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Law applicable to disputes arising from commercial agency agreements

There are many legal cases and court decisions concerning commercial agency agreements and national courts will increasingly be asked to adjudicate international commercial agency related disputes.

In May 2013, the *Cour de cassation* (French Supreme Court) had been called upon to determine the territorially competent court to adjudicate disputes arising from or in connection with a commercial agency agreement. To do so, it had to identify the main place of activity of the commercial agent[1] (cf. our June 2013 e-newsletter).

Most recently, it is the Court of Justice of the European Union (the "CJEU") that was called upon to rule on a question referred to it for a preliminary ruling. Specifically, the referring court asked the CJEU whether the law chosen by the parties to a commercial agency agreement may be disregarded by the court before which the dispute has been brought, established in another Member State, in favor of the law of the forum, on the ground that the latter is considered mandatory in the legal order of that Member State[2].

In this specific case, a commercial agency agreement had been entered into between a Belgian commercial agent and a Bulgarian principal. The parties had agreed that the agreement was to be governed by Bulgarian law and that any dispute arising from or in relation with the contract was to be settled by the arbitration chamber of the Chamber of Commerce and Industry in Sofia (Bulgaria).

Following the termination of the agreement by the principal, the commercial agent initiated proceedings before Belgian courts and sought the payment of various indemnities provided for under Belgian law that offers greater protection to commercial agents than Bulgarian law.

Alleging that the Belgian courts did not have jurisdiction to hear the dispute because of the arbitration clause set forth in the commercial agency agreement, the principal raised a plea of inadmissibility.

The Belgian Supreme Court, to which the case had been brought, decided to stay the proceedings and referred to the CJEU a question for a preliminary ruling. The question did not concern the competent jurisdiction[3] but the law applicable to the dispute. The Belgian Supreme Court made a reference to (i) the so-called Commercial

Agents Directive that requires Member States to take the measures necessary to ensure that the commercial agent is, after termination of the agency agreement, indemnified or compensated[4], and (ii) the Rome Convention[5] that provides that the parties can freely chose the law applicable to their contractual relationship[6] but that further specifies, however, that the mandatory rules of the law of the Members States continue to apply[7].

The CJEU recalled that the classification of national provisions as "public order legislation" applies to national provisions "*compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State*". In addition, it specified that any plea related to the existence of a mandatory rule "*must be interpreted strictly*".

In the commented case, the Belgian government claimed that the provisions of the Belgian Law on commercial agency contracts were binding and could be classified as mandatory rules.

In this respect, it pointed out that "*This law, although adopted as a measure for the transposition of Directive 86/653, gave a wider scope to the term 'commercial agent' than that given to it in the directive*" and that "*that law extended the possibility of compensation for commercial agents in the event of termination of their contracts, with the result that it is clear that it is under Belgian law that the dispute in the main proceedings must be heard*".

The CJEU did not rule on the issue of whether or not the relevant provisions of Belgian Law were public order rules; it is an issue that must be settled by Belgian courts. Yet, it approved the reasoning of the Belgian government and held that the fact that "*the transposition in the Member State (…) offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals*" is an indication that the law in question could be classified as public order provisions.

This argumentation is quite surprising since it means that the law chosen by the parties should be systematically disregarded in favor of the law of the forum insofar as the latter is more favorable to the parties – to the extent, however, that the Directive was properly transposed into the law of the forum.

In any event, the CJEU answered yes to the question referred to it by the referring court.

It ruled that the law chosen by the parties to a commercial agency agreement, even if it is a proper transposition of the Directive, can be disregarded in favor of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents. Yet, for this solution to apply, the legislature of the Member State of the law of the forum must have held it to be crucial to grant commercial agents protection going beyond that provided for by the Directive.

Even though this decision is line with the Rome Convention, if may result in a lack of legal certainty for parties

to a commercial agency agreement – and, in fact, to any type of contracts – as they may have to apply a law other than that they had originally chosen.

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[1] Cf. Commercial Chamber of the *Cour de Cassation*, May 14, 2013, n°11-26.631.

[2] CJEU, October 17, 2013, United Antwer Maritime Agencies / Navigation Maritime Bulgare, C-184/12.

[3] The CJEU specified that *"The referring court has referred to the Court of Justice only the question of the law applicable to the contract, thus taking the view that it has jurisdiction to decide the dispute (…). The Court therefore intends to answer the question referred without prejudice to the question of jurisdiction."*

[4] Directive 86/653 of December 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. It should be underlined that, under this Directive, a commercial agent is defined as "*a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal.*" The Directive does not apply to commercial agents that provides services but only to those engaged in the sale of products. However, at the time they transposed the Directive into their national law, a certain number of Member States have elected to extend the regime enacted by the Directive to commercial agents that supply services, as was the case in the commented decision.

[5] Convention of June 19, 1980 on the law applicable to contractual obligations. As recalled by the CJEU, the Rome Convention has since been superseded by Regulation (EC) No 593/2008 on the law applicable to contractual obligations (known as the "Rome I Regulation"). Even if the Rome I Regulation had been in effect at the material time, the outcome of the dispute would have been the same as Article 9 of this Regulation incorporates the relevant provisions of the Rome Convention.

[6]Article 3 of the Rome Convention: "*A contract shall be governed by the law chosen by the parties*".

[7] Article 7 §2 of the Rome Convention: "*Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation*".

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