Follow up: The Directive as a public policy (ordre public) provides protection for commercial agents in international contexts

Generally, where parties agree on a choice of law in the contract, the courts will apply that law, but in relation to commercial agency agreements, parties cannot evade mandatory rules provided by the Directive by choosing the law of a non-EU member state.

Background of Ingmar v Eaton (Case C-381/98 from 9 November 2000)

Choice of Law

In 1989, Ingmar and Eaton concluded a contract under which Ingmar was appointed as Eaton's commercial agent in the United Kingdom. The contract was governed by the law of the State of California. It must be noted that under American law the agent has no right for indemnity or compensation after termination of the contract.

The contract was terminated in 1996. Ingmar instituted proceedings before the High Court of Justice of England and Wales seeking payment of commission and, pursuant to Article 17, compensation for damage suffered as a result of the termination of its relations with Eaton.

Articles 17 and 18 of the Directive specify the circumstances in which the commercial agent is entitled, on termination of the contract, to an indemnity or to compensation for the damage he suffers as a result of the termination of his relations with the principal.

The High Court held that the Regulations (UK implemented the Directive by the Commercial Agents Regulations 1993 – „the Regulations“) did not apply, since the contract was governed by the law of the State of California. Ingmar appealed against that judgment to the Court of Appeal of England and Wales, which decided to submit the question to the European Court of Justice (the ECJ), whether Articles 17 and 18 of the Directive 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.

The ECJ (Ingmar GB Ltd. v Eaton Leonard Technologies Inc., Case C-381/98 from 9 November 2000) agreed that the freedom of contracting parties to choose the system of law by which they wish their contractual relations to be governed is a basic tenet of private international law. However, that freedom can be removed by rules that are mandatory (ordre public). The right of indemnity or compensation is such a mandatory rule. The mandatory nature of the right to indemnity or compensation is confirmed by the fact that, under Article 19 of the Directive, the parties may not derogate from them to the detriment of the commercial agent.

Furthermore, it should be borne in mind that the Directive is designed to protect commercial agents, after termination of the contract as defined in the Directive and the purpose of Articles 17 to 19.

Hence the ECJ held that Articles 17 and 18 of the Directive, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member coun-

try and a clause of the contract stipulates that the contract is to be governed by the law of that country. It is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the EU Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

The Ingmar case shows clearly that if the Directive had not existed, the Court of Appeal could have not been able to judge differently than the High Court, because there would not have been a reason for submitting a question to the ECJ. Thus the UK agent would have lost his right to claim indemnity or compensation from the American principal. The choice-of-law-clause was valid with the result that the contract was governed by the law of the State of California, which does not grant the agent indemnity or compensation after termination. The UK Regulations provides that they do not apply where the parties have agreed that the agency contract is to be governed by the law of another state. Under English law, effect will be given to the applicable law as chosen by the parties, unless there is a public policy reason (ordre public), such as an overriding provision, for not so doing. Such overriding provisions are the provisions of the Directive, and in particular those provisions relating to the payment of compensation to agents on termination of their agreements with their principals. The regime established by the Directive is mandatory in nature. Consequently the provisions of the Directive are applicable in circumstances like this.

Full ECJ judgement under:
http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d5d520599fd94249ad88dbfc463b87b625.e34KaxiLc3qMb40Rch0SaxuNbhj0?text=&docid=45788&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=185069

The ECJ in Ingmar was concerned with a choice-of-law clause.

In the next case, the agency agreement contained a choice-of-law clause coupled with an exclusive forum selection agreement.

Background of German Supreme Court (Case VII ZR 25/12 from 5 September 2012)

Choice of Jurisdiction

In 2005, an American company headquartered in Virginia concluded an agency agreement with a German agent. The German agent was responsible for sales not only in Germany, but also throughout the EU. Both parties agreed to resolve all disputes exclusively in courts of Virginia. Furthermore, the contract contained a choice-of-law clause designating Virginia law as governing law. Importantly, the contract expressly excluded the agent's German-law right to a post-termination indemnity.

In 2009, the American principal terminated the agent. The agent filed suit for outstanding commissions and indemnity.

All three courts (District Court in Heilbronn, Higher Regional Court of Stuttgart, German Surpreme Court, Case VII ZR 25/12 from 5 September 2012) held that a jurisdiction clause is not recognized if a stipulation of an exclusive jurisdiction of a foreign court (jurisdiction in Virginia - USA) combined with a choice of law leads to the result, that the court, which is called upon, does not apply international binding law.
Articles 17 and 18 of the Directive ensure that the agent is entitled, on termination of the contract, to an indemnity or to compensation for the damage he suffers as a result of the termination of his relations with the principal, which is inalienable according to Article 19. Furthermore, the provisions of the Directive are mandatory according to the ECJ judgment of Ingmar v Eaton.

Full text under: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=VII%20ZR%2025/12&nr=61762

It is important to note that the German Supreme Court was in no doubt that the ECJ would set down the same ruling. Therefore they did not see any necessity submitting the ruling to the ECJ.

Consequence

To sum up, without the Directive, the commercial agency laws of the 28 Member States are not able to protect agents in cases where the agent carries on his activity in a Member State and the principal is established in a non-member country and the contract stipulates that it is to be governed by the law of that country. Clauses that are agreed as part of the freedom of contract can only be removed by rules that are overriding and mandatory like Articles 17 and 18 of the Directive. Consequently, only the provisions of the Directive can be applied in circumstances like this irrespective of the law by which the parties intended the contract to be governed (of course this only applies when the situation is closely connected with the EU Community).

Again, it should be pointed out that if there had not been a Directive in both cases, the national protective right for agents of UK and Germany could not have been applied due to valid choice-of-law and choice-of-jurisdiction clauses.

Without the Directive as a public policy, multinational companies could choose the law, which is most favourable for them e.g. the one that does not grant the agent indemnity/compensation. As a result, all EU national laws would isolate themselves due to internationally mandatory "particular law".

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For any questions Eckhard Döpfer can provide you with further information: doepfer@cdh.de.