You can't always get what you want

From reinstatement to prescription in international commercial agency agreements

David Diris, MA
David.diris@kockspartners-law.be

Kocks&Partners
Legrandlaan 41
B-1050 Brussels, Belgium

T +32 2626 14 41
F +32 2626 14 40
info@kockspartners-law.be

1. Belgian law and reinstatement have always been a difficult marriage. In general, Belgian law does not know the legal construction of 'reinstatement': even an unlawful termination will definitely terminate the agreement. One can only claim indemnities, not the reinstatement.

In the following case, a German commercial agent was confronted with the unexpected consequences hereof, when he brought his Belgian principal to court.

I. FACTS

2. German commercial agent A *(hereafter 'Agent A')* closed an exclusive commercial agency agreement with a Belgian company B *(hereafter 'Principal B')*. Agent A would help distribute the products of Principal B, the principal, on the West-German and Austrian market.

Both parties agreed to render Belgian (agency) law applicable on the agency agreement. As competent Court for any disputes regarding the agency agreement, parties referred to the Court of the place of the principal's registered office (being in fact the Court of Commerce of Dendermonde, Belgium).

3. After 16 years of collaboration, the agency agreement was terminated by Principal B, with an insufficient notice period. Moreover, Principal B directly informed the clientele of Agent A in the contractual territory of the termination of the agency agreement.

II. LEGAL PROCEEDINGS

4. Ignoring the agreed forum clause, Agent A decided to bring the case before the German Courts. Agent A claimed the reinstatement of the agency agreement for the length of the legal notice period, together with a new letter of the Principal B in which the latter informed the clientele that they would have to send their orders to Agent A till the end of aforementioned legal notice period.

Where the Landgericht Nürnberg-Fürth granted these claims of Agent A in a speed procedure, the decision was reversed after opposition of Principal B, ruling that the German Courts had no jurisdiction. Agent A filed appeal at the Oberlandesgericht Nürnberg, but after a negative so-called 'Gerichtlicher Hinweis' *(a sort of pre-trial information by the Court, allowing parties to withdraw claims which are estimated to be without any chance)*, Agent A decided to withdraw the appeal *('Zurücknahme der Berufung' – article 516 German Judicial Code)*.

III. REINSTATEMENT TURNS INTO PRESCRIPTION

5. Agent A now turned to the Court of Commerce Dendermonde, following the forum clause. As mentioned above, Agent A – contrary to the German procedural law – could not claim reinstatement under Belgian (procedural) law. Therefore, Agent A claimed the indemnity in lieu of notice *(art. 18, § 3 Belgian Agency Law, hereafter BAL)* and a clientele indemnity *(art. 20 BAL)*.

However, Agent A lost sight of article 25 BAL: legal actions arising out of an agency agreement must be initiated within 1 year after termination of the agency agreement. Therefore, Principal B believed the claims of Agent A were barred by statute of limitations.

6. In first degree, the Court of Commerce Dendermonde agreed with Principal B.[1] Although the Court recognized that – in accordance with article 2244 Belgian Civil Code *(hereafter BCC)* – the German procedure could interrupt the **term of limitation**, the Court decided that the withdrawal of the German procedure should be qualified as a withdrawal from proceedings out of article 826, 2 Belgian Judicial Code *(hereafter BJC)*. Under Belgian procedural law, withdrawal from proceedings out of article 826, 2 BJC also implicates that the effect of the interruption of the limitation is discontinued.

7. The Court of Appeal Ghent reversed the decision of the Court of Commerce Dendermonde.[2] The Court of Appeal believed – correctly in my opinion – that because the withdrawal under German procedural law is similar to the withdrawal under Belgian procedural law, it does not necessarily have similar effects.

The Court of Appeal acknowledged that the German procedure could have interrupted the limitation. Belgian literature and jurisprudence accept that even a writ of summons filed before a Court without jurisdiction, has an interrupting effect on the prescription.[3]

8. However, the Belgian Court of Cassation ruled in 1991 that the prescription is only interrupted for those rights which are specifically claimed in the writ of summons.[4] In 2001, the Court of Cassation added to the above also the claims which are virtually included in the writ of summons.[5]

[1] Court of Commerce Dendermonde, 5 December 2006, A.R. 613/06, *unpubl.*
[2] Court of Appeal Ghent, 31March 2010, 2007/AR/1327, *unpubl.*
[3] A. VAN OEVELEN, 'Recente ontwikkelingen inzake de bevrijdende verjaring in het burgerlijk recht', *R.W.* 2000-01, 1442, referring to Court of Commerce Antwerp, 27 March 1990, *Rechtspr. Antw.* 1992, 59.
[4] Cass., 3 June 1991, *R.W.* 1991-92, 412.
[5] Cass., 7 May 2001, *Arr.Cass.* 2001, 819.

Much to the surprise of Agent A, the Court of Appeal Ghent ruled that the claims before the Belgian Courts *(indemnity in lieu of notice and clientele indemnity)* were **not the subject of the procedure before the German Courts, nor virtually included**. The Court of Appeal stated that the claims in the German procedure aimed at the reinstatement of the agency agreement, while the claims before the Belgian Courts had arisen from the termination of the agency agreement.

On these grounds, the Court of Appeal decided that the claims of Agent A were barred by statute of limitation.

III. COMMENTS

9. When following a rather rigid interpretation of the jurisprudence of the Belgian Court of Cassation, one can agree with the Court of Appeal Ghent: the claims of indemnities were indeed not expressly included in the procedure before the German Courts.

However, an indemnity in lieu of notice is – like the word says itself – only due when no (or insufficient) notice period is given. Under Belgian commercial agency law, giving a notice period is the rule.[6] Agent A did in my opinion nothing more or less than claiming his notice period in the German procedure, as German procedural law foresees the possibility to reinstate the agreement.

The Court of Appeal Ghent now punishes Agent A for the fact that Belgian law does not know this possibility of reinstatement. Did the Court of Appeal forget that under Belgian commercial agency law the notice period prevails over the indemnity in lieu of notice, like the in kind execution prevails over paying an indemnity under common Belgian contract law?

[6] P. COLLE, 'Kroniek handels- en distributieovereenkomsten', *R.W.* 2007-08, 186.

The rejection of the clientele indemnity is even more problematic. Agent A asked the German Court, together with the reinstatement of the agreement, to order that Principal B would have to take measures to safeguard the clientele of Agent A (i.e. a letter to the clientele). A claim of a clientele indemnity would be illogical and even impossible at that moment, as Agent A was claiming the reinstatement and waived the unlawful termination of the agreement in accordance with German procedural law.

10. Of course, one could argue that Agent A created these problems himself by ignoring the written forum clause in his agreement (which attributed clearly the exclusive jurisdiction to the Belgian Courts). However, not all agency agreements will contain such forum clauses, leaving the jurisdiction and applicable law to be open questions.

The decision of the Court of Appeal Ghent shows that disputes relating to international agency agreements should be handled with care. Although the national legislations were more or less harmonized by the Directive, pitfalls still exist on those points not governed by the Directive.