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Case No: CC/2009/APP/0385

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
30/10/2009

B e f o r e :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between:

ACCENTUATE LIMITED
Appellant
- and -

ASIGRA INC (a company incorporated in Canada)
Respondent

Mr Philip Moser (instructed by Dobsons) for the Appellant
Mr Igor Ellyn QC and Mr Peter de Verneuil Smith (instructed by Clyde & Co LLP) for the
Respondent
Hearing dates: 20th October 2009

HTML VERSION OF JUDGMENT

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Mr Justice Tugendhat :

1. This appeal from the decision of DJ Levinson ("the District Judge") sitting at Chichester District Registry on 28 May 2009 raises questions as to the relationship between EU law and the law of arbitration.

2. The Claimant is an English company. The Defendant is a Canadian company based in Ontario. On 19 January 2004 they had made an agreement headed Master Reseller Agreement ("MRA") for the distribution by the Claimant of software products of the Defendant. The Defendant gave notice to terminate the agreement on 13 November 2006. The MRA contained a choice of law clause, that is clause 18.3, which contains a choice of the laws of Ontario and the federal laws of Canada as the governing law ("Ontario law"). It also contained an arbitration clause, clause 18.5, requiring that all disputes be settled by arbitration to be held in Toronto.

3. I shall refer to the Defendant as the Licensor, and to the Claimant as the Distributor.

4. On 6 September 2006 the Distributor informed the Licensor that it was preparing a claim for breach of contract together with a further claim for compensation under the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations"). On 5 June 2007 it quantified this by letter in the sum of £1.75m. On 21 June 2007 the Licensor gave notice of arbitration. On 31 July 2008 the Distributor issued a Claim Form and on 4 August 2008 the District Judge gave permission to the Distributor to serve the Licensor out of the jurisdiction. On 6 February 2009 the Licensor applied to the District Judge to set aside her order of 4 August and service. The Licensor also applied for a stay of the proceedings pursuant to s.9 of the Arbitration Act 1996. On 29 May 2009 the District Judge declared that this court has no jurisdiction to hear the Distributor's claim, granted the Licensor's applications, and gave permission to the Distributor to appeal.

5. In the arbitration the Licensor claimed a declaration that the Distributor had no claims against the Licensor under the MRA upon any basis. The Distributor protested that arbitration proceedings would be pointless. It contended that it is unlawful to seek to contract out of the Regulations, with the result that the English courts would not be bound by any finding by the arbitral Tribunal to the effect that there was no claim under the Regulations. Nevertheless, the Distributor participated in the arbitration, submitting to the Tribunal that the claim under the Regulations was outside the scope of the arbitration clause. But in the alternative, the Distributor included a counterclaim for compensation under the Regulations.

6. The arbitrators issued a number of Awards. On 20 December 2007 they denied the Distributor's request for a declaration that the Regulations were outside the scope of the arbitration clause. On 3 March 2008 they determined that the Regulations did not apply in determining the rights and liabilities of the parties, but that these were to be determined according to Ontario law. On 10 February 2009 they declared that the Licensor was liable to the Distributor for certain direct losses unrelated to the Regulations.

7. The Licensor had no interest in enforcing these Awards, in the sense of taking steps to have the quantum assessed and recovered. In a monetary sense the Award was against the Licensor. But in substance the Licensor had achieved what it had set out to achieve. The Licensor's interest in the Award is to use it as a means of defeating the claim that the Distributor was bringing in England for compensation under the Regulations. The Licensor's case is that if the Distributor wished to challenge the Award then it should have done so by an appeal or an application to set it

aside. It is the Licensor's case that any such step must be taken in the courts of Canada. It is not suggested that an application to set aside a Canadian award can be made in England. The Distributor has taken no such steps in Canada. It submits it does not need to, because the Award is contrary to public policy and a nullity under EU law.

8. The Distributor submits that the obligation of the English court is to give effect to EU law in priority to the arbitration award. The law of the European Union is not foreign law, and is a matter of which the English courts must take judicial notice: European Communities Act 1972, s3, Sch 1 Pt 1. The Licensor submits it is the other way round.

9. The Arbitration Act 1996, in succession to the Arbitration Act 1975, now gives effect to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards which has been ratified by all Member States: Chitty on Contracts 30th ed para 32-011. Canada is a party to that Convention.

10. If that were the only issue between the parties at this stage, it would be a point of law. But the Licensor also submits, in the alternative, that on the true construction of the MRA, and on the facts, the Distributor is not an agent within the meaning of the Regulations. If that be so, the Distributor would have no claim for compensation. But it would also follow that the Distributor would have no basis for submitting that the Award was not binding upon it. So the Licensor should not have to defend the claim brought in England on its merits, but that claim should be stayed.

11. Accordingly, by a Respondent's Notice, the Licensor seeks to uphold the Order of 29 May on the grounds that the Distributor has no arguable case, and there is no serious issue to be tried, that the Regulations apply to the MRA, as a matter of construction of that agreement, or in the light of the facts. The Licensor also seeks to uphold the Order of 29 May on a ground unrelated to the merits of the dispute, namely that the Distributor did not make full and frank disclosure.

THE PROVISIONS FOR SERVICE OUT OF THE JURISDICTION

12. The provisions of the CPR in force when permission was given to serve out of the jurisdiction were CPR 6.20(5)(c), 6.20(6) and 6.21(1) and (2A), which, so far as material, read as follows:

"6.20 ... a claim form may be served out of the jurisdiction with the permission of the court if

(5) a claim is made in respect of a contract where the contract ... (c) is governed by English law ...

(6) a claim is made in respect of a breach of contract committed within the jurisdiction...

6.21(1) An application for permission under rule 6.20 must be supported by written evidence stating: (a) the grounds on which the application is made and the paragraphs of rule 6.20 relied on; (b) that the claimant believes that his claim has a reasonable prospect of success....

6.21(2A) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim".

13. What these provisions require is explained in the case law, and is not in dispute. The Distributor emphasises that all that is required is that it should show a "good arguable case" that this Court has jurisdiction, and that on the merits all that it must show is that there is a serious

issue to be tried: *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 A.C. 438, and generally: White Book 2009, paras. 6.37.1 and 6.37.15.

14. The Licensor emphasises that in *Albon v Naza Motor Trading SDN BHD* [2007] 1 Lloyd's Law Rep 297, 302 para 15 Lightman J stated to have a good arguable case "generally speaking the applicant for permission must show a strong probability that the claim falls within the letter and the spirit of the Gateway". The test of a "serious issue to be tried" is the same merits test as a "reasonable prospect of success" (*BAS Capital Funding Corp v Medfino Ltd* [2004] 1 Lloyd's Rep 311). As Lightman J said in the same paragraph of *Albon*, that is a lesser hurdle than a good arguable case.

15. The Distributor submitted to the District Judge that permission should be granted on the following four grounds:

i) that the contract is governed by English law, namely the Regulations, because the Ontario choice of law clause in the contract is contrary to the mandatory provisions of the Regulations. It submits that a choice of arbitration in Ontario is also contrary to the same mandatory provisions of the Regulation. It relies on *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* [2000] ECR I-9305 paras 21-26;

ii) that the failure to pay the compensation due to it under the Regulations is a breach of an implied term, and it occurred in England because the payment was due in England. Alternatively, it submits that the termination of the contract on 4 August 2006 was a breach within the jurisdiction;

iii) that England is the most appropriate forum because it is incorporated in England, the contract was performed in England and the payment was due in England;

iv) alternatively, that the English court has "sui generis jurisdiction and because it seeks a remedy to which it is entitled pursuant to mandatory provisions of EU law, in order to give effect to the overriding rules of EU law".

THE DISTRICT JUDGE'S JUDGMENT

16. In the application by the Licensor to set aside leave, the Licensor set out the following grounds:

i) a failure to give full and frank disclosure;

ii) a failure to adduce written evidence in support of CPR 6.21(1), in particular CPR 6.21(1)(a), and a failure to state a belief that it had reasonable prospects of success CPR 6.21(1)(b);

iii) the contract was governed by Ontario law;

iv) an arbitration was underway in Canada;

v) the relationship between the parties was one of distributorship, not agency, and the Regulations did not apply.

17. The District Judge rejected the submission that there was a lack of written evidence and that there had been a failure to disclose what ought to have been disclosed, or a material irregularity, in paras 35-41, 58-62 and 64-65 of her judgment.

18. She held that the failure to state a belief that it had reasonable prospects of success was

remediable under the CPR rules 3.1 and 3(2)(m), and that she should remedy that, there being no prejudice to the Licensor: paras 43-44 and 63.

19. The District Judge considered the case of Ingmar, and distinguished it, on the basis that it concerned a choice of law clause, rather than, a case where she accepted there was an arbitration which was still in the process of determination, and in which the Distributor had participated. She held that while that remained the situation, the Distributor could not issue proceedings in England. See paras 45-57 of her judgment.

20. The District Judge considered whether the Distributor had shown a sufficiently strong case for permission to serve out to be granted. She concluded that there was a real issue for the determination of the court, with a reasonable prospect of success, that the Distributor was an agent: paras 58-62 of her judgment.

21. In its Appellant's Notice the Distributor contended, and the Licensor now accepts, that the point that the Canadian arbitration was still proceeding, which the District Judge had accepted, was erroneous. Both parties have asked for permission to adduce expert evidence on Ontario law. I gave permission. But since the parties agreed on this point, I do not need to consider this point further.

22. In its Appellant's Notice the Distributor further contended that the District Judge erred in failing to find that the choice of Ontario law and Ontario arbitration, if upheld, would be an evasion of EU law. The English court is obliged to give effect to the mandatory rights under the Regulation. Further, on its true construction, the arbitration award does not decide otherwise, and, in the alternative, if it did, then the court could not stay the English proceedings, but would be obliged to refuse to recognise the award. Because she had accepted the erroneous submission as to the arbitration proceedings being pending, the District Judge had not addressed this point.

23. The Licensor issued a Respondent's Notice dated 24 July 2009 in which it seeks to uphold the judgment of the District Judge on the grounds that (1) there exists no good arguable case or serious issue to be tried on the contention that the Distributor was an agent, and (2) the full and frank disclosure point.

THE CASE THAT THE DISTRIBUTOR WAS AN AGENT

24. If there is no sufficiently arguable case that the Distributor is an agent within the meaning of the Regulations, then there is no basis for the Distributor's claim for compensation, and there can be no criticism of the Award. So I shall consider this point first. This is an appeal by way of review under CPR 52.11. I can see no error on the part of the District Judge in relation to this point. Nevertheless, in deference to the detailed submissions I have received, and the importance of the point, I set out the reasons which would lead me to reach the same conclusion as the District Judge.

25. It is the Distributor's case that its only entitlement to compensation arises from UK statute law, specifically Regulation 17 of the Regulations, which in turn implement EU law in the form of EU Council Directive 86/653/EEC on the co-ordination of the laws of member States relating to self-employed commercial agents (OJ No. L382, 31 December 1986, p. 17; "the Directive").

26. The definition of a "commercial agent" in Regulation 2(1) has two limbs, as follows:

"2.—(1) In these Regulations—

"commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal"), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that

principal".

27. The Distributor relies only on the first limb. It submits that it had continuing authority to negotiate the sale or purchase of goods on behalf of the Licensor.

28. The Distributor submits that for the purposes of defining a commercial agent pursuant to Reg. 2(1), the term "negotiate" is to be given a very wide definition.

29. For example, in the recent case of *Fryer v Ian Firth Hardware Ltd* [2008] 2 Lloyd's Rep 108, at paras. 17 and 18 Patten J (as he then was) said:

[...] The word "negotiate" is not defined in the Regulations but Bowstead on Agency [18th ed.] (at para 11–018) suggests that "one who canvasses on what one would call a retained basis" could be a commercial agent unless actually forbidden to solicit contractual offers".

30. The finding in *Fryer* was informed in part by the earlier decision of Fulford J in *PJ Pipe & Valve Co Ltd v Audco India Ltd* [2005] EWHC 1904. Both those cases in turn are based on the definition of "negotiate" in commercial agency cases in *Parks v Esso Petroleum Co Ltd* [1999] 18 Tr L Rep 232; [2000] EuLR 25. In that case there was extensive argument, including reference to the German text of the version of the Directive which was then current. Morritt LJ (as he then was) held that "negotiate" meant what the Oxford English Dictionary said it meant: "to deal with, manage or conduct" (see at 32D to 33F).

31. The Distributor submits that there is at least a serious issue to be tried that the Distributor was "dealing with, managing or conducting" the sale of the Licensor's goods to third party customers. That was the whole purpose of the retainer. This is so whether reference is made to the documents or to the evidence of Mr. Wise, the Managing Director of the Distributor.

32. Mr Wise states that at no time did the Distributor ever purchase a software licence from the Licensor, nor take title in any of the goods that were supplied to customers of the Licensor. The Distributor's function was to persuade customers to purchase software from the Licensor and to collect the licence fees. The Distributor entered order details of the customer on the Licensor's website, including full details of the customer. The Distributor received payments for the licenses, updates or subscriptions, and passed them on to the Licensor, after deducting its commission and any relevant UK taxes.

33. The Distributor relies on clause 3.1(ii) of MRA, which is headed 'License Grants'. It provides that the Licensor will grant to the Distributor a right and license during the term of the agreement to "market, distribute and offer the Software to the Licensees".

34. The Distributor also relies on clause 5.1 which provides that the Distributor will provide DS-Keys to 'Resellers' "on behalf of" the Licensor.

35. The Licensor notes that the MRA includes both the substantive agreement between the Distributor and the Licensor, and, at Schedule C, a form of Software Licence Agreement which the end user of the software has to enter into with the Licensor. The end user is to do this by pressing a virtual button which appears on the screen marked with the words "I accept". This is a requirement of clause 6.5

36. The Licensor relies on the provisions of the MRA as follows.

37. The recitals provide that:

"[the Licensor] has available for sale and distribution, certain backup/restore data storage

management technology known as 'ASIGRA Televaulting' and other software products;...

[the Distributor] desires to act as a Master Reseller for and distribute [the Licensor]'s software ..."

38. By Clause 1.1(v) 'software' is defined to include some items of hardware associated with its use.

39. Clause 4.1 provides that:

"... [the Distributor] will use commercially reasonable efforts to market and promote the sale of the Software through the appointment of qualified Resellers and shall actively manage such Resellers..."

40. Clause 6.5 provides that the Distributor:

"may not negotiate the terms of any Software Licence Agreement with any prospective Licensee nor agree to any conflicting, different or additional terms."

41. Clause 7.1 provides that "the pricing to the Distributor for licenses for the Software" will be as set out in Schedule A.

42. Clauses 7.2 and 7.3 provide:

"7.2 Pricing of Licences, Etc. [the Distributor] will be free to determine the price charged to Licensees for the Software and the price to be charged to Licensees for any MR Support or for the creation of MR Customizations provided by Master Reseller under MR Agreements..."

7.3 ... Payment by [the Distributor] to [the Licensor] for Software licensed by Licensees will be due as follow: one hundred per cent (100%) is due with the submission of the DS-Key Request Form from [the Distributor] to [the Licensor], prior to [the Licensor] issuing a DS-Key."

43. A DS-Key is defined in Clause 1.1(d) as the hardware and software dongle which enables the software to function properly.

44. The pricing in Schedule A provides that the payments to be made to the Licensor by the Distributor shall be based on a Schedule 1A, but that the Distributor:

"shall receive a discount of ... 45% off the List Price for the Software and Tools ... that it purchases from [the Licensor] and provides to the Resellers and Licensees..."

45. Schedule A provides that:

"[the Distributor] will execute a DS-Key Request Form between [the Distributor] and [the Licensor]. [The Distributor] will collect all fees due and owing from Licensee in respect of the Software License Agreement and the MR Services Agreement and will remit applicable fees to [The Licensor]. [the Licensor] shall provide the DS-Keys to [the Distributor] upon receipt of appropriate documentation and fees."

I have not been shown Schedule 1A, and it has not be suggested to me that the DS-Key or any other item of hardware is separately priced

46. Clause 6.1 provides that the Distributor will submit Purchase Orders to the Licensor for the Software. I have not seen any examples of these.

47. Clause 15 of MRA provides:

"PROHIBITED PRACTICES[the Distributor] may not make any contracts or commitments on behalf of [the Licensor] nor make any representations, covenants, warranties or other representations regarding the Software other than those authorised herein or by [the Licensor] in writing."

48. Clause 18.13 provides:

"Independent Contractors. The parties to this Agreement are independent contractors and are not agents or representatives of each other. Neither party will have the power to bind the other, nor will either party misstate or misrepresent its relationship hereinunder."

49. In summary, as I find, the MRA makes provision for the supply primarily of software to an end user, but there is also some hardware to be provided in association with the provision of the software. At least that part of the hardware that is constituted by the DS-Key is to be provided to the end user only after the end user has become a party with the Licensor to the Software License Agreement.

50. The evidence of the Licensor includes the following, Mr Wood, the solicitor for the Licensor, states that the Distributor:

"purchased software licenses from [the Licensor] at a 45% discount ... and sold the licenses to its own customers at whatever mark up it could negotiate with its customer. Upon payment by [the Distributor] for a software licence, [the Licensor] provided computer disks to [the Distributor] together with licence keys and a dongle to enable [the Distributor]'s client to run the software... [the Distributor]'s customer was required to 'click' its agreement to a 'EULA' namely, an end user license agreement".

51. The Licensor submits that performance of the Distributor's obligations is carried out by a sale of hardware from the Licensor to the Distributor, and a sub-sale by the Distributor to a Licensee, whether directly, or through a Reseller. I have not been shown any documents to support the contention that (or detailed explanation of how) the Distributor enters into contracts of sale with the end user Licensees in respect of the hardware that is supplied. I have seen no reference to any invoices having been addressed by the Distributor to the end users.

52. The Licensor relies on *Sagal (Trading as Bunz UK) v Atelier Bunz GMBH* [2009] EWCA Civ 700. In that case the Court of Appeal, on 3 July this year, (and so subsequently to the decision of the District Judge), provided guidance on the meaning of "commercial agent". Article 1(2) of the Directive was explained to have two limbs. The first limb is authority to negotiate on behalf of the principal (paragraph 12):

"The first limb of the definition envisages that the agent does not have authority to contract on his principal's behalf but only has authority to negotiate terms on behalf of his principal and then refer back to him to see whether he wants to make a contract on certain terms with a third party customer."

53. *Sagal* contracted in its own name. This case authority for the proposition that those who contract in their own names are not within the scope of the Regulations.

54. It may be that the draughtsman of the MRA envisaged that there would be sales of hardware by the Licensor to the Distributor, and sub-sales by the Distributor to the end user who was to enter into the Software License Agreement. But supply of hardware is so subsidiary a part of the subject matter of the MRA that this interpretation seems very technical, not to say a little

unrealistic. Although Schedule A includes the words "... the Software [the Distributor] purchases from [the Licensor]" (see para 44 above), I can see no way in which the Distributor could be said to purchase software (whether or not it purchased hardware). Schedule C makes clear that a direct contractual relationship was envisaged between the Licensor and the end user, not a licence to the Distributor followed by a sub-licence from the Distributor to the end user.

55. Although the supply of the hardware is ancillary to the supply of the software, the supply of the hardware is critical to the Distributor's case. The Regulations apply to a person who negotiates the sale or purchase of "goods": see Regulation 2(1) cited in para 26 above. If no hardware was to be supplied under the MRA, then the Regulations would not apply at all.

56. Software is intellectual property, not a chattel, but hardware is a chattel. In so far as the performance of the MRA leads to the formation of a Software Licence Agreement in the form of Schedule C, then that is an agreement made between the Licensor and the end user.

57. In so far as the performance of the MRA leads to the supply to the end user of hardware, the legal analysis is not so clear on the evidence before me.

58. In my judgment there is a real prospect of the Distributor succeeding on its submission that the substantive obligation of the Distributor was to find end users who would enter into Software Licence Agreements with the Licensor. In respect of this aspect of the Distributor's contractual obligations the Distributor can plausibly be seen as acting as an agent.

59. In the present case, in so far as the Software Licence Agreement is concerned, it is clear that the Distributor did not have authority to contract on the Licensor's behalf. What the Distributor did seems to me likely to be found to come within the definitions of negotiation adopted by Patten J and Morritt LJ in Fryer and Parks.

60. Accordingly, I find that the Distributor has satisfied me that it has a real prospect of success on the merits of its claims.

61. On the particular facts of this case, this conclusion takes the Distributor some way towards showing that it has a good arguable case that its claims come within one or both of the provisions of CPR 6.20 upon which it relies.

THE ARBITRATION AWARD AND THE REGULATIONS

62. Since the District Judge did not decide this point, I have to approach it afresh.

63. Regulation 17 sets out the entitlement to compensation as follows:

Entitlement of commercial agent to indemnity or compensation on termination of agency contract

17.—(1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.

(2) Except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified. [...]

(6) [...] the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.

(7) For the purpose of these Regulations such damage shall be deemed to occur particularly

when the termination takes place in either or both of the following circumstances, namely circumstances which—

(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or

(b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal. [...]

64. Regulation para 19 is the important provision at the centre of this dispute:

19. The parties may not derogate from regulations 17 and 18 to the detriment of the commercial agent before the agency contract expires.

65. The Arbitration Act 1996 s.9 provides:

"9(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. [...]

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On the application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. [emphasis added by the Licensor]

66. The Arbitration Act 1996 s.101 provides that:

"A New York Convention award shall be recognised as binding between the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales..."

67. The Licensor is relying on the Tribunal's award by way of defence or otherwise in England and Wales.

68. The Arbitration Act 1996 s.103 provides that:

"(3) Recognition or enforcement of the award may ... be refused if it would be contrary to public policy to recognise or enforce the award".

69. Where a claimant commences proceedings in England, and a defendant applies for a stay for arbitration, there are occasions when an issue arises between the parties as to whether there is in force between the parties a valid arbitration agreement. There are two different kinds of jurisdiction. The first is jurisdiction to decide a claim on its merits. The second is jurisdiction to decide whether the court or tribunal has jurisdiction of the former kind. See *Williams & Glyn's Bank v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, 443.

70. English law takes the view that the arbitral Tribunal can rule upon its own jurisdiction, and this power is often referred to as the principle of 'kompetenz-kompetenz'. As expressed in Art 21

of UNCITRAL Arbitration Rules:

"The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objection with reference to the existence or validity of the arbitration clause or of the separate arbitration agreement."

71. When there is an application for a stay under the Arbitration Act 1996, the court will generally grant a stay to enable the Tribunal to make such a ruling (which is what the District Judge understood to be the effect of her order in this case). But in English law the Tribunal cannot be the final adjudicator of its own jurisdiction. See Chitty para 32-084. I note in passing that the position would appear to be similar in Canada, since it is the Licensor's submission that the Distributor could have applied to the courts in Canada to set aside the Award (albeit that on the facts of this case it is very unlikely to have succeeded).

72. It is the Distributor's primary case that the Ontario arbitration Award is strictly irrelevant to the compensation claim, and that that must be so in respect of any non-EU arbitration award which does not apply mandatory provisions of EU law. Where an arbitration clause purports to apply a foreign law which does not give effect to a mandatory provision of EU law, then the agreement to arbitrate is void and the parties are not "party to an arbitration agreement" within the meaning of the Arbitration Act 1996 s.9(4) and (1) respectively.

73. The Distributor's secondary case is that the Award did not in fact purport to make an Award in respect of the compensation claim. The Distributor relies upon the wording of the Award of 3 March 2008, which included the following:

18. [...] There may be interesting academic and intriguing domestic and international policy reasons why an arbitral tribunal should or should not apply non lex contractus mandatory rules of law to certain situations. But this is not a debate for this Arbitral Tribunal. Here, based on an uncontested set of facts, this Arbitral Tribunal has been asked to determine a specific question.

19. Here, while a principal purpose of the English Regulation according to the European Court of Justice may be to "protect, for all commercial agents, freedom of establishment and operation of undistorted competition in the internal market" [fn.: (Ingmar GB Ltd. v. Eaton Leonard Inc.)], this does not justify restricting the parties' freedom to choose a desired governing law in Ontario.

20. It is the Arbitral Tribunal's decision therefore that the English Regulations do not apply in determining the rights and liabilities of the parties to this arbitration. Those rights and liabilities will be determined in accordance with the "Governing Law" selected by the parties in Clause 18.3 of the [Agreement].

74. In its judgment in Ingmar the ECJ held that:

24. The purpose of the regime established in Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained.

25. It must therefore be held that 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 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. (emphasis added by the Distributor)

75. The Advocate General had stated the principle a little more widely in his Opinion:

78. Consequently, Article 19 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. Such is the case whatever the origin of the rules chosen by the parties to the contract, since the text of Article 19 does not, in this respect, draw a distinction between the legal norms of a non-EU State or those which are simply drawn up, *ab initio*, by the parties themselves.

79. The general scheme of the Directive confirms the mandatory nature of that provision. [...]

89. It appears that Article 19 of the Directive may be compared with the category of laws which, in international law, are categorised as 'mandatory rules', that expression denoting 'the device of applying a domestic rule to an international situation according to its intention to be applied and regardless of its designation by a rule of conflict'.

90. Article 19 of the Directive requires the application of mandatory provisions notwithstanding any choice to the contrary, even where that choice relates, as in the present case, to the selection of the law of a non-EU State.

91. The interests which the provisions in question seek to protect, namely competition within the Community and the protection of commercial agents who carry on their activities there, are the reason for the Community legislature's firmly expressed intention to make those provisions prevail over any expression to the contrary on the part of the contracting parties. (emphasis added by the Distributor)

76. It follows, submits the Distributor, that any contractual choice by the parties that has the practical effect of depriving the commercial agent of his compensation will fall foul of the mandatory nature of Reg. 17. That must therefore apply to choice of foreign law as much as, e.g., to choice of foreign arbitration (and especially a combined choice of foreign law and arbitration, as in the present case).

77. The Distributor submits that any arbitration award that offended against a mandatory rule of EU law would itself have to be refused recognition by national courts in Member States, see: Case C-168/05 *Claro v Centro Móvil Milenium* [2006] ECR I-10421. That case concerned mandatory, EU law-derived unfair terms in consumer contracts and an arbitral award that failed to have regard to the same. The ECJ held that Member states' courts must decline to follow arbitral awards delivered in breach of mandatory EU provisions:

35. [...] where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type (see, to that effect, *Eco Swiss*, paragraph 37). [...]

39. Having regard to the foregoing, [...] the Directive must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

78. In Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para. 37 the ECJ said:

"[...] where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (ex Article 85(1))."

79. For all present purposes this Court acts a Community Court and is obliged to give effect to the Claimant's mandatory Reg. 17 rights. Indeed, the same would be the case even if other provisions of national law (such as, e.g., the Arbitration Act 1996) would normally militate against such a conclusion, see: Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, Summary, at paras. 3 and 4, which read as follows:

In accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the Institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

Any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.

A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

80. The Licensor submits that in *Ingmar* the ECJ decided that in respect of a choice of law parties cannot derogate from Article 19 of the Directive (the attempt to choose Californian law was impermissible). It did not concern jurisdiction. Further, it has no application to the question of whether an arbitral tribunal's decision (alleged to be in breach of Article 19 of the Directive) is binding. The binding nature of a final arbitration award is a matter of English arbitration law.

81. The Licensor submits that the Distributor's true complaint is that the Tribunal got the choice of law wrong; the Tribunal should have applied the Regulations not Canadian law. The correct avenue for challenging the Awards was the Canadian Courts. The Appellant chose not to do so; these findings are now *res judicata*.

82. The Distributor has sought in the English proceedings to go behind the Second Award and rely upon the Regulations. That is not permissible. The Distributor accepted arbitration as the forum for the resolution of disputes. The Distributor's attempt at a second bite at the cherry falls squarely in section 9(4) of the Arbitration Act 1996 and the Court has no discretion and must stay the proceedings.

83. Whilst it is accepted that it is arguable that a breach of mandatory European law is a ground for refusing enforcement of an arbitration award that does not assist the Appellant in seeking to generate jurisdiction to litigate a matter which falls within a binding arbitration agreement.

84. Section 9(4) does not deprive the Distributor of a mandatory right under Community law and should not be declared incompatible. The stay operates irrespective of the choice of law and would apply even if the MRA had expressly incorporated the Regulations. The Distributor's real complaint is that the Tribunal should have applied the Regulations not Canadian law. The remedy for the complaint lay in seeking to annul the Awards in Canada.

85. As to the Distributor's alternative case, the Licensor submits that the Tribunal found that the application of the Regulations was within its jurisdiction (paragraph 20 First Award of 20 December 2007), saying:

"[the Distributor]'s request for a declaration that the Regulations are wholly outside of the scope of the authority granted to the Arbitration Tribunal therefore is denied".

86. The Tribunal went on to hold in the Award of 3 March 2008 at paragraph 20:

"It is the Arbitral Tribunal's decision therefore that the English Regulations do not apply in determining the rights and liabilities of the parties to this arbitration. Those rights and liabilities will be determined in accordance with the "Governing Law" selected by the parties in Clause 18.3 of the MRA."

87. I prefer the submissions for the Distributor.

88. The decision in *Ingmar* requires this court to give effect to the mandatory provisions of EU law, notwithstanding any expression to the contrary on the part of the contracting parties. In my judgment this must apply as much to an arbitration clause providing for both a place and a law other than a law that would give effect to the Directive, as it does to the simple choice of law clause that was under consideration in *Ingmar*.

89. Accordingly, the arbitration clause would be "null and void" and "inoperative" within the meaning of s.9(4) of the Arbitration Act, in so far as it purported to require the submission to arbitration of "questions pertaining to" mandatory provisions of EU law, and Regulation 17 in particular, provided that the Regulations apply at all.

90. If I am wrong about that, then on the Distributor's secondary case, I prefer the submissions of the Licensor. In my judgment the tribunal found that it had jurisdiction to determine the claim of the Distributor for compensation under the Regulation, but held that it failed because it was not applicable under Ontario law.

91. In the light of the foregoing it is necessary to return to consider the provisions of CPR 6.20 under which permission to serve out was obtained.

92. If the Regulations apply, then the choice of Ontario law cannot be applied to the Distributor's claim for compensation under Regulation 17. It follows that the court must address the question what law does govern the claim for compensation under the Regulation. On the facts of the present case, there is no candidate other than the law of England and Wales.

93. For these reasons, I conclude that the Distributor has a good arguable case that its claim for compensation under the Regulations comes within CPR 6.20(5)(c), and is not defeated by the choice of Ontario law or the Ontario arbitration clause.

94. For the same reasons, I also conclude that the Distributor has a good arguable case that its claim for compensation under the Regulations comes within CPR 6.20(6). If compensation was payable at all, then it was payable in England, and so the breach occurred in England.

95. It follows that the District Judge fell into error when she granted a stay of these proceedings pursuant to s.9 of the Arbitration Act 1996. It has yet to be determined that there was a binding arbitration clause applicable to this claim, or an award which can be recognised by this court. On this point the appeal must succeed.

96. I wish to add that nothing in this judgment should be taken as a criticism by me of the conduct or reasoning of the arbitral Tribunal. As Mr Ellyn QC submitted, it was the duty of the Tribunal to apply the law which, according to the MRA, was designated by the parties as the law applicable to the substance of the dispute: see UNCITRAL Art 33. The passages cited from the Award in para 73 above demonstrate that the Tribunal was fully conscious of the relevant considerations. They were clearly aware that the English court might approach the matter differently for reasons which do not reflect adversely upon the Tribunal.

FULL DISCLOSURE

97. It is common ground that the Distributor was obliged to make full and frank disclosure in applying for permission to serve these proceedings out of the jurisdiction. This includes the obligation to draw to the court's attention 'significant factual, legal and procedural aspects of the case': *Memory Corporation v Sidhu* [2000] 1 WLR 1443.

98. The Licensor submitted to the District Judge, and to me, that there had been failures in a number of respects. The Licensor submits that the failures included:

- i) Not setting out the definition in the Regulations of a 'commercial agent';
- ii) Not pointing out to the District Judge material terms of the MRA, in particular clauses 6.1, 7.2, 15, 18.5 and 18.13, and the fact that it did not sell software in the name of the Licensor;
- iii) Failing to disclose to the District Judge that the arbitration Tribunal had determined that the Regulations did not trump Ontario law, and not explaining why *res judicata* did not apply;
- iv) Not mentioning the mandatory provisions of s.9(4) of the Arbitration Act 1996, or explaining why it did not apply.

99. It can be seen that these points substantially overlap with the substantive arguments on the appeal, which have been determined largely against the Licensor. Points (i) and (ii) go to the merits of the issue whether the Regulations apply. The Distributor accepts that the disclosure could have been fuller. The District Judge considered this point at paras 58-62 of her judgment. She considered that at the time she granted leave she had enough information to conclude that there was a real issue for determination by the court, and that it was not necessary for her at that stage to consider at length the merits of any possible defence. The conclusion that I have reached, having heard all the arguments for the defence, is also that the Distributor has a real prospect of success on this point. If it is relevant to this point I would assess the Distributor's prospects of success on this point as higher than that minimum. It is high enough so that it would be unjust to set aside the order on this point in this case.

100. Points (iii) and (iv) do not seem to be to at all strong. The primary point in the Distributor's case in support of the application for permission in substance addresses these points: see para 15.i) above.

101. This is an appeal by way of review not rehearing. The Licensor has re-argued the point. The District Judge decided that it would not be just to set aside the order on procedural grounds. I can see no error in her judgment on this point.

CONCLUSION

102. For the reasons given above, the decision of the Canadian arbitral Tribunal that they had jurisdiction is not conclusive of that question. This court must consider the issue whether the arbitration agreement applied to, or was binding in so far as it applied to, any claim by the Distributor for compensation under reg 17 of the Regulations. If the Distributor fails then the Licensor will be entitled to the stay ordered by the District Judge. It will also follow that the Distributor would be bound to fail on the merits of its claim brought in these proceedings. But if the Distributor succeeds in establishing that the Regulations apply, then there can be no stay of the claim brought in England. The Licensor will not be entitled to rely on the Tribunal's award as a defence to these proceedings. But it may not follow that the Distributor succeeds on the merits of its claim. That will depend upon any defence as to the merits of that claim which may be available to the Licensor.

103. The appeal will be allowed. The Order of 29 May 2009 paras 1-4 and 6 will be set aside, and the stay of proceedings lifted. The permission to serve out of the jurisdiction given on 4 August 2008 will stand and directions will be given, if not agreed, for the proceedings to continue.

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