

Comments under Belgian law to 4 recent cases of the European Court of Justice on commercial agency

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I. ECJ 9 November 2000, Ingmar vs. Eaton, C-381/98

1. In this case, the ECJ dealt with the question whether articles 17 and 18 of the 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* (hereafter: *Council Directive*) are applicable when the agent provided his services in a Member State but the principal is located in a non-Member State and the agency agreements contains a choice of law in favor of the law of that non-Member State.

The ECJ decided that even when the principal is established in a non-Member State, articles 17 and 18 of the Council Directive are applicable when the commercial agent carried out his activity in a Member State, notwithstanding any choice of law.

2. Out of the preparatory works concerning article 27 of the Belgian Law of 13 April 1995 *regarding Commercial Agency Agreements* (which implements the Council Directive, *hereafter: BCAL*), it is clear that the Belgian legislator wanted to protect a commercial agent whose principal place of business is located in Belgium, even if his activities are outside Belgium. The majority of the literature therefore concluded that a commercial agent with his principal place of business in Belgium, will be protected by the Belgian law, notwithstanding a different choice of law. This majority found support for its view in the aforementioned Ingmar-decision, as the ECJ considered certain articles of the Council Directive as mandatory (just as the Belgian legislator considered mandatory certain articles of the BCAL).

2.1 However, the difference between the view of the ECJ and the Belgian legislator concerns the fact that the ECJ grants protection on basis of the place of the activities of the agent, while the Belgian legislator refers to the principal place of business.

2.2 Belgian literature is also divided over the question whether this protection under article 27 BCAL is still applicable if parties have chosen the law of another EU-member state, which has also implemented the Council Directive.

II. ECJ 10 February 2004 Mavrona vs. Delta, C-85/03

3. In the Mavrona vs. Delta-case, the ECJ was asked for a preliminary ruling concerning the question whether a person who acts on behalf of a principal but in his own name, comes within the scope of the Council Directive.

In a short answer, the ECJ made it clear that the Council Directive is only applicable on persons who act on behalf and in name of a principal.

4. The Belgian jurisprudence and literature always made a clear distinction between commercial agent (in name and on behalf of principal), broker (on behalf of principal but in own name), distributor (on own behalf and in own name) and commercial representatives (under authority of an employer). A person who acts in his own name but on behalf of a third, would

qualify as a commission agent under article 12, Book I, Title VI, Belgian Code of Commerce.

III. ECJ 16 March 2006, Poseidon vs. Marianne, C 3/04

5. In another preliminary ruling, the question was raised whether a person who negotiates only 1 contract and its extension year to year in return for a commission, is within the scope of the Council Directive.

The ECJ refers to article 1 (2) of the Council Directive and states that to fulfill the condition of continuing authority, it is required that the principal should have conferred continuing authority to negotiate successive extensions. The Advocate-General made the distinction between the situation where the agent was given the task to negotiate one contract and the situation where the agent was given the task to negotiate one contract and its extensions. If in the first situation, the mere fact that the intermediary and the principal maintained relations throughout the contractual period is, in itself, insufficient to demonstrate such authority.

6. Belgian authors considered this view of the ECJ as a quite broad interpretation of the concept 'continuing authority'. After this decision, Belgian Courts ruled that occasionally using the services of an agent, does not constitute the necessary sustainable relationship. Such occasional services are still not enough to qualify as a commercial agent, even when there is a continuous

relationship¹. However, Belgian Courts agreed with the ECJ that the fact that the agent only succeeded in closing a contract with 1 client, does not necessarily mean there was no continuing authority².

**IV. ECJ 28 October 2010, Volvo Car vs. Autohof Weidensdorf,
C-203/09**

7. The German Bundesgerichtshof asked a preliminary ruling of the ECJ on the question whether a commercial agent is entitled to an indemnity in the event of contractual termination of the contract by the principal if a serious ground for immediate termination of the contract existed but was not the cause of the termination.

In the opinion of the ECJ, article 18(a) of the Council Directive precludes that a commercial agent is deprived of his goodwill indemnity when the principal establishes a default by that agent which occurred after notice of termination of the contract was given, but before the contract expired and which was such as to justify immediate termination of the contract in question.

8. Although not expressly stipulated in the BCAL, Belgian jurisprudence and literature agree that during the given notice period both parties have to respect all stipulations of the agency

¹ Court of Commerce Kortrijk 5 February 2004, A.R. 02608/03, *unpubl.*, referred to by B. LAMBRECHT, 'Kroniek van 12 jaar rechtspraak over het toepassingsgebied van de Handelsagenturwet', DAOR 2007, 392-393.

² Court of Appeal Ghent 20 December 2004, A.R. 2003/Ar/2701, *unpubl.*, referred to by B. LAMBRECHT, o.c., 394.

agreement which has been terminated³. As a result, termination with immediate effect when the agent seriously fails to carry out his obligations, remains possible. In accordance with article 20 BCAL, the agent shall not be entitled to an indemnity where the principal has terminated the agency contract because of a serious failure of the agent.

In my opinion, if the serious failure is discovered within the notice period, the principal can still terminate the agreement with immediate effect. If the discovery only takes place after the notice period, the principal could try to recover damages under common law rules.

³ Court of Appeal Antwerp 24 February 1988, DAOR 1991, 65.