INTERNATIONAL COMMERCIAL AGENCY AGREEMENTS AND PRIVATE INTERNATIONAL LAW

1. Summary

1.1 For the first time since the enactment in 1986 of the European Council Directive on the co-ordination of the laws of member states relating to self employed commercial agents (the “Directive”), the European Court has now been asked to decide the status of the Directive under private international law.

1.2 The case in question is Ingmar v Eaton, which has been referred to the European Court under Article 177 of the Treaty of Rome by the English Court of Appeal.

1.3 The purpose of this brief note is to canvass some of the arguments which might be considered by the European Court when the reference is heard.

2. Background

2.1 The role of commercial agents is well known. They act as independent intermediaries representing their principals in the market. Commercial agents negotiate sales to customers of their principals’ products. They do not buy product from their principals, but arrange sales directly from their principals to the customer. For the provision of this service, commercial agents are typically paid a commission by their principals, calculated as a percentage of the sale price of the product to the customer.

2.2 Commercial agency is of particular importance in international trade. It provides a convenient structure enabling a foreign supplier to penetrate an overseas market. By using the services of an agent established in the targeted overseas market, the principal can benefit from the knowledge and local connection of the agent, avoids the investment and commitment of managerial resources required by the establishment of a branch or subsidiary, and by taking advantage of the agent’s services on a commission basis, can effectively test the overseas market on a “no cure, no pay” basis.

2.3 But the position of the commercial agent is vulnerable. Because of the agent’s role as intermediary, the principal necessarily has perfect knowledge of the customers procured by the agent. As sales volumes build, the temptation for the principal to circumvent the agent and enter into direct relationships with customers can often become overwhelming against the background of an increasing commission bill, often fuelled by repeat orders from the same customers. It is commonplace, therefore, for the commercial agent to find his relationship with his principal brought to an end precisely at the moment where the agent’s efforts have resulted in the establishment of a significant new customer base for the principal in a new market. In this way, the agent becomes the victim of his own success and the principal takes advantage of the goodwill in the principal’s product, created largely as a result of the agent’s efforts.

2.4 For these or similar reasons, some European countries had felt the need, well before the enactment of the 1986 Directive, to give commercial agents a certain level of legal protection. At that time European countries fell essentially into three camps on the question of commercial agency. The common law countries, Great Britain and Ireland, afforded the commercial agent no special protection, firmly wedded to the notion of freedom of contract. Then came the Germans, who felt that agents should have a legal protection.

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1 86/653/EEC, OJ No L.382, 31 December 1986, p.17
3 For a recent example of this principle in the English Court of Appeal, see AMB Imballaggi Plastici SRL v Pacflex Ltd, The Times, July 8, 1999
indemnity payable on termination of their contracts, essentially as a payment to the agent for the goodwill acquired by the principal. This payment was based broadly on one year’s commission averaged over the last five years of the agency. Thirdly, the French also provided for a payment in termination, but concentrated more on compensating the loss of the agent flowing from termination of the relationship. Typically agents would be entitled to about two year’s gross commission as compensation for the loss of continuing ability to earn commission from customers for the principal’s products.

2.5 This, then, was the commercial and legislative background to the enactment in 1986 of the agency Directive.

3. The Directive

3.1 The following policy objectives for making the Directive are revealed from a cursory review of the recitals to the Directive:

- curing disparity in the treatment of commercial agents in the Community to achieve equal conditions of competition (Recital 2)
- harmonisation of the conditions applicable to the carrying on of trade within the Community (Recital 3)
- the protection of commercial agents (Recital 2)

3.2 The Directive goes on to provide certain minimum levels of protection of commercial agents, in particular concerning the payment of commission (Articles 8-11) and compensation and indemnity payments on termination of an agency contract (Articles 17-19), modelled broadly on the French and German systems briefly discussed above.

3.3 For the benefit of commercial agents, the Directive provides at certain points that the protection provided by specified provisions of the Directive is guaranteed to the agent, no matter what the agency contract says. Such protection is afforded in particular to the provisions of the Directive governing termination payments by Article 19, which provides that: The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent…. Similar provisions to Articles 17, 18 and 19 appear in the UK regulations (“Regulations”) implementing the Directive.

4. The Private International Law Issue

4.1 In Ingmar, there was no dispute that Ingmar was a commercial agent appointed to sell the products of its US principal, Eaton, in the UK and Ireland. The interesting point was, however, that although the agent, Ingmar, was established in the UK, the agency contract stated that it was governed by the law of California. The judgement of the English Court of Appeal does not reveal whether the agency agreement also contained a clause dealing with jurisdiction. Given that the parties found themselves before an English court, we may assume therefore either that there were no provisions in the agreement dealing with the question of jurisdiction or (perhaps less likely) that there was a provision conferring jurisdiction on the English courts.

4.2 For Eaton, the case was simple. Since Californian law applied, the UK Regulations could not apply, and Ingmar was therefore not entitled to compensation under Regulations 17 and 18 when the agency agreement was terminated by Eaton in 1996.

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4 Regulations 17, 18 and 19
Ingmar advanced the argument that Regulations 17 and 18 were rendered mandatory by Regulation 19, and indeed applied despite the parties’ choice of Californian law. It is the resolution of these arguments which the English court has now referred to the European Court of Justice.

5. The Arguments

5.1 In fact, the text of neither the Directive nor the Regulations gives much help in suggesting an answer to the question raised in Ingmar.

5.2 Certain passages in the recitals to the Directive might be cited to support the view that the Directive should be interpreted to apply only to trade between member states, and therefore not to the Ingmar case which concerned trade between member states and a third country. For example, Recital 2 highlights the need for harmonisation: where principal and commercial agent are established in different Member States\(^6\), and Recital 3 states that … trade in goods between Member States\(^7\) should be carried on in conditions which are similar to those of a single market.

5.3 Conversely, however, Recital 2 also refers to …differences in national laws… affect[ing] conditions of competition and the carrying on of [commercial agency] within the Community and [being] detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions.

5.4 Whilst clearly the detrimental effect of different regimes applicable to commercial agency is particularly in focus when a principal in one member state appoints an agent in another, unwelcome divergence would also occur and the protection of EU agents might also be prejudiced if the regime of a non-member state applied to agents within the community. In summary, a study of the recitals to the Directive appears to be inconclusive in resolving the question now submitted to the European Court.

5.5 Is the text of the UK Regulations of any assistance? Interestingly, the British government created problems for itself by needlessly trying to address the question of applicable law by including in Regulation 1 additional provisions which have no basis in the Directive. The original version of Regulation 1 provided that the Regulations applied to the activities of commercial agents in Great Britain, but did not apply when the parties chose the laws of another member state. This wording gave rise to the obvious problem that where an agent outside the UK, but within the Community, had a contract subject to English law, he was arguably not protected because his activities were not in the Great Britain under Regulation 1. Having been suitably reprimanded by the Commission, the government has now changed the wording of Article 1\(^8\) to make it clear that the Regulations will apply where, pursuant to a choice by the parties recognised by the law of another member state, English law applies.

5.6 Having chosen specifically to deal with applicable law, the British government then not only created problems by getting the Regulations wrong so far as they dealt with the laws of EU, but also completely failed to address the more interesting question of the choice of a non-EU law, raised in Ingmar. It might be argued (as Ingmar effectively did) that Ingmar’s position is supported by the statement in Regulation 1(2) that the Regulations apply to the activities of commercial agents in Great Britain, subject only to the application of the laws of another member state, or to English law being chosen to apply outside the UK within the Community. To the extent that Ingmar’s activities are in

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\(^6\) Emphasis mine

\(^7\) Emphasis mine

the UK\(^9\), the Regulations apply and although a specific exception is made for the choice of an EU law, no exception is made for the choice of a non-EU law.

5.7 Ingmar also put forward an argument based on Article 3(3) of the Rome Convention on applicable law\(^10\), the same argument put forward by the Commission in its report on the application of Article 17 of the Directive\(^11\). Article 3(3) of the Convention provides that the parties’ choice of a foreign law will not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of mandatory rules of that country. Mandatory rules are rules which cannot be derogated from by contract. Articles 17 and 18 of the Directive (and Regulations 17 and 18) cannot be derogated from to the detriment of the agent, and so applied to protect Ingmar despite the choice of Californian law.

6. The Referral to the European Court

6.1 The Court of Appeal was right to refer the case to the European Court despite the force with which all the above arguments were advanced on behalf of the parties. The Court of Appeal mentioned that neither side had managed to find a case in any EU country on the point. There was no clear or obvious answer to the problem raised, and the European Court should rule to secure a uniform interpretation of the Directive across the Community.

6.2 But there is an additional reason to refer the case to Luxembourg. All the arguments summarised above are essentially of a technical nature - some turn on the precise wording of provisions of the UK Regulations, let alone the Directive. The important considerations in this case are however matters of legal and commercial policy, which can be appropriately resolved only by the European Court.

6.3 To discuss these policy issues, we need to go back to the aims of the Directive mentioned above. Allowing key provisions of the Directive to be set aside by choice of a non-EU law would certainly both cause disparity in the treatment of commercial agents in the Community, and prejudice harmonisation of the conditions applicable to the carrying on of trade within the Community. Disparity and unequal conditions of trade would in practice be likely to occur only in cases concerning non-EU principals, and so of importation of third country goods into the Community. Whilst there is nothing new in treating third country imports differently from intra-Community trade, it is worth taking a moment to consider what the likely practical outcome of this would be. Taking the current case as an example, if the choice of Californian law is upheld, Eaton will not need to provide for the payment of compensation on termination of the contract with Ingmar, nor will certain other provisions of the Regulations apply, dealing for example with minimum notice periods and minimum payment terms for commission. This has the peculiar result of advantaging Eaton, a non EU supplier over an EU supplier who would be bound to accept the liability to provide the protections for the agent set out in the Directive.

6.4 The Advocate General’s opinion on the point of law was issued on 11 May 2000. His opinion supports the agent by answering the following questions:

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\(^9\) Interestingly, this would still leave open the question of Ingmar’s activities in the Republic of Ireland. The Irish regulations contain no provisions similar to Regulation 1 of the British Regulations. So far as Northern Ireland is concerned, a separate but identical set of Regulations applies there.

\(^10\) Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980

• Is the Directive territorially applicable? Yes.

• If territorially applicable, are the provisions thereof relating to the sums payable after termination of the commercial agency contract materially applicable although the contract is expressly governed by the law of a non-EU State as chosen by the parties? Yes.

Advocate General's reasoning:

• The territorial scope of the Directive

  − In Åhlström and Others v Commission (1988)\(^{12}\), the Court acknowledges the territoriality principle as a basis for certain essential competition rules. That principle appears to state that the existence of an element of connection with EU territory in a legal relationship, even if it is contractual, justifies the application of the norm of EU laws in question.

  − If competition in the EU is affected by undertakings which are not resident there, it is legitimate to apply sanctions to them, precisely because of the territorial location of the offending conduct. There is nothing to preclude the actual pursuit of an economic activity, if it takes place in that territory, from being governed by the EU law which is materially applicable.

• The impact of the choice of the law of a non-EU State on the legal rules applicable when the contract is terminated

  − A contractual clause by which parties intend to remove their relationship from the scope of legislation designed to establish a uniform legal framework for the same type of agreement as that which links them brings about a rupture of the desired harmonisation. By definition, the idea of a general right to choose the law applicable clashes head on with any process of normative coordination.

  − The choice, by the parties, of a law which omitted the obligation to indemnify or which neglected it by establishing a less favourable regime, would reduce the protection available to the agent. In that case, the law would place him at a disadvantage as compared with his competitors while at the same time placing his principal at an advantage as compared with other principals.

  − The competitive advantage ensuing from the choice of a different law would encourage any principal, provided that he was in a position of economic superiority vis-à-vis the other prospective contracting party, to insert in the contract a clause designating the law of a non-EU State in order to benefit thereby.

  − Article 19 of Council Directive 86/653\(^{13}\) must be read as precluding the contracting parties from substituting for the indemnity regime defined in Articles 17 and 18 of the Directive indemnity arrangements which are less favourable than those which it lays down.

  − The general scheme of the Directive confirms the mandatory nature of that provision. Mandatory rules do not refer to any right of derogation. On the contrary, they clearly specify that the parties may not contract out of them. Article 19 of the

Directive belongs to that category of mandatory norms, as is clearly shown by the prohibition which it lays down on derogating from Articles 17 and 18.

The European Court is not obliged to follow the Advocate General’s Opinion and the final outcome from the European Court is awaited with interest.

6.5 The decision of the Scottish Court of Session in Douglas King -v- T Tunnock Limited in March 2000 has also raised the stakes for Eaton as the Court followed French law by allowing the agent two years’ gross commission by way of compensation on termination and ignored the concept of mitigation.

6.6 Finally, if the protection of commercial agents is also an aim of the Directive, it cannot be right to allow non-EU principals an easy opportunity to drive a coach and horses through the Directive by choosing an applicable law which does not give the protection it provides for.

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