distributors was optional rather than mandatory. However, the most interesting aspect of the proposed Commercial Code was not what it said, but what it did not say. It said nothing about how distributors' indemnity should be calculated or whether it should be subject to any form of limit. By contrast, the regulation on goodwill indemnity in agency contracts carefully reproduced the calculation method and limit existing in the Agency Law, ultimately derived from the Agency Directive. Taken together, the silence on goodwill compensation for distributors was eloquent. Goodwill disputes between agents and their principals would be subject to a mandatory solution, including a specific calculation method and a quantitative limit. Goodwill disputes between distributors and their principals, on the other hand, would be subject to the general rules: whatever the parties, on an equal footing, could establish in fact and in law.[19]

However, in 2014, the Commercial Code proposal was transformed into a draft law, and any reference to distribution agreements disappeared along the way.[20]

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14 An inevitable effect of legislation that is not general: benefits granted to a particular social sector are at the expense of others; in the end, the strongest prevails. See F.-A. von Hayek, *The Political Ideal of the Rule of Law* (Cairo: National Bank of Egypt Printing Press 1955) and F.-A. Von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press 1960).

15 Law 7/2011, of 11 Apr. 2011, on regulatory reforms, 4th Additional Provision.

16 In a term of six months: Law 7/2011, of 11 Apr. 2011, on regulatory reforms, 4th Additional Provision, para. 2.

17 Official Gazette of the Parliament dated 29 Jun. 2011, www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_138-01.PDF. See in particular, Art. 25. The bill was proposed again later that year, once again without success.

18 General Commission of Codification, *Proposal for a Commercial Code*, 17 Jun. 2013, Book V, Art. 543-24, www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/1292430803457-Propuesta_del_Codigo_Mercantil_17_de_junio_de_2013.PDF.

19 The proposed regulation was very close to the DCFR, as we will realize below.

20 Even the *Consejo de Estado* echoed the disappointment in its Opinion 837/2014, published at the beginning of 2015: 'The evident difficulty of codifying the content of contracts of a very diverse

3. Goodwill indemnity in court

3.1. Overview of the sources of law

7. The absence of specific rules on distribution agreements left the courts wondering where to turn to resolve disputes arising from the contract, but for which the autonomy of the parties had not provided a solution. To explain this, it is necessary to outline some basic concepts of Spanish law.

The current Commercial Code refers the interpreter of commercial distribution agreements back to the general rules of private law found in the Civil Code.[21] The Civil Code begins by establishing a hierarchy of sources of law.

Las fuentes del ordenamiento jurídico español son la ley, la costumbre y los principios generales del derecho.[22]	The sources of the Spanish legal system are the law, custom and the general principles of law.

The fact that they are hierarchical means that only if the above source fails can we turn to the next.

Los principios generales del derecho se aplicarán en defecto de ley o costumbre, sin perjuicio de su carácter informador del ordenamiento jurídico.[23]	General principles of law shall apply in the absence of applicable statute or custom, without prejudice to the fact that they contribute to shape the legal system.

Case law is also important as a complementary source.

La jurisprudencia complementará el ordenamiento jurídico con la doctrina	Case law shall complement the legal system by means of the doctrine

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nature like those that can be included under the general concept of "distribution contracts" is not, in the opinion of this Council, enough excuse to postpone the approval of a legal regulation that has already been formally announced by the legislator and the necessity of which has been highlighted by case law'. The whole Commercial Code project was put on hold in 2014. It was resumed in 2018 but has not been further pursued since. See the section on distribution agreements of the 2018 draft in General Commission of Codification, *Proposal for a Commercial Code*, Mar. 2018, Book V, Art. 545-23, www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/1292430803661-Propuesta_de_la_Seccion_Segunda__de_Derecho_Mercantil__del_Anteproyecto_de_Ley_de_Codigo_Mercantil_.PDF.

21 Code of Commerce (Spain), Art. 50: 'Commercial contracts, with regard to everything related to their requirements, modifications, exceptions, interpretation and termination and the capacity of the contracting parties, for all that which is not expressly established in this Code or in special laws, shall be governed by the general rules of common law'.

22 Civil Code (Spain), Art. 1, para. 1.

23 Civil Code (Spain), Art. 1, para. 4.

La jurisprudencia complementará el ordenamiento jurídico con la doctrina que, de modo reiterado, establezca el Tribunal Supremo al interpretar y aplicar la ley, la costumbre y los principios generales del derecho.[24]	Case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of law, custom and general principles of law.

3.2. The initial years

8. Goodwill indemnity has been interpreted and applied by the Supreme Court in different ways. Prior to the enactment of the Agency Law 1992, the analysis was based on the hierarchy of sources of law outlined above. In the absence of legislation and custom, the courts had to resort to general principles of law to determine whether this type of remedy had a place in our legal system. After some hesitation, the Supreme Court stated its position in 1988.[25] The Court granted goodwill indemnity based on the general principle of law prohibiting unjustified enrichment.[26] The Supreme Court held that the principal's enjoyment of a clientele generated by the distributor led to unjustified enrichment and confirmed the grant of the goodwill indemnity. This line of reasoning was then repeatedly applied in subsequent Supreme Court judgments, even after the entry into force of the Agency Law.[27]

9. The transposition of Directive 86/653/EEC in Spain by means of the Agency Law, whose Article 28 recognizes and regulates the indemnity for goodwill, triggered a debate on the suitability of this legal provision to regulate the indemnity for goodwill also in the case of distributors.[28] A period of great uncertainty followed,

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24 Civil Code (Spain), Art. 1, para. 6.

25 Tribunal Supremo (Civil) 22 Mar. 1988, 16957/1988, www.poderjudicial.es/search/TS/openDocument/9e3731c1f649cf51/19960109.

26 Formulated by Pomponius as follows: *'Nam hoc natura æquum est neminem cum alterius detrimento fieri locupletiorem'* [For this is by nature fair, that nobody should be enriched to the detriment of another.]: Digest 50,17,206. In the DCFR, Art. VII. – 1:101: Basic rule, para. 1: 'A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment'. Of interest are also, in the DCFR, Art. VII. – 3:101: Enrichment, para. 1: 'A person is enriched by: (a) an increase in assets or a decrease in liabilities; (b) receiving a service or having work done; or (c) use of another's assets;' as well as Art. VII. – 3:102: Disadvantage, para. 1: 'A person is disadvantaged by: (a) a decrease in assets or an increase in liabilities; (b) rendering a service or doing work; or (c) another's use of that person's assets'.

27 Tribunal Supremo (Civil) 27 May 1993 (3440/1993), www.poderjudicial.es/search/TS/openDocument/4ba2750124d8bc92/20040603;

Tribunal Supremo (Civil) 22 Apr. 2002 (2841/2002), www.poderjudicial.es/search/AN/openDocument/bbdb7814a57c91a2/20031203.

28 C. Paz-Ares, La indemnización por clientela en el contrato de concesión.

with the Supreme Court ruling in a series of similar cases both for and against the grant of goodwill indemnity to distributors.[29]

3.3. The consolidation

10. The disorientation was so profound that, in 2005, the Civil Division of the Supreme Court announced[30] that it would henceforth adopt the following position:

No procede en términos generales la *aplicación analógica* del Article 28 de la Ley del Contrato de Agencia a ningún otro supuesto ni puede resultar	In general terms, Article 28 of the Agency Law is *not applicable by analogy* to any other circumstances, nor can it be automatically applied to contracts such

29 *Pro*, Tribunal Supremo (Civil) 12 Jun. 1999 (4151/1999), www.poderjudicial.es/search/AN/openDocument/ea05efe47824165d/20031203;

Tribunal Supremo (Civil) 10 Mar. 2000 (1930/2000), www.poderjudicial.es/search/AN/openDocument/6eb81a1808a6faff/20030704;

Tribunal Supremo (Civil) 1 Apr. 2000 (2682/2000), www.poderjudicial.es/search/AN/openDocument/a57965d4407dd16a/20030704;

Tribunal Supremo (Civil) 13 Jul. 2001 (6151/2001), www.poderjudicial.es/search/AN/openDocument/ea8779ddaf726027/20031203;

Tribunal Supremo (Civil) 26 Apr. 2002 (2985/2002), www.poderjudicial.es/search/AN/openDocument/b72d12a0fa7550ff/20031203;

Tribunal Supremo (Civil) 16 Dec. 2002 (8428/2002), www.poderjudicial.es/search/AN/openDocument/b1f29423ff77d730/20030703;

Tribunal Supremo (Civil) 21 Nov. 2005 (7031/2005), www.poderjudicial.es/search/AN/openDocument/d0a2388d70ed742f/20051215.

Contra, Tribunal Supremo (Civil) 20 Jan. 2000 (213/2000), www.poderjudicial.es/search/AN/openDocument/7dc26e0074a192e4/20030704;

Tribunal Supremo (Civil) 12 Jul. 2000 (5756/2000), www.poderjudicial.es/search/AN/openDocument/adae6b27156667af/20031203;

Tribunal Supremo (Civil) 5 Feb. 2004 (650/2004), www.poderjudicial.es/search/AN/openDocument/d2f395bf9af3cdd9/20040228;

Tribunal Supremo (Civil) 18 Mar. 2004 (1887/2004), www.poderjudicial.es/search/AN/openDocument/e5b7d4976bffe97e/20040403;

Tribunal Supremo (Civil) 26 Apr. 2004 (2734/2004), www.poderjudicial.es/search/AN/openDocument/2283599d4c90b28d/20040506;

Tribunal Supremo (Civil) 16 Mar. 2005 (1652/2005), www.poderjudicial.es/search/AN/openDocument/00d0997ee2a10223/2005042;

Tribunal Supremo (Civil) 27 Oct. 2005 (6574/2005), www.poderjudicial.es/search/AN/openDocument/f16bc1d7774fef25/20051201.

30 The agreement was approved on 20 Dec. 2005. The question remains whether this type of agreement, in which the Supreme Court gives *pro futuro* interpretations of disputed points without reference to a particular case, is acceptable under the above-mentioned hierarchy of legal sources – and ultimately under the constitutionally enshrined separation of powers. In any case, the trend towards the use of this dubious technique is growing.

No procede en términos generales la *aplicación analógica* del Article 28 de la Ley del Contrato de Agencia a ningún otro supuesto ni puede resultar automática su aplicación a contratos tales como concesión, distribución y similares. No obstante, *los criterios* que dicho artículo establece *resultarán aplicables cuando exista identidad de razón*, esto es, la creación de clientela y su existencia, generada por quien solicita la, indemnización, que resulte de *aprovechamiento para el principal*, examinándose en todo caso de quién resulta ser el cliente.[31]

In general terms, Article 28 of the Agency Law is *not applicable by analogy* to any other circumstances, nor can it be automatically applied to contracts such as dealership, distributorship or similar agreements. Nevertheless, *the criteria* established in said Article *will apply where there is identical cause*, which is to say the existence of goodwill *created* by the party seeking compensation but *benefitting* the principal, subject to due investigation in any event to establish the party to whom the goodwill actually belongs.

The 'criteria' that could be applied 'where there is identical cause' point to the idea of unjustified enrichment. The Supreme Court was thus confirming the approach taken in the 1988 judgment.

11. A series of Supreme Court judgments consistently applied this reasoning,[32] and a judgment of 15 January 2008[33] – issued by the plenary session of the Civil Division for the purpose of unifying case law – ratified it in full. The 2008 judgment insisted that it was not Article 28 but the 'idea inspiring' Article 28 that was to be applied. It also added a legal basis that had not always been properly considered: the need to respect not only what the parties had expressly agreed, but also all the natural consequences of the contract in good faith, as required by the Civil Code:

Los contratos ... obligan, no sólo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley.[34]

Contracts ... bind the parties, not just to the performance of the matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, usage, and the law.

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31 Italics added.

32 This rationale was followed by, *int. al.*, Tribunal Supremo (Civil) 22 Jun. 2007 (5830/ 2007), www.poderjudicial.es/search/AN/openDocument/088cac9b5b7b4590/20071004;

Tribunal Supremo (Civil) 20 Jul. 2007 (5408/2007), www.poderjudicial.es/search/AN/openDocument/c6d9730771c7ac46/20070809;

Tribunal Supremo (Civil) 31 Jul. 2007 (5808/2007), www.poderjudicial.es/search/AN/openDocument/408d97fbf4df3108/20071004.

33 Tribunal Supremo (Civil) 15 Jan. 2008 (829/2008), www.poderjudicial.es/search/AN/openDocument/fdaaa739d9d1fa6a/20080424.

34 Civil Code (Spain), Art. 1258. Also, Art. 7, para. 1, of the Civil Code sets forth that '[r]ights must be exercised in accordance with the requirements of good faith'; and para. 2 that '[t]he law does not support abuse of rights or antisocial exercise thereof'.

All in all, the Supreme Court's reasoning is based on three grounds: firstly, the 'idea inspiring' goodwill indemnity for agents – and not Article 28 of the Agency Act as such – was applicable; secondly, unjustified enrichment, which occurs when the principal benefits from the goodwill created by the agent, must not be permitted; thirdly, good faith must be observed.

A review of the post-2008 case law on goodwill indemnity shows that the Supreme Court succeeded in its attempt to harmonize future decisions. Both parties and courts have consistently applied the three-pronged test.[35]

The concepts that make up the three-pronged test are admittedly not easy to apply in practice. Some lower courts have decided to cut the Gordian knot and simply apply Article 28 of the Agency Act in practice,[36] contrary to the indications of the Supreme Court. To ensure the correct application of the three-pronged test, these concepts – especially the elusive recourse to analogy – need to be further distilled.

4. Critical analysis

4.1. Analogy

12. Although the Civil Code gives the general principles of law the status of direct and independent sources of law,[37] it also leaves some room for analogy.[38]

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35 The following may be mentioned, *int. al.*: Tribunal Supremo (Civil) 26 Mar. 2008 (4392/2008), www.poderjudicial.es/search/AN/openDocument/04cd148087e6dde6/20080911;
Tribunal Supremo (Civil) 15 Oct. 2008 (5549/2008), www.poderjudicial.es/search/AN/openDocument/07dd0ba2a9726092/20081113;
Tribunal Supremo (Civil) 21 Jan. 2009 (66/2009), www.poderjudicial.es/search/AN/openDocument/5889c1ed2df3f753/20090212;
Tribunal Supremo (Civil) 13 Feb. 2009 (450/2009), www.poderjudicial.es/search/AN/openDocument/cc5e5f11c31f9f62/20090305;
Tribunal Supremo (Civil) 5 Nov. 2013 (5635/2013), www.poderjudicial.es/search/AN/openDocument/a4b28a39d77c9a99/20131210;
Tribunal Supremo (Civil) 27 May 2015 (2449/2015), www.poderjudicial.es/search/AN/openDocument/a1a3e1cad972204b/20150619;
Tribunal Supremo (Civil) 16 Mar. 2016 (163/2016), www.poderjudicial.es/search/AN/openCDocument/f9caf3b37c843044ddaedeee435516724ce9be7cb8919d3a;
Tribunal Supremo (Civil) 1 Mar. 2017 (708/2017), www.poderjudicial.es/search/AN/openDocument/f8022a951628e1ef/20170310;
Tribunal Supremo (Civil) 19 May 2017 (317/2017), www.poderjudicial.es/search/AN/openCDocument/f9caf3b37c843044c13003b2ec45c8c46b6175841b32b7a5;
Tribunal Supremo (Civil) 19 Dec. 2018 (712/2018), www.poderjudicial.es/search/AN/openDocument/8710334a8b2cc03d/20180424#.

36 This is particularly acute in relation to the calculation of compensation and the application of a cap, which will be discussed later.

37 Civil Code (Spain), Art. 1, para. 1.

38 Civil Code (Spain), Art. 4, para. 1.

Procederá la aplicación analógica de las normas cuando éstas no contemplen un supuesto específico, pero regulen otro semejante entre los que se aprecie identidad de razón.	Rules shall be applied by analogy where the relevant rules fail to contemplate a specific case but do regulate another similar one in which the same rationale is perceived.

Regarding the position of analogy in the hierarchy of sources of law, the legal provision to be extended by analogy is treated as if it were directly applicable legislation.[39] Since legislation is the first level of the hierarchy, recourse to analogy must therefore precede recourse to general principles of law. The practical consequence is that, before resorting to the general principles of law, it is necessary to search for legal provisions governing similar factual scenarios.[40]

13. This is where the traditional distinction between *analogia legis* and *analogia juris* comes into play. *Analogia legis* fills the gap by extending the facts described in a particular legal provision to other facts not expressly provided for. *Analogia juris*, on the other hand, extracts or derives, by a kind of induction, a general rule or principle from one or more legal provisions and then applies it to the unregulated situation.[41] The application of these two techniques leads to diametrically opposed results.

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39 G. García-Valdecasas, 'Los principios generales del Derecho en el nuevo título preliminar del Código Civil', 2. *Anuario de Derecho Civil* 1975, pp (331-336), at 335, www.boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-C-1975-20033100336. See also P. de Pablo, J. Martín, M. Urrea, 'Artículo 1. Fuentes del derecho y jerarquía normativa', in P. de Pablo, F. Orduña, A. Cañizares (dirs.), *Código civil comentado* (Cizur Menor: Civitas 2nd edn 2016), vol. 1, 'Título preliminar: De las normas jurídicas, su aplicación y eficacia. Libro I: De las personas. Libro II: De los bienes, de la propiedad y de sus modificaciones (artículos 1 a 608)' (P. de Pablo, coord), pp 29-46.

40 G. García-Valdecasas, 'Los principios generales del Derecho en el nuevo título preliminar del Código Civil', *Anuario de Derecho Civil* 1975.

41 Tribunal Supremo (Civil) 30 Jul. 2007 (5670/2007), www.poderjudicial.es/search/AN/openDocument/11d5981631e72fbd/20070927: *analogia juris* does not imply 'the extraction of a norm from another norm or sub-norm, because it is not the chosen legal precept that regulates the new case, but the principle that is revealed or that can be known through the law'. See also Tribunal Supremo (Civil) 16 Jun. 2011 (3634/2011), www.poderjudicial.es/search/AN/openDocument/25fc53357d58ef72/20110630. It may be worth pointing out that *analogia juris* signified a huge methodological step to overcome the pitfalls of *analogia legis* in the interpretation of the Digest; only the modern renationalization of law pushed back for the less sophisticated method of *analogia legis*: see A. Errera, 'Tra *analogia legis* e *analogia juris*: Bologna contro Orléans', in F. Liotta, *Studi distoria delditto medioevale e moderno*, vol. 2 (Bologna: Monduzzi 2007), pp 139-189. See also today, J. M.ª Pena & J. M. Busto, 'Comentario al artículo 4 del Código Civil', in R. Bercovitz (coord), *Comentarios al Código Civil* (Cizur Menor: Aranzadi 5th edn 2021), pp 53-58.

4.2. Analogia legis: lack of identical cause

14. The key question in *analogia legis*[42] is whether the two sets of facts, the regulated and the unregulated, have the 'same rationale',[43] *eadem ratio*,[44] *identidad de razón.*[45]

Article 28 of the Agency Law entitles commercial agents to indemnity for the goodwill they have generated and which the principal will benefit from after termination. This indemnity is mandatory[46]: the autonomy of the parties is sacrificed to ensure the protection of a natural person who is usually dependent, in a broad sense, on his principal: perhaps a large corporation that could easily impose the renunciation of the important form of relief that the goodwill indemnity represents. The need for special protection arises from this form of asymmetry.[47]

Since this asymmetry is not necessarily present in distribution agreements, there is no reason to restrict the autonomy of the parties in this area.[48]

15. However – and this subtle distinction is far from irrelevant – , the fact that the agent deserves special protection does not imply that the nature and justification of goodwill indemnity *per se* is the realization of social protection for weak parties, so that it could only be granted by virtue of an express legal mandate.[49] A deeper, more nuanced analysis reverses this logic.

The Agency Act operates in two steps. First, it merely describes the typical circumstances justifying the indemnity.

1. Cuando se extinga el contrato de agencia, sea por tiempo determinado o indefinido, el agente que hubiese aportado nuevos clientes al empresario o	1. When an agency contract is terminated, either for a specific or indefinite period of time, the agent that had brought the principal new customers or

42 It seems more expedient to consider *analogia legis* first since its applicability would prevail over the *analogia juris.* See J. M.ª Pena & J. M. Busto, 'Comentario al artículo 4 del Código Civil', pp 53–58. In turn, C. Paz-Ares, La indemnización por clientela en el contrato de concesión, addresses *analogia juris* first.

43 Civil Code (Spain), Art. 4.1.

44 *Ubi eadem ratio est, ibi eadem juris dispositio esse debet.*

45 See *int. al. mult.*, Tribunal Supremo (Civil) 21 Nov. 2000 (8498/2000), www.poderjudicial.es/search/AN/openDocument/1d914b1a04b5640e/20030808;

Tribunal Supremo (Civil) 17 Apr. 2012 (2876/2012), www.poderjudicial.es/search/AN/openDocument/00c0fd4748d8cd84/20120514.

46 Agency Contract Law 1992, Art. 3.

47 See C. Paz-Ares, La indemnización por clientela en el contrato de concesión.

48 Conclusion shared, *int. al.*, by the Supreme Court: Tribunal Supremo (Civil) 26 Apr. 2004 (2734/2004), www.poderjudicial.es/search/AN/openDocument/2283599d4c90b28d/20040506.

49 C. Paz-Ares, La indemnización por clientela en el contrato de concesión.: 'Goodwill compensation has a social substance or end (hence its mandatory nature)'. *Contra*, F. Martínez, supra n. 12, p 99, citing German scholarship.

incrementado sensiblemente las operaciones con la clientela preexistente, tendrá derecho a una indemnización si su actividad anterior puede continuar produciendo ventajas sustanciales al empresario y resulta equitativamente procedente ... [50]

has significantly increased operations with existing customers, shall be entitled to an indemnity if his previous activity may continue to garner substantial benefits to the principal and is equitable ... [51]

Second, it imposes conditions on the calculation and amount of indemnity.

3. La indemnización no podrá exceder, en ningún caso, del importe medio anual de las remuneraciones percibidas por el agente durante los últimos cinco años o, durante todo el período de duración del contrato, si éste fuese inferior. [52]

3. The [amount of] the indemnity shall not exceed, in any case, the average annual amount of remuneration received by the agent throughout the last five years, or throughout the whole duration of the contract, if such period is shorter. [53]

Simultaneously, it makes both *an* (whether) and *quantum* (how much) mandatory.[54]

In other words, the Agency Law – like the Directive it transposes – does not create the goodwill indemnity *ex nihilo*, as in a kind of *fiat*, but simply recognizes its existence in certain circumstances and then intervenes to ensure that it is not systematically waived due to the principal's superior bargaining power (by making it mandatory)[55] and to facilitate the agent's access to justice (by simplifying and standardizing the method of calculation).

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50 Agency Law 1992, Art. 28, para. 1.

51 *Compare* the English text of the Commercial Agency Directive, Art. 17, para. 2: '(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 Art. 20; (b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question; (c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages'.

52 Dir. 86/653/EEC, Art. 28, para. 3.

53 *Compare* the English text of Dir. 86/653/EEC, Art. 17, para. 2.

54 Agency Law 1992, Art. 3, para. 1. See also Dir. 86/653/EEC, Art. 19.

55 The Directive explicitly states that the mandatory nature is to protect agents: Art. 19: 'The parties may not derogate from Articles 17 and 18 *to the detriment of the commercial agent* before the agency contract expires'.

To compensate for the fact that these two rules tend to favour the agent, the legislator introduces another standardized mechanism, this time in favour of the manufacturer (a mandatory cap).

In fact, neither the Agency Directive nor the Spanish Agency Law prescribe a calculation method, but only a cap and a method for calculating the cap. This distinction is regularly made in Germany or Austria, where the gross value of the goodwill (*Rohausgleich*) is calculated according to the most appropriate method, while in parallel the annual average of the last remunerations is determined to set the cap (*Höchstbetrag*) at the level of the remuneration.[56] This is not the case in Spain and other countries. Be that as it may, the above explanation remains valid under this more nuanced interpretation: the mandatory nature of the indemnity favours the agent, the cap favours the principal, and the method of calculation is left open.

In summary, the Agency Law provides certain mechanisms to ensure that goodwill indemnity is available and fair in the peculiar and specific context of agencies. That is the essence of the regime, the *ratio* of the rule.

16. Since an identical *ratio* is a prerequisite for *analogia legis* and the *ratio* of legislative intervention in the case of agents is absent in the case of distributors, the inevitable conclusion is that *analogia legis* cannot be applied.

4.3. Analogia juris: the common principles underlying goodwill indemnity

17. Since *analogia legis* is not a viable ground to justify goodwill indemnity for distributors, the possibility of recourse to *analogia juris* needs to be explored.

18. Throughout the term of the agreement, the distributor has promoted the sale of the principal's goods. This activity has created or enhanced goodwill, which is an intangible asset.[57] While the contract exists, both parties benefit from this asset: the principal through the promotion of his goods, the distributor in the form of the resale margin. When the contract expires, the cause or reason for the mutual enrichment disappears.

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56 See M. Nocker, *Kommentar zum Handelsvertretergesetz 1993* (Vienna: Verlag Österreich, 2nd ed 2015).

57 An 'asset' is 'anything of economic value, including property; rights have a monetary value, and goodwill'. It is thus 'an umbrella term for all such forms of economically valuable positions that are legally protected'. It does not matter whether the property in question is 'tangible or intangible, movable or immovable'; 'the goodwill of a business ... may constitute an asset', in C. von Bar & E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition (Munich: Sellier European Law Publishers 2009), pp 4004–4005. See also S. Swann (ed.), Study Group on a European Civil Code, *Unjustified Enrichment* (PEL Unj.Enr.) (Oxford: Oxford University Press 2010), pp 91–118, 171–212, 343–374, 461–475.

However, at the very moment that the intermediary is removed from the chain, the asset may become available to the manufacturer. The immediate result may be higher prices for the final consumer because they include the distributor's margin.[58] The producer can benefit from these higher prices in many ways: it can maintain the existing retail price, or it can commercially exploit a lower price to broaden its customer base.[59] In both cases, the overcharge can remain as a competitive advantage. A competitive advantage that was partly or wholly created by the ability of the distributor to get the market to accept these relatively high prices. A competitive advantage that the producer may now, without the distributor, enjoy without cause, for no reason at all.

19. At this point, when the shadow of unjustified enrichment begins to loom, it is time to resume the analogical exercise and recall the various parts into which Article 28 of the Agency Law – and Article 17 of the Directive – can be dissected. We know that one part (para. 3 of the Law, transposing para. 2(b) of the Directive) represents a non-extendable ratio because it is conditioned by socio-economic peculiarities that are alien to distributors. But there is another part, the one that simply recognizes the circumstances in which it is fair to grant goodwill indemnity altogether (para. 1 of the Law, transposing para. 2(a) of the Directive):

> ... [E]l agente que hubiese aportado nuevos clientes al empresario o incrementado sensiblemente las operaciones con la clientela preexistente, tendrá derecho a una indemnización si su actividad anterior puede continuar produciendo ventajas sustanciales al empresario y resulta equitativamente procedente ... [60]

> ... [T]he agent that had brought the principal new customers or has significantly increased operations with existing customers, shall be entitled to an indemnity if his previous activity may continue to garner substantial benefits to the principal and is equitable ... [61]

This is the 'idea inspiring' Article 28 of the Law and Article 17 of the Directive: to prevent the unjustified enrichment that would result from the facts

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58 Prices are the right indicator; margins are not. Margins depend on how the entrepreneur wishes to organize its business. The objective indicator is the end price that customers are willing to pay for the same product.

59 C. von Bar & E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition (Munich: Sellier European Law Publishers 2009), pp 4004–4005: 'An asset must be something which is capable of commercial exploitation. That is to say, it must be something for whose grant or use a person would be prepared to pay; it must be a right or an equivalent which is of potential economic benefit'.

60 Agency Law of 1992, Art. 28, para. 1.

61 *Compare* the English text of the Dir. 86/653/EEC, Art. 17, para. 2.

described.[62] The entitlement, not the cap. The fact that indemnity for goodwill must be granted, not that it must be limited.

To the extent that the general principle of law prohibiting unjustified enrichment underlies the recognition of goodwill indemnity in the context of agency contracts, the principle thus distilled can be extended by *analogia juris* to distributors.

20. Some authors have suggested applying *analogia legis* – probably perceived as safer ground – by removing the mandatory nature of Article 28 and using it *as if it were* a dispositive rule.[63] The problem is that this is not the case. The mandatory nature of the rule is an integral part of the legislative package designed to respond to the peculiarities of agencies: to make both the *an* and the *quantum* mandatory in order to avoid unilaterally imposed waivers, to facilitate access to justice, and then to rebalance the situation with a maximum amount. Removing the mandatory nature of the package would render its protective purpose meaningless.

A possible compromise could lead to an argument in favour of applying via *analogia legis* only Article 28(1), and not Article 28(3). This would lead to the same practical conclusions as *analogia juris*, but arguably from a more formalistic and therefore less substantial and fragile perspective. *Analogia juris* remains a deeper and more solid foundation.

21. We must not overlook the additional support of good faith – contracts bind the parties not only to what is expressly agreed, but to everything that good faith requires – [64] as an integral part of the three-pronged test set out by the Supreme Court in 2008.[65] Even in situations where the distribution agreement does not expressly provide for the distributor's right to be compensated in the form of goodwill, it would obviously be contrary to *bona fides* to benefit without payment from an asset whose value has been enhanced or even created by someone else. In this way, good faith appears as a complementary – perhaps more consensual – ground for goodwill indemnity in all European countries, otherwise firmly rooted in the prohibition of unjustified enrichment by *analogia juris*.

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62 A doctrinal sector has traditionally argued against unjustified enrichment as the main legal ground for goodwill indemnity. With the consolidation of goodwill indemnity in case law based on that ground, the objections are aging, revealing the heated context in which they were devised. See e.g., C. Paz-Ares, La indemnización por clientela en el contrato de concesión.

63 F. Martínez, supra n. 12, p 332.

64 Civil Code (Spain), Art. 1258.

65 We are referring again to the Tribunal Supremo (Civil)15 Jan. 2008 (829/2008), with the plethora of lower courts and other Supreme Court decisions that have incorporated this reasoning.

4.4. European private law to the rescue

22. The above conceptual architecture is reinforced by the most recent and ambitious statement of European private law: the Draft Common Frame of Reference (DCFR).[66] This outstanding undertaking, unmatched in its comprehensiveness and depth of insight, offers the only transnational *positive* regulation of this issue.

The drafters of the DCFR had no doubt: 'the goodwill of a business' is one of the assets that can give rise to unjustified enrichment.[67]

23. The DCFR partially merges the contracts for the establishment of a commercial agency, a franchise, or a distributorship[68] into a general part[69] applicable to all three types of contracts.[70] The indemnity for goodwill is dealt with in this general part[71]:

IV. E. – 2:305: Indemnity for goodwill

(1) When the contractual relationship comes to an end for any reason (including termination by either party for fundamental non-performance), a party is entitled to an indemnity from the other party for goodwill if and to the extent that:

(a) the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business; and
(b) the payment of the indemnity is reasonable.

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66 C. von Bar, E. Clive & H. Schulte-Nölke, et al. (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, Outline Edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law (Munich: Sellier European Law Publishers 2009), www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf.

67 C. von Bar & E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition (Munich: Sellier European Law Publishers 2009), pp 4004–4005. See also S. Swann (ed.), Study Group on a European Civil Code, *Unjustified Enrichment (PEL Unj.Enr.)*, *cit.*, pp 91–118, 171–212, 343–374, 461–475.

68 As well as 'with appropriate adaptations, other contracts under which a party engaged in business independently is to use skills and efforts to bring another party's products on to the market' (DCFR, Art. IV. E. – 1:101: Contracts covered).

69 C. von Bar & E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition (Munich: Sellier European Law Publishers 2009), Book II, Part III. M. W. Hesselink headed the drafters' working group.

70 Chapter 1: General provisions.

71 Chapter 2: Rules applying to all contracts within the scope of this part.

Each of the three contracts then receives its own specific regulation.[72] In the special part devoted to commercial agency, we find a rule on the amount of the indemnity for goodwill that is in line with the Agency Directive and, by extension, the Spanish Agency Law[73]:

IV. E. – 3:312: Amount of indemnity

(1) The commercial agent is entitled to an indemnity for goodwill on the basis of IV. E. – 2:305 (Indemnity for goodwill) amounting to:

(a) the average commission on contracts with new clients and on the increased volume of business with existing clients calculated for the last 12 months, multiplied by:
(b) the number of years the principal is likely to continue to derive benefits from these contracts in the future. .

(3) In any case, the indemnity must not exceed one year's remuneration, calculated from the commercial agent's average annual remuneration over the preceding five years or, if the contractual relationship has been in existence for less than five years, from the average during the period in question.

(4) The parties may not, to the detriment of the commercial agent, exclude the application of this Article or derogate from or vary its effects.

However, in the special section devoted to distributorship, any such effort is conspicuous by its absence. No reference is made to indemnity for goodwill. Consequently, the rule contained in the general part applies.

In this way, the DCFR, which aims to provide an integral and systematic regulation of the three contracts, makes a deliberate distinction: in the case of agencies, both a compulsory calculation method and a ceiling are considered appropriate; in the case of distributors, on the other hand, neither a specific calculation method nor a ceiling is considered appropriate.[74]

24. The rule set forth in the general part of this section of the DCFR has only one requirement: that 'payment of the indemnity is reasonable'. As the context makes clear, this requirement of 'reasonableness' includes both that the indemnity be paid at all and how much it should be paid. Using the syntactic power of Latin, both *an* and *quantum* must be 'reasonable'. According to the DCFR, what is 'reasonable' is to be 'objectively ascertained', having regard to the 'nature and purpose of what is being done' as well as 'the circumstances of the case'.[75]

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72 Chapter 3: Commercial agency; Ch. 4: Franchise; Ch. 5: Distributorship.

73 Agency Directive Dir. 86/653/EEC, Arts 17 and 19; Agency Contract Law 1992, Arts 3 and 28.

74 This was in essence the regulation contained in the above-mentioned Spanish Proposal for a Commercial Code.

75 DCFR, Art. I. – 1:104; also DCFR, Annex, Definitions.

The Principles of European Contract Law (PECL)[76] add 'good faith' to the definition and emphasize the need to consider 'the nature and purpose of the contract' and 'the circumstances of the case'.[77]

The standard of 'reasonableness' is therefore broken down into three sub-standards, namely the 'circumstances of the case', the 'nature and purpose of the contract', and 'good faith'. This confirms the stance taken by the Spanish Supreme Court, which referred to the 'nature and purpose of the contract' and 'good faith' as the third requirement of the three-pronged test for the entitlement to this indemnity.

25. In the end, the figure that most accurately quantifies the true, actual value of goodwill will always be the most 'reasonable'. Nothing above or below that figure would be reasonable. Indeed, under DCFR, the 'reversal of enrichment'[78] takes place 'by paying its monetary value'.[79]

5. The last frontier: quantifying goodwill indemnity

5.1. Overcoming the limit imposed by an inadequate analogy

26. The uncertainty surrounding the quantification of goodwill has been repeatedly highlighted.[80] However, compared to the relatively minor controversies over whether to use net or gross margins as a benchmark, or whether to include or exclude VAT, there has been surprisingly little interest in the merits of a cap.[81]

Moreover, the hasty and indiscriminate application to distributors of the rigidities existing in the context of commercial agencies has hampered attempts to address the specific problems of distributors.[82] The most common error is the analogous application of Article 28(3) of the Law – Article 17(2)(b) of the Directive –, which limits the maximum amount of compensation based on a very specific, non-extendable *ratio*. Sometimes the lack of rigour has gone so far that in practice the cap for agencies has been understood as a kind of exact amount to

76 O. Lando & H. Beale (eds), *Principles of European Contract Law*, Parts I and II (The Hague: Kluwer Law International 1999); O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds), *Principles of European Contract Law*, Part III (The Hague: Kluwer Law International 2003), www.trans-lex.org/400200/_/pecl/#head_15.

77 PECL, Art. 1:302 – Reasonableness.

78 DCFR, Ch. 5: Reversal of enrichment.

79 DCFR, Art. VII. – 5:101: Transferable enrichment.

80 See e.g., F. Martínez, supra n. 12, p 360 in Spain; and M. Nocker, supra n. 56, in Austria.

81 These matters have been ruled on by the Court of Justice of the EU, e.g., ECJ 26 Mar. 2009, *Turgay Semen* v. *Deutsche Tamoil GmbH*, eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:62007CJ0348.

82 Tribunal Supremo (Civil) 1 Mar. 2017 (708/2017), www.poderjudicial.es/search/AN/openCDocument/f9caf3b37c843044c13003b2ec45c8c433ecf4a558046cf6.

be received by agents – and, through a doubly inadequate extension, by distributors.[83]

27. As we know, the European legislative intervention took the form of an integral package aimed, on the one hand, at protecting agents by ensuring that they are not systematically pressured to waive indemnification (hence the mandatory character) [84] and at facilitating the agent's access to justice (hence the standardized calculation methodology); and, on the other hand, at rebalancing the situation by establishing a cap in favour of the principal (another standardized mechanism).

The entire mechanism functions as a Procrustean bed. In Greek mythology, Procrustes was an outlaw from the region of Attica who physically attacked people by stretching them or cutting off their limbs to force his victims to fit the size of an iron bed. The regulation of indemnity for goodwill in the context of agents is Procrustean because it forces the infinitely varied characteristics, circumstances, and value of goodwill in each individual case to fit the iron bed of an arbitrary standard. Limbs are either cut or stretched; they are never left alone as they are.

In effect, the one-size-fits-all approach sacrifices justice in the individual case on the altar of policy. It may relieve economically weak agents of the burden of providing a financial valuation of the true value of the intangible asset that is goodwill, which is often a complex and expensive undertaking. It may simplify the task of judges in a recurring type of dispute that is necessarily heard in state courts.[85] But the approach has its drawbacks.[86] In all cases where the value of goodwill exceeds the imposed cap, it implies *some degree* of unjustified enrichment – precisely, the amount above the cap up to the actual value of goodwill – to the benefit of the principal and at the expense of the agent. Similarly, the standardized method of calculation may produce a figure that exceeds the actual value of the goodwill, thus producing *some degree* of unjustified enrichment to the benefit of the agent and at the expense of the principal. Just as Procrustes always had to use *some degree* of violence against his unfortunate guests – either by cutting off or stretching their limbs – to satisfy his mania.

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83 J. Martí, 'El método para la cuantificación de la compensación por clientela en el contrato de agencia: la cuestión pendiente de la jurisprudencia española', 298. *Revista de Derecho Mercantil* 2015, pp 439–460.

84 As the reader may recall, Art. 19 of the Directive expressly states that the mandatory character aims at protecting agents.

85 Only the courts of the agent's domicile may hear disputes arising from commercial agency contracts, in accordance with the mandatory forum established by the 2nd Additional Disposition of the Spanish Agency Law of 1992.

86 Once again, this happens every time that the law is not general, but particular to benefit social groups, necessarily at the expense of others.

The compromise can be justified by policy considerations in the context of agencies. Not in the case of distributors. In this context, the legally induced level of unjustified enrichment – when the whole purpose of the goodwill indemnity is precisely to prevent unjustified enrichment – cannot be explained. In this type of contract, there is not necessarily a weaker party in need of protection; it is not by chance that the EU and Spanish legislators, as well as the participants in harmonization projects, have refrained from intervening or regulating this area. Even the argument of simplifying the task of judges in the financial assessment of the value of goodwill does not hold water, since distribution disputes are not subject to any mandatory forum and can therefore be submitted to arbitration, as is often the case.[87]

28. Moreover, it is highly questionable whether the method of analogy can be used *against* the general principle, i.e., to limit the scope of the underlying general principle of law which would otherwise be applicable[88] and which must be considered in any case, even when applying law or custom.[89]

29. Consequently, if the actual 'monetary value'[90] of goodwill in a particular case is a certain amount, it is inappropriate and unfair to cut it off in the absence of an explicit positive rule. Otherwise, we would be acting like Procrustes, irrationally and arbitrarily preventing the full reversal of unjustified enrichment.

5.2. Looking forward: towards a full, equitable quantum

30. Rejecting a cap on goodwill indemnity is only the first step in our journey to ensure that the indemnity represents the true value of goodwill. The next step is to identify a mechanism for determining that value.

On this point, the Spanish Supreme Court, and possibly those of other countries, often upholds calculations made by lower courts based on an

87 We are not aware of any court or author that has proposed to extend by analogy the mandatory forum of the agent's domicile, established by virtue of the 2nd Additional Disposition of the Spanish Agency Law, to distributor disputes, although it would seem to have the same justification as that offered by the proponents of extending by analogy the mandatory regime of goodwill indemnity.

88 In the words of the Supreme Court Judgment of 20 Sep. 1982, 'the use of both the *analogia legis* and *analogia juris* must be made with a very restrictive character when unfavorable consequences are derived from their application'. The same idea underlies Art. 4, para. 2, of the Civil Code: 'Criminal statutes, exceptional statutes and statutes of temporary nature shall not be applied in cases or times other than as expressly provided therein'.

89 According to Art. 1, para. 4, of the Civil Code, general principles of law 'contribute to shape the legal system'. Our analysis has focused on the direct application of a particular general principle as an independent source of law and obligations (see Art. 1089 of the Civil Code), but the importance of this second, pervasive function cannot be overstated.

90 DCFR, Art. VII. – 5:101: Transferable enrichment.

inappropriate analogous application of the legal provision transposing Article 17(2)(b) of the Directive. However, this is of limited relevance for our purposes. Quantifying damages is a *quæstio facti*. As such, it corresponds to the courts of instance; supreme courts, which in principle deal only with *quæstiones juris*,[91] have a limited scope of review. Moreover, when a supreme court is called upon to act as an adjudicatory body,[92] rather than in its role of supervising or unifying the application and interpretation of the law, its findings do not constitute case law, *jurisprudencia*, and thus lack the authoritative legal force they enjoy when they are truly interpreting the law.[93] The parties and their lawyers are therefore free to present the most appropriate evidence to calculate the true value of goodwill, which is then freely assessed by judges and arbitrators.[94]

31. Faced with the need to make factual determinations in this type of dispute, a supreme court judge, like any trial judge or arbitrator, will rely heavily on accounting and financial expert evidence.[95] For good reason: goodwill is a financial asset

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91 See Rules 172(1) and 174(1) of the ELI-UNIDROIT Model European Rules of Civil Procedure:

Rule 172. *Right to a second appeal.* (1) A party may only appeal from a first appeal judgment if such an appeal is necessary to (a) correct a violation of a fundamental right (b) secure uniformity in the law (c) decide a fundamental question which is not limited to the case at issue, or (d) develop the law.

Rule 174. *Scope of appellate review – second appeal.* (1) Within the relief sought, as far as admissible, the second appeal court's review shall encompass (a) the interpretation and application of the law in the first appeal judgment; (b) the legality of the proceedings in the first appeal court, provided that the appellant challenged the error complained about immediately before that court.

92 In the Judgment of Tribunal Supremo (Civil) 15 Mar. 2016 (1158/2016), www.poderjudicial.es/search/AN/openDocument/13eb3a9d226936cd/20160329, the Supreme Court had to decide the case according to the evidence in the file. Forced to choose between the three expert reports submitted to the court *a quo*, it excluded two of them because they did not address the value of goodwill and kept the one that did.

93 Civil Code (Spain), Art. 1.6: 'Case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of law, custom and general principles of law'.

94 See Rule 98 of the ELI-UNIDROIT Model European Rules of Civil Procedure: Rule 98. '*Evaluation of evidence.* The court will freely evaluate evidence'. In Spain, evidence must be evaluated *según las reglas de la sana crítica*, i.e., with a wise and critical mind, a traditional phrase that encapsulates the need for the free evaluation of evidence to be exercised in a rational and not arbitrary manner; see e.g., Arts 316, 348 or 376, *int. al.*, of the Spanish Civil Procedure Code. The Supreme Court can only review evaluation of evidence when it is alleged to be manifestly irrational or arbitrary: Tribunal Supremo (Civil) 9 Jul. 2012 (5821/2012), www.poderjudicial.es/search/AN/openDocument/8aba5834722aad23/20120928 (in connection with Art. 469, para. 1, s. 2, of the Civil Procedure Code, on the grounds for the extraordinary appeal for procedural infringement).

95 Tribunal Supremo (Civil) 15 Mar. 2016 (1158/2016), www.poderjudicial.es/search/AN/openDocument/7dc26e0074a192e4/20030704: 'The determination of the future benefits of goodwill ... must be obtained through prospective estimations based on expertise and objective criteria, among which those used in the economic, accounting or financing fields'. See also Tribunal Supremo (Civil) 5 May 1964, p 1380.

consisting of 'the value of a well-respected business name, good customer relations, high employee morale, and other factors expected to translate into greater than normal earning power'.[96] This value results in sustained and recurring future earnings; more specifically, extraordinary future contribution margins attributable to the distributor's performance, which are in addition to the ordinary future contribution margins attributable to the manufacturer's efforts and the products' own qualities.[97] Goodwill is therefore an independent source of future income, a specific market advantage capable of generating future benefits.[98]

If the key to the value of goodwill is future excess earnings or exceptional contribution margins, the indemnity can be estimated quantitatively as the net present value of all expected future excess contribution margins.[99] In short, the valuation of goodwill is a matter of discounting all future excess earnings back to the present.

This conclusion raises a probably insurmountable objection to the standard *quantum* determination based on past rather than future earnings. The goal of goodwill indemnification is not to provide distributors with a form of insurance so that they can maintain their past standard of living for another year after termination. The goal of goodwill indemnification is to reflect the ability of goodwill to create wealth. Therefore, any methodology that looks backward – unless it is established by positive law in pursuit of some supposed higher good – is fundamentally flawed from both a logical and an economic standpoint.

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96 J. Downes & J. Goodman, *Dictionary of Finance and Investment Terms* (New York: Barron's 2nd edn 2014).

97 By definition, any asset has an economic value that is not captured by other assets. Hence the term 'extraordinary' is particularly expressive in this context: an earning power beyond the supplier's ordinary, standard earning power. An 'increase in assets' is, by the way, one of the typical expressions of unjustified enrichment (DCFR, Art. VII. – 3:101: Enrichment).

98 That is the idea mirrored by the General Accounting Plan, approved by Royal Decree 1514/2007, of 16 Nov. 2007, which recognizes goodwill in Rule 19 on Valuation and Registration. Under the Plan, while goodwill remains internal, it may not be recognized for accounting purposes; it is a business combination that triggers its recognition for accounting purposes. In a non-technical way, the facts underlying goodwill disputes always involve a sort of business combination.

99 This is a fundamental concept in business valuation; it is no coincidence that the DCFR defines 'monetary value' as 'the sum of money which a provider and a recipient with a real intention of reaching an agreement would lawfully have agreed as its price', in an exercise of hypothetical reconstruction (DCFR, Art. VII. – 5:103: Monetary value of an enrichment; saving). According to C. von Bar, E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition (Munich: Sellier European Law Publishers 2009), p 4129, this is an 'objective value' that will need to be determined by reference to 'expert valuations'. See also S. Swann (ed.), Study Group on a European Civil Code, *Unjustified Enrichment (PEL Unj.Enr.)*, *cit.*, pp 91–118, 171–212, 343–374, 461–475.

32. Consider the following situation.[100] For twenty years, a company has been the distributor of certain products used in the construction industry. In 2013, the manufacturer decided to terminate the contract and enter the market directly with its sales force. The distributor requests an indemnity for goodwill, which meets the requirements to be granted.

If the retrospective, backward-looking methodology established by the Agency Directive and the Agency Law were applied by analogy, the amount of compensation – the average of the previous years' margins – would probably be zero or even negative, as the previous five years had seen a severe crisis in the construction sector and the distributor had made a herculean effort to keep the products on the market with no margin or even at a loss. By 2013, however, the crisis had bottomed out and the following years were marked by a steady recovery and, finally, great profits.

Would it be 'reasonable' or 'equitable'[101] to quantify damages by projecting the distributor's average losses during the *lean-cow* years into the *fat-cow* years when the manufacturer reaped the fruits of the distributor's labour? Or would that be tantamount to validating an expropriation of goodwill? The example, perhaps an extreme one, illustrates how technically inadequate and materially irrational it is to look to the past instead of assessing the ability of goodwill to generate wealth in the future.

33. Let us add another fact to the hypothesis. Let us suppose that the above circumstances did not happen by chance; that the manufacturer had internally discussed the termination in 2010, but decided against it because the crisis was not over yet, preferring to leave the distributor to face the hard times.

Indeed, by knowingly choosing the years from which to draw the average, a principal may be able to indirectly influence the amount of compensation and thus act to maximize the degree of unjustified enrichment. This is why 'good faith' is not a gratuitous sub-standard.[102] This is also why a forward-looking assessment of the true value of goodwill is a cleaner, more objective, less manipulable methodology. A methodology, by the way, that is not necessarily more favourable to the distributor; it may be more favourable to the principal.[103] It is simply more technically sound and logically consistent.

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100 The facts described by way of example are taken from a real case, an ad hoc arbitration conducted under the UNCITRAL Rules in Paris, in which de Benito Arbitration represented the distributor.

101 An explicit reference is made to equity by Art. 28, para. 1 of the Agency Law of 1992, as well as by Art. 17, para. 2, s. (a) of the Agency Directive Dir. 86/653/EEC. The appeal to equity is further justified by Art. 3.2 of the Civil Code (Spain), which obliges the judge to take equity into account when applying the law.

102 The duty of good faith is particularly expected 'in exercising a right to terminate an obligation or contractual relationship' (DCFR, Art. III. – 1:103: Good faith and fair dealing).

103 In the Belgian Cour de Cassation Civ. 20 Jun. 2008, no. C.07.0382.F the party raising the forward-looking approach was the principal, not the distributor.

34. It is undoubtedly impossible to determine the true value of goodwill with millimetre precision. This impossibility is inherent in any assessment of the *value* of things, one of the most difficult concepts in economic theory.[104] The challenge is even greater when that value is based on predictions of what the future will bring in the midst of technological innovation, market disruption, and crises of all kinds.[105] But change is not an exception to otherwise stable situations; it is inherent in life, economics, and history. None of these circumstances prevent us from assessing the value of existing goodwill at any given time. All good financial valuations, based on a wealth of specialized knowledge, consider the dynamic nature of the economic process. This allows judges and arbitrators to address the *quantum* parts of their judgments and awards with confidence. The certainty of change cannot have a paralysing effect, which would only benefit the party in a position to enjoy those future benefits.

6. Concluding remarks: the DCFR as a model regulatory framework

35. The analysis carried out in this article shows that any regulation of goodwill indemnity in the context of distributors should be in line with the legal principles and rules enshrined in the DCFR, with its transparent recognition of goodwill indemnity without a predetermined quantification method or an unjustified quantitative ceiling.

Thus, disputes over goodwill indemnification in distribution agreements should be handled as they would be in contracts between independent, responsible businessmen. Distributors seeking to recover goodwill should not rely on any form of statutory insurance. They should bear the burden of proving the existence and monetary value of goodwill – as they would for any other item of relief – and should have the autonomy to choose the most appropriate method of doing so, subject to the general rules of evidence without undue legal constraints.[106] Similarly, manufacturers may wish to contest the claim by presenting any evidence to the contrary, without the benefit of a cap alien to the general law of obligations.

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104 C. Menger set the basis to fully grasp the idea of value in C. Menger, *Grundsätze der Volkswirtschaftslehre* (Vienna: Wilhelm Braumüller 1871), in English: *Principles of Economics* (Auburn: Ludwig von Mises Institute 2007), cdn.mises.org/Principles%20of%20Economics_5.pdf.

105 See N. N. Taleb, *The Black Swan. The Impact of the Highly Improbable* (New York: Random House 2010).

106 See Rules 24(1) and 25(1) of the ELI-UNIDROIT Model European Rules on Civil Procedure. Rule 24. '*Facts.* (1) The parties must put forward such facts as support their claim or defence'. Rule 25: '*Evidence.* (1) Each party is required to prove all the relevant facts supporting its case. Parties must offer evidence supporting their factual contentions'.

Bringing the multifaceted, infinite reality of life into the courtroom is never an easy task. But this difficulty cannot deter parties, lawyers, experts, and judges or arbitrators from striving to achieve the fairest and most accurate outcome in each case. To abandon this quest would be to abandon our faith in science and reason, and thus in the law's ability to give everyone their due: *suum cuique tribuere.*[107]

Yes, we prefer Ulpian to Procrustes.

107 Ulpian, Digest 1,1,10,1.