ECJ Rules on Choice of Law Clause in Commercial Agency Agreements

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On 17 October 2013, the Court of Justice of the European Union (the "ECJ") answered a preliminary question from the Belgian Supreme Court in the case of United Antwerp Maritime Agencies NV ("Unamar") vs. Navigation Maritime Bulgare ("NMB") (Case C-184/12). The ECJ ruled that EU Member States may create mandatory rules concerning commercial agency agreements that prevail over the law applicable to a commercial agency agreement pursuant to the parties' contractual choice. Moreover, the Supreme Court seems to have implicitly found that Belgian courts have jurisdiction in case a Belgian commercial agent brings an action for compensation following termination even if the parties provided for an arbitration clause in their agreement.

In 2005 NMB (principal) and Unamar (commercial agent) entered into a commercial agency agreement for the operation of NMB's container liner shipping service (the "Agreement"). The Agreement contained an arbitration clause referring all disputes regarding the agreement to the Chamber of Commerce and Industry in Sofia, and stipulated that Bulgarian law applies. Even though the Agreement had been concluded for a renewable 1-year period, NMB decided on 19 December 2008 to extend the Agreement only until 31 March 2009. Unamar considered this to be a case of unlawful termination and claimed compensation before the Antwerp commercial court pursuant to the Belgian Law of 13 April 1995 on commercial agency agreements (*Wet van 13 april 1995 betreffende de handelsagentuurovereenkomst/Loi du 13 avril 1995 relative au contrat d'agence commercial* – the "Law on Commercial Agency Agreements").

The Law on Commercial Agency Agreements implements in Belgian law Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the "Commercial Agency Directive"). While the Commercial Agency Directive sets forth a minimum set of rules governing the commercial agency relationship, the Law on Commercial Agency Agreements in some respects goes beyond the requirements of the Commercial Agency Directive. Amongst other things, it gives the commercial

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agent greater rights to compensation in case the principal terminates the commercial agency agreement unlawfully.

The crux of the problem was that Article 27 of the Law on Commercial Agency Agreements provides that "[*w]ithout prejudice to the application of international conventions to which Belgium is a party, any activity of a commercial agent whose principal place of business is in Belgium shall be governed by Belgian law and shall be subject to the jurisdiction of the Belgian courts.*" This gave rise to the question whether (i) the arbitration clause in the Agreement is enforceable; and (ii) whether the broader compensation rules set forth in the Law on Commercial Agency Agreements are mandatory provisions which override the parties' choice of Bulgarian law in the Agreement.

Supreme Court – Preliminary Question

At first instance level, the Antwerp commercial court sided with Unamar. The commercial court did not recognise the arbitration clause, accepted jurisdiction and ruled on the termination of the Agreement on the basis of Belgian law. On appeal, the Antwerp Court of Appeals overturned the commercial court's judgment. The Court of Appeals held that it lacked jurisdiction in view of the arbitration clause and considered Unamar's compensation claim to be inadmissible.

Unamar challenged the Court of Appeals' judgment before the Supreme Court which decided to stay the proceedings and question the ECJ on whether the Belgian Law on Commercial Agency Agreements can override the parties' contractual choice of Bulgarian law.

Since this was the only question which the Supreme Court referred to the ECJ for a preliminary ruling, the Supreme Court would seem to have already implicitly decided that it has jurisdiction over the matter, indicating that it would find the arbitration clause "null and void, inoperative or incapable of being performed" under Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, to which Belgium is a party.

ECJ – Law Of EU Member State Can Override Choice Of Law Clause In Specific Circumstances

The Convention on the law applicable to contractual obligations (the "Rome Convention") sets forth the rules applicable to choice of law clauses in the EU. The Rome Convention was later replaced by Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the "Rome I Regulation"). However, as the Rome I Regulation applies only to agreements concluded after 17 December 2009, the ECJ examined the Supreme Court's question under the rules of the Rome Convention.

As a general rule, the Rome Convention permits parties to choose the law applicable to their contractual arrangements (Article 3 of the Rome Convention). Yet, the Rome Convention

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provides for an exception in case of "*mandatory provisions", i.e., provisions of the law of the forum which "are mandatory irrespective of the law otherwise applicable to the contract*" (Article 7 of the Rome Convention). The Supreme Court wanted to know whether the Law on Commercial Agency Agreements can be considered to be a "*mandatory provision*" within the meaning of Article 7 of the Rome Convention.

In its response, the ECJ stressed that the Commercial Agency Directive intended to harmonise the laws of the EU Member States regarding commercial agency and was meant to avoid any distortion of competition. The ECJ then continued by contemplating that mandatory rules, or "*rules categorised as public order legislation*", do not allow EU Member States to deviate from their obligation to ensure compliance of national laws with EU law. The ECJ also emphasised that EU Member States should try to give full effect to the principle of the freedom to contract, which constitutes the cornerstone of the Rome Convention.

The ECJ then pointed out that the assessment of whether a national law is "mandatory" should include not only the exact terms of that law, but also its general structure and all the circumstances surrounding it to determine whether "*it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned*". The ECJ clarified that this may be the case when the EU Member State implemented the Commercial Agency Directive by extending its scope, or by making wider use of the discretion afforded by that Directive, or when the EU Member State offers greater protection to commercial agents by virtue of the particular interest which the EU Member State pays to that category of nationals. All of these elements were present in the case at hand.

On a final note, the ECJ specified that, unlike what was the case in previous rulings, the law which was to be rejected in the present case in favour of the law of the forum was that of another EU Member State. In doing so, the ECJ made it clear that the Supreme Court has to be particularly careful in assessing whether the Law on Commercial Agency Agreements is "mandatory" in order not to compromise either the harmonising effect intended by the Commercial Agency Directive or the uniform application of the Rome Convention at EU level.

A copy of the judgment can be found at http://curia.europa.eu/juris/liste.jsf?num=C-184/12.

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