

# **Applying the law of the principal without the provisions which protect the agent – Denmark**

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## **The Danish Act on Commercial Agents Section 1(2)**

*“The provisions in Sections 22 and 25-27 – that may not be derogated from to the detriment of the agent – may neither be derogated from to the detriment of the agent through an agreement stipulating that foreign law shall be applied to the legal relationship if the legal relationship would otherwise be subject to this law.”*

Section 22: Rules on termination notice (see the Directive Article 15)

Sections 25-27: Rules on compensation upon termination (see the Directive Article 17)

These are “overriding mandatory rules”

## **The Danish Act on Commercial Agents Section 1(3)**

*“If Danish law applies under circumstances where the activities of the agent due to contractual provisions is not to be conducted in a member country of EEC or EFTA, or in one of the Nordic countries, the parties can derogate from all the provisions of this law.*

*Sections 22 and 25-27 can, however, not be derogated from if mandatory provisions exist concerning termination and compensation in commercial agent relationships in the country where the agent is to perform his activities or where the agent is domiciled.”*

## What does this mean?

- All mandatory provisions in the Act can be derogated from if the agent's activities are not conducted in the:
  - Nordic countries
  - EU
  - EFTA
- However, (overriding) mandatory provisions on termination notice and compensation upon termination in the Act cannot be derogated from if mandatory provisions concerning termination and compensation exist:
  - Where the agent conducts his activities, or
  - Where the agent is domiciled



## Why does Denmark have this rule?

- When the Act was prepared in 1988-1989, the majority of the Danish Working Group did not recommend the rule, because the rule would oppose the Directive's principle of harmonization
- However, the Confederation of Danish Industry (the minority of the Danish Working Group) emphasized the importance of the rule being:
  - In the interests of Danish exporters
  - The agents of the excluded countries would not expect protection under the mandatory rules if they did not have such in their own jurisdiction
- The Danish Ministry of Justice therefore implemented the rule

## **How does the rule work? An example from Danish case law...**

- Danish principal
- South African agent
- Worked together for 22 years
- Contract subject to Danish law
- The principal terminated the contract upon 6 months notice

## An example... (continued)

- The contract contained the following clause on damages and compensation:

*"Both parties renounce any claim for damages unless gross negligence has been displayed by one of them. The principle for a possible indemnification is compensation for lost earnings. The compensation amount cannot exceed the last three months' commission.*

*If the Principal gives notice to terminate the Contract without reason the Agent may claim compensation up to an amount corresponding to the commission paid by the principal over the past six months."*

- The provisions of the Act would most likely have resulted in the agent receiving maximum compensation

## An example... (continued)

- However, the Court found that the clause in the contract fully regulated the questions of compensation and damages between the parties. As a result, the South African agent could not invoke Sections 25-27 of the Danish Act on Commercial Agents
- Why? South Africa did not have mandatory rules on termination and compensation in commercial agent relationships
- *See: Chemimpo South Africa (PTY) Ltd. vs. Danisco A/S* (Judgment of the Danish Maritime and Commercial Court of September 2, 2003)



## **But what if the rule did not exist?**

- In absence of the rule the South African agent could have enforced the protective rules in Danish law
- Should the Danish principal then have chosen South African law as the governing law instead?

## **Should the Danish principal choose South African law?**

- Pros:
  - Freedom to customize termination notice and compensation provisions in the contract
  - No protective rules to consider by a competent court
  - Enforcement possibilities taking applicable law in to consideration
    - Against the agent in South Africa
    - Against the principal in Denmark
  - Others?
- Cons:
  - No specific knowledge on South African law
    - Necessary to work with local counsel, costs etc.
  - Jurisdiction (Denmark or South Africa?)
    - Costs, procedural rules, enforcement etc.
  - Others?



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**Questions?**



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## Thank you

Peter E.P. Gregersen advises Danish and international companies within contract law especially in relation to resellers, agents and franchising, including related matters within competition law, intellectual property law and marketing law.

Acting as an advisor in a large number of international cases, he has acquired a substantial expertise within international civil law and procedural law. Peter E. P. Gregersen has conducted numerous cases before the Danish courts and arbitration tribunals, and he also has experience in litigation before the European Court of Justice.

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