International Distribution Institute

The Case Law of the European Court of Justice on The Interpretation of the Directive

IDI Conference - Turin

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Poseidon C-3/04 16 March 2006
Continuing Authority

- A self-employed intermediary has authority to conclude, not several, but a sole charter for a ship, subsequently extended over years.
- Can we consider that an intermediary who is not entrusted for several contracts but only for a sole one, subsequently extended, has a “continuing authority” to negotiate?

- To assess the continuing authority, the number of transactions concluded by the intermediary is an indicator but is not the sole determining factor.

- However the mere fact that some relations are maintained is in itself insufficient to demonstrate a continuing authority.

- Where a self-employed intermediary had authority to conclude a single contract, subsequently extended over several years, the principal should have conferred continuing authority on that intermediary to negotiate successive extensions to that contract

Mavrona C-85/03 10 February 2004
Commission agents

- Does the Directive include, in addition to intermediaries acting in the name and on behalf of a principal, persons who act on behalf of a principal but in their own name?

- The Directive does not include commission agent “acting for undisclosed principals by charging “mark up”.

- Persons who act on behalf of a principal but in their own name do not come within the scope of that Directive.

- However, nothing precludes a national legislature from introducing for the protection of commission agents, appropriate rules inspired by the Directive.

Chevassus-marche C-19/07 17 January 2008

No action on the part of the Principal

- Is a commercial agent with a specific geographical area entitled to commission where a commercial transaction between a third party and a customer belonging to that area has been concluded without any action on the principal's part?

- In the decision Kontogeorgas, the court said that where a commercial agent is entrusted with a geographical area, and the principal was involved in a transaction, the agent is entitled to a commission;

- However the presence of the principal in the transactions for which the commercial agent can claim commission is indispensable.

- The commercial agent does not have the right to a commission for transactions concluded by customers belonging to that area with a third party without any action on the part of the principal

Ingmar C-381/98 9 November 2000
Mandatory Law

- Does the Directive apply when the contract includes a choice of non EU law clause, but when the commercial agent carried on the activity in European Union?

- The regime established by Articles 17 to 19 of the Directive is mandatory in nature.

- When the commercial agent carries on his activity within the EU, the contract cannot evade those provisions by the simple expedient of a choice of law clause.

- Articles 17 and 18 must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country

- BUT – would a jurisdiction clause still apply in favour of a non-EU jurisdiction?

Bellone C-215/97 30 April 1998
Commercial Agents Register

- A domestic law impose a requirement on a commercial agent to register.

- A commercial agent is not registered. The domestic court voids the contract because of this lack of registration.

- Does the Directive preclude a national rule which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register?

- Yes, the Directive precludes to make the validity of an agency contract conditional upon the entering of the commercial agent in the register.

Caprini C-485/01 6 March 2003
Commercial Agent Register

- A domestic law provides that the agent must register first in a register of commercial agents, and then in a register of undertakings.

- This law prohibits registering in the second register if not registered in the first one

- Does the Directive preclude a rule of national law which makes the enrolment of a commercial agent in the register of undertakings conditional on that agent's name having been entered in an appropriate register?

- No, the Directive does not preclude it, on condition that non-registration in the register of undertakings does not affect the validity of an agency contract or that the consequences of such non-registration do not adversely affect in any other way the protection of the commercial agent.

Centrosteel C-456/98 13 July 2000
Commercial Agents Register

- A commercial agent was not entered in the register of commercial agent.
- The domestic law has not already transposed the Directive.

- The court held in Bellone that the Directive precluded a national rule which made the validity conditional upon the registration.
- The issue here is that the Directive has not already been transposed.
- How is the domestic court supposed to deal with this situation?

- The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

Turgay Semen Deutsche C-348/07 Tamoil
26 March 2009
(1) Limitation of the Amount of the Indemnity

- Does Article 17(2)(a) means it is not possible automatically to limit the indemnity by the amount of commission lost, even though the benefits which the principal continues to derive have to be given a higher monetary value?

- Commission lost is only one of several elements relevant to determine whether the amount is equitable.

- Then, it is to the national court to determine whether the indemnity granted is equitable.

- It is not permissible to automatically exclude, in a case where the benefits which the principal continues to derive exceed the estimated commission lost by the commercial agent, the possibility of any increase in that indemnity up to the maximum of the ceiling laid down in Article 17.

Turgay Semen Deutsche C-348/07 Tamoil
26 March 2009
(2) A principal belonging to a group of companies

- When the principal belongs to a group of companies, do benefits accruing to other companies of that group are properly taken into account for the purpose of calculating the amount of indemnity to which the commercial agent is entitled?

- It is the principal and only him who will pay the remuneration, not the other companies in the group.

- That precludes the taking into consideration of benefits accruing to third parties, unless that is what was agreed contractually between the principal and the commercial agent.

- Consequently, where the principal belongs to a group, benefits accruing to other companies of that group are not, in principle, deemed accruing to the principal and, consequently, do not necessarily have to be taken into account for the calculation of indemnity.

Quenon K.SPRL v Beobank SA (formerly Citibank Belgium SA) and Metlife Insurance SA (formerly Citilife SA

- Belgian case on indemnity.
- Article 17(2) of the Directive entitles agents to indemnity and recovery of damage suffered as a result of contract termination.
- Question – What is damage?
- In the UK only non-amortised investment or costs incurred for:-
  - Dismissal of employees or redundancy.
  - Showroom costs of sole agency.
  - Catalogue costs if sole agency or major expense incurred for principal.

Quenon K.SPRL v Beobank SA (formerly Citibank Belgium SA) and Metlife Insurance SA (formerly Citilife SA

- Calculate damages by the difference between the amount of loss actually suffered and the amount of the indemnity based on one year's average commissions.
- No double recovery i.e. you cannot claim indemnity twice.
- Query balance of commissions on fixed term contract termination – doubtful if indemnity plus full period of fixed term would be awarded.
- Likely result is commissions for balance of fixed term less amount paid on indemnity as additional damages.

Volvo Car C-203/09 28 October 2010
Agent's Default After Termination

- The case involved, not a commercial agreement, but a dealership agreement. However, in Germany provisions concerning commercial agent's indemnity apply by analogy to a dealership agreement.

- The principal decided to terminate the contract. After the termination, but still during the notice period, the dealer became liable for some fault.

- Article 18 says that the indemnity shall not be payable where the principal has terminated the agency contract because of default attributable to the commercial agent.
- Does article 18 preclude a commercial agent from being deprived of indemnity when the default on the part of that agent occurred after notice of termination?
- When the principal becomes aware of the commercial agent's default only after the end of the contract, it is no longer possible to apply the mechanism provided for in Article 18 and the indemnity shall be paid.

- The commercial agent cannot be deprived of his entitlement to an indemnity under that provision where the principal establishes, after notifying the termination, a default on his part.
- Nevertheless, Article 17 provides that the commercial agent is entitled to an equitable indemnity having regard to all the circumstances. Consequently, the agent's conduct may be taken into account in the assessment made to determine the fairness of his indemnity.

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Honyvem C-465/04 23 March 2006
Other Criteria to Assess the Indemnity

- An agent's contract states that it is governed « by the provisions of the civil code, special laws concerning the commercial agent mandate and collective agreements in the distribution sector ».
- Does the indemnity provided by Article 17 may be replace, pursuant to a collective agreement, by an indemnity determined according to criteria other than those laid down by Article 17, such for instance criteria from a collective agreement?

- The parties are able to derogate from Article 17 before the contract expires provided that the derogation is not unfavourable to the commercial agent.
- Derogation from Article 17 may be accepted only if ex ante, there is no possibility that at the end of the contract that derogation will prove to be detrimental to the commercial agent.

- Consequently, if it is about a collective agreement, it must be established that the application of that agreement is never unfavourable to the commercial agent. It must be guaranteed that an indemnity greater or at least equal to that resulting from Article 17 will be granted.

- The indemnity which results from Article 17 cannot be replaced, pursuant to a collective agreement, by an indemnity determined in accordance with criteria other than those prescribed by Article 17 unless it is established that such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater than that which results from Article 17.

Marchon Germany GmbH v Yvonne Karaszkiewicz
7 April 2016

- ECJ preliminary ruling on Article 17 (2) (a) on whether new customers introduced by the agent included those the agent started selling other ranges of products to, not previously sold to them by the principal.
- The customers were existing customers of the principal for spectacles.
- The agent sold 3 ranges not previously sold to them
- Held : the meaning of new customers was not to be construed restrictively and would cover existing customers to whom the agent introduced new products

Questions & Answers

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