“Sole Distributorship and Agency Agreement”: Should Commissions on Sales Made Directly by the Supplier be Paid to the Distributor?

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“Sole Distributorship and Agency Agreement” qualified as an exclusive distribution agreement and not as an agency agreement resulting in no sales commissions for the distributor.

Judgment of the Federal Supreme Court of 5 July 2022
Case Reference : 4A_180/2022

Facts

The dispute concerned the following (summarized) facts:

A company active in the international trade of machinery and industrial goods, as well as financial and consulting services (the “Distributor”), and a company active in the development, manufacture and trade of machinery and software, and the provision of services thereof (the “Supplier”), entered into an Agreement entitled “Sole Distributorship and Agency Agreement” (the “Agreement”).

The Supplier contracted the services of the Distributor as an exclusive distributor and agent for the Russian national territory. An annex to the Agreement listed a series of machines which included model xxx but not model yyy, the latter being a model which did not exist at the time the Agreement was concluded.

The Distributor’s main obligation was to purchase and resell the products independently “in its own name and for its own account” in the territory assigned to it. Contingent to mutually agreed conditions, the Distributor could act as an agent for the Supplier on a case-by-case basis. With regard to remuneration, the Agreement provided that the Distributor would sell the Supplier’s products with a 25% maximum mark-up in order to cover its expenses and margins. The Agreement also provided that the Distributor would be entitled to its “respective commission” on any pending offers that would lead to a customer order within 6 months of the Agreement’s termination.

On November 8, 2012, the Supplier terminated the contract effective May 15, 2013 and admitted to having sold five model yyy machines directly to Russian customers up until November 15, 2013.

On March 24, 2014, the Distributor initiated debt enforcement proceedings against the Supplier in order to obtain payment of CHF 480’000 with interest, to which the defendant filed an opposition. Following a first legal proceeding, the First Instance Court of Gruyère ordered the Supplier to pay the Distributor CHF 480’000 with interest. The Court held that the Agreement was an agency contract and an exclusive distribution agreement, subject to the rules of Art. 418a et seq. of the Swiss Code of Obligations (SCO), granting the Distributor a commission to which it was entitled to for business concluded without its assistance during the term of the Agreement (Art. 418g para. 1 SCO “the agent is entitled to the agreed or customary commercial agent’s commission or sales commission on all transactions that it facilitated or concluded during the agency relationship and, unless otherwise agreed in writing, on transactions concluded during the agency relationship by the principal without the agent’s involvement but with clients acquired by it for transactions of that kind”). In addition, the Court considered that model yyy machines were covered under the Agreement.

Following the Supplier’s appeal, the Court of Appeal of Fribourg reversed the above ruling and dismissed the claims put forward by the Distributor.

The Distributor filed a civil law appeal with the Federal Supreme Court.

Issue

The issue in this case was whether the Distributor was entitled to a commission on direct sales that were made by the Supplier in the territory granted to the Distributor.

Decision

1. The Conditions of Agency and Distribution Agreements

The Federal Supreme Court recalled the Court of Appeal's reasoning on the nature of the Agreement and the application of Art. 418a et seq. SCO and reminded the key distinctions between an Agency Contract and an Exclusive Distribution Agreement.

According to Art. 418a para. 1 SCO, an agent is a person who undertakes to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf and for their account without entering into an employment relationship with them (Federal Supreme Court judgment 4C.218/2005 of April 3, 2006, para. 3.2).

An Exclusive Distribution Agreement is one by which a person (i.e. the supplier) promises to another (i.e. the exclusive distributor) to deliver specific goods to it at a certain price and to ensure it exclusivity in a given geographic area, in exchange for payment and promotion of sale within said geographical area (Federal Supreme Court judgments 4A_393/2021 of March 4, 2022, para. 6.2.1; 4A_241/2017 of August 31, 2018, para. 3; 4A_61/2008 of May 22 2008, para. 2 unpublished in ATF 134 III 497. As opposed to an Agency Contract, the Distribution Agreement is not subject to a specific legal regulation (Federal Supreme Court judgment 4A_71/2019 of October 8, 2019, para. 4.1.1). The distributor has greater independence since it acts in its own name and on its own account, whereas an agent does so in the name and on behalf of the other party (Federal Supreme Court judgment 4C.130/2004 of June 18, 2004, para. 2.2). In the case at hand, the Distributor purchased the products from the Supplier and resold them in its own name and to its own customers, as provided for in the Agreement.

2. The Will and Intent of the Parties

The Federal Supreme Court analyzed the question of the will and intent of the Parties in response to the Distributor's allegation that the manner in which the facts had been established by the Court of Appeal were a violation of Art. 18 SCO. According to the Distributor, the Parties had agreed that it was entitled to a commission on direct sales.

According to Art. 1 para. 1 SCO, the contract is perfected when the parties have, mutually and consistently, expressed their will. If the parties have not agreed on all essential elements of the contract, the contract has not been concluded (ATF 127 III 248, para. 3d and the references cited; Federal Supreme Court judgment 4A_553/2020 of February 16, 2021, para. 4.2).

To determine the content of a contract, and whether it has been concluded, the judge shall interpret the parties' expressions of will (ATF 144 III 93, para. 5.2; Federal Supreme Court judgment 4A_177/2021 of September 6, 2021, para. 3.2).

According to the rules of interpretation of contracts derived from Art. 18 SCO, the judge shall, first and foremost, seek the real and common intention of the parties (subjective interpretation), and, if necessary, empirically, on the basis of clues. Clues are not limited to the content of the declarations of will – written or oral –, but also the (general) context, i.e., all circumstances making it possible to determine the (real) will of the parties. These could include statements made prior to the execution of the contract or facts arising subsequent to its execution, and, in particular, the subsequent conduct of the parties which would highlight their own conceptions thereof at the time.

Lastly, if the judge fails to determine the real and common will of the parties, either because the evidence is lacking or it is inconclusive, or if the judge finds that one party did not understand the will expressed by the other at the time of the contract's execution–which does not result from the simple fact that it asserts it during the procedure, but shall result from the administration of evidence, the judge shall resort to normative (or objective) interpretation according to the Principle of Trust. In other words, the judge shall seek their objective will by determining the meaning that, according to the rules of good faith, each of them could and should reasonably lend to the declarations of will of the other. This principle makes it possible to impute to a party the objective meaning of its declaration(s) or its conduct, even when it does not correspond to its intimate will. Determining the objective will of the parties in accordance with the Principle of Trust is a question of law, which the Federal Supreme Court is at liberty to review (ATF 144 III 93, Section 5.2.3 and the cited references).

In this case, the Federal Supreme Court concluded that the Court of Appeal had accurately determined the subjective will of the parties without needing to resort to objective interpretation, because in assessing the evidence, it was clear that according to the Agreement, the Distributor's main requirement was to purchase from the Supplier and to resell the products as an independent party "in its own name and for its own account" in the territory assigned to it and that its remuneration would be based on reselling the products with a 25% maximum mark-up. Thus, the Parties were bound by an Exclusive Distribution Agreement and not by an Agency Contract. The title of the Agreement's Section 10 related to the remuneration of the Distributor, the "commission rate", had no bearing on the analysis of the Federal Supreme Court.

The Federal Supreme Court also considered that the Distributor did not claim that the SCO's provisions concerning the agent's remuneration should be applied by analogy.

Furthermore, although the Agreement also provided for a case-by-case Agency Contract, the Parties did not agree on the terms of an Agency Contract concerning the products that the Supplier sold directly on the territory assigned to the Distributor, and in particular those relating to the commission.

Following these considerations, the Federal Supreme Court deemed it unnecessary to examine whether model yyy machines were covered under the Agreement.

In conclusion, the Federal Supreme Court rejected the appeal, thereby confirming the judgment handed down by the Court of Appeal of Fribourg.

Key takeaway

This case constitutes an important reminder of the distinctions between an Agency Contract and an Exclusive Distribution Agreement as well as the legal consequences of such distinction. In this case the very title of the Agreement was ambiguous because it referred to both a distributorship and to an agency agreement, "Sole Distributorship and Agency Agreement".

Comments

This case prompts three important practical comments/takeaways:

1. This case is an interesting and didactical example of the fundamental distinction that is made under Swiss contract law between an agency agreement that is regulated under Swiss contract law (Art. 418a et seq. SCO) and an exclusive distribution agreement which is an innominate agreement to which legal provisions relating to agency agreements do not apply directly even though certain legal provisions may be applied by analogy.

2. Due to the comment above, this case triggers the specific question whether Art. 418g SCO which is applicable to agency agreements may be applied by analogy to exclusive distribution agreements which was not discussed in this case. As mentioned by the Federal Supreme Court, the Distributor did not claim that the SCO's provisions concerning the Agent's commission should be applied by analogy in the event the Agreement would be qualified as an Exclusive Distribution Agreement (which is what the Federal Supreme Court decided). One can wonder whether the Distributor could have potentially benefitted from the application by analogy of Art. 418g SCO by relying on a source of legal literature. To the best of our knowledge, the author of this comment is the only author who has suggested the application, by analogy, of Art. 418g para. 2 SCO (which provides that "an agent to whom a particular area or clientele has been allocated exclusively is entitled to the agreed commission or, in the absence of such an agreement, the customary commission on all transactions concluded during the agency relationship with clients belonging to that area or clientele") to the Exclusive Distribution Agreement (see Kaveh MIRFAKHRAEI, Les indemnités de fin de contrat dans le contrat d'agence et le contrat de distribution exclusive, Basel/Zurich/Geneva 2014, p. 62, N 206). As such, it would have been interesting to have the opinion of the Federal Supreme Court on this issue.

3. According to the Federal Supreme Court, an Agency Contract is one by which a person undertakes to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf and for their account without entering into an employment relationship with them. However, the definition of an Agency Contract provided by the Federal Supreme Court is partially incorrect because the agent shall have **several** agency contracts in order to act for "**more principals**" (see Kaveh MIRFAKHRAEI, Les indemnités de fin de contrat dans le contrat d'agence et le contrat de distribution exclusive, Basel/Zurich/Geneva 2014, p. 9, N 11, n. 2).

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