

Unamar: Arbitration clause drowned by gold plated provision in Belgian Law on commercial agency?

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A judgment of the European Court of 17 October 2013 (C-184/12) honors gold plated provisions when considered mandatory. Member state courts are allowed to consider their national gold-plating (the practice of implementing rules tougher than the minimum required by the EU) as being of overriding mandatory character.

Arbitration clause

In 2005, Unamar, a Belgian commercial agent, and NMB, a Bulgarian principal, concluded a commercial agency agreement for the operation of NMB's container liner shipping service. The agreement provided that it was to be governed by Bulgarian law and that any dispute relating to the agreement was to be determined by the arbitration chamber of the Chamber of Commerce and Industry in Sofia (Bulgaria). On 19 December 2008, NMB informed its agent that it was obliged, for financial reasons, to terminate their contractual relationship.

On 25 February 2009 Unamar brought an action before the Antwerp Commercial Court for an order that NMB pay various forms of compensation provided for under the Belgian Law on commercial agency contracts, namely, compensation in lieu of

notice, a goodwill indemnity and supplementary compensation for dismissal of staff. NMB in turn brought an action against Unamar for payment of outstanding freight.

Invalid

Before the Antwerp Commercial Court, NMB raised a plea of inadmissibility, alleging that the Belgian court did not have jurisdiction to hear the dispute before it because there was an arbitration clause in the commercial agency contract. By judgment of 12 May 2009, the Antwerp Commercial Court ruled that NMB's plea of lack of jurisdiction was unfounded. With regard to the applicable law in the two disputes brought before it, the Antwerp Commercial Court ruled, *inter alia*, that Article 27 of the Belgian Law on commercial agency contracts was a unilateral conflict-of-law rule which was directly applicable as a 'mandatory rule' and which thus rendered the choice of foreign law ineffective. Article 27 of the Law on commercial agency states that Belgian law applies and that the Belgian Courts are competent if the agent has his main establishment in Belgium.

Valid

By a judgment of 23 December 2010, the Antwerp Court of Appeal upheld in part the appeal brought by NMB against the judgment of 12 May 2009, ordering Unamar to pay outstanding freight. In addition, it declared that it did not have jurisdiction to rule on the claim for payment of compensation made by Unamar because of the arbitration clause in the commercial agency contract, which it held to be valid. It took the view that the Belgian Law on commercial agency contracts was not part of public policy, nor of Belgian international public policy, within the meaning of Article 7 of the Rome Convention. In addition, it considered that the Bulgarian law chosen by the parties also allowed Unamar, as the maritime agent of NMB, the protection of Directive 86/653, even if that directive provided for only a minimum level of protection. Against that background, in the view of the Antwerp Court of Appeal, the principle of the freedom of contract of the parties had to prevail, and therefore Bulgarian law was applicable.

Request for a preliminary ruling

Unamar brought an appeal in cassation against the judgment of the Antwerp Court of Appeal. The Court of Cassation took the view that it is apparent from the legislative history of the Belgian Law on commercial agency contracts that Articles

18, 20 and 21 of that law must be regarded as mandatory rules of law, owing to the mandatory nature of Directive 86/653 which it transposes into national law. According to the Court of Cassation, it appears from Article 27 of that law that the objective it pursues is to offer an agent whose principal place of business is in Belgium the protection of the mandatory rules of Belgian law, irrespective of the law applicable to the contract.

For that reason, the Court of Cassation decided to stay proceedings and to refer the following question to the Court: *“Having regard, not least, to the classification under Belgian law of the provisions at issue in this case (Articles 18, 20 and 21 of the [Law on] commercial agency contracts) as special mandatory rules of law within the terms of Article 7(2) of the Rome Convention, must Articles 3 and 7(2) of the Rome Convention, read, as appropriate, in conjunction with [Directive 86/653], be interpreted as meaning that special mandatory rules of law of the forum that offer wider protection than the minimum laid down by [Directive 86/653] may be applied to the contract, even if it appears that the law applicable to the contract is the law of another Member State of the European Union in which the minimum protection provided by [Directive 86/653] has also been implemented?”*.

Up to the courts

According to the ECJ, Articles 3 and 7(2) of the Rome Convention must be interpreted as follows: (1) the law of a Member State of the European Union which meets the minimum protection requirements laid down by Council Directive 86/653/EEC on commercial agents; (2) and which has been chosen by the parties to a commercial agency contract; (3) may be rejected by the court of another Member State before which the case has been brought in favour 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; (4) only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by that directive, taking account in that regard of the nature and of the objective of such mandatory provisions.

Crucial

So in order to knock out the law of another member state in favour of the law of the forum, the provision must be crucial for the protection of the legal (political, social, economic) order of the Member State. If the provision is not crucial, there is no reason to deviate from the parties' freedom to choose the applicable law (Article 3 of the Rome Convention).

Assessment

To emphasize the above, the Court states that it is thus for the court of (ano)the(r) Member State, when making the assessment, to take account not only of the exact terms of the law, but also of its general structure and all the circumstances in which that law was adopted.

State judge crucial?

It should be noted that the ECJ did not explicitly rule on the issue of jurisdiction, given that the Court of Cassation had not raised this in its request. But there seems to be a risk, when a Belgian court would consider article 27 of the Belgian Law on commercial agency mandatory, that an arbitration clause in a commercial agency contract (with an agent having his main establishment in Belgium) would be considered invalid. Taking into account that Belgium recently adopted the UNCITRAL Model Law, thus fostering both national and international arbitration, it would be no less than a disgrace when the exclusive jurisdiction of the Belgian State courts would be deemed to be "crucial" for the protection of the legal, political, social or economic order of Belgium. To be continued.