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CASE CARD | 20 September 2023

OVB Allfinanz v A. Š. (32 Cdo 1049/2018)

Agency

1. CASE SUMMARY

A. Summary of facts

The Defendant was a natural person acting as a commercial agent for the Applicant, which was the financial institution OVB Allfinanz. According to the agency contract concluded between the parties, the Applicant was entitled to reimbursement of the commission for financial contracts brokered by the Defendant that were terminated by third parties before their two?year anniversary.

After the termination of the contract with the Defendant, the Applicant sought reimbursement of part of the related commission for contracts that were terminated before the expiry of two years from the date of their conclusion. The Defendant disagreed with such a requirement of the Applicant to reimburse the received commission, claiming that the agency agreement deviates from the statutory regulation to his detriment. Therefore, the Applicant brought a claim seeking reimbursement of part of the commission already provided to the commercial agent.

According to Section 660 of Act No. 513/1991 Sb., the Commercial Code, as amended (the 'Commercial Code') a commercial agent shall be entitled to a commission on commercial transactions concluded during the period covered by the agency contract as soon as the third party fulfils or is obliged to fulfil its contractual obligation. This provision is the implementation into Czech law of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents (the 'Directive'). (*)

The national legislation goes beyond the Directive and states that if the third party is not due to fulfil its obligations until more than six months after the conclusion of the transaction, the commercial agent's right to a commission arises already on the date of conclusion of the transaction. The right to the commission of a commercial agent under Czech law (in accordance with Article 11 of the Directive) is extinguished if it is clear that the contract between the principal and the third party will not be performed and if the non-performance is not the result of circumstances attributable to the principal. Commission which has already been paid must be refunded if the right to it has been extinguished. These provisions of the Directive and the national legislation may only be waived in favor of the commercial agent.

The Court of First Instance concluded that the provision for the recovery of the commission in the event of termination of the agency contract before the expiry of a certain period is invalid, as such provision is contrary to

the mandatory provisions of the Commercial Code. The Court of First Instance held that the obligation of the commercial agent was fulfilled when the contracts were concluded with the third parties. According to its decision, the statutory method of extinguishing the right to commission cannot be reflected in the future in such a way that the right to a part of the commission already paid depends on circumstances which will arise only in the future, since such a breach of the contracts is beyond the control of the agent.

The judgment was subsequently upheld by the Municipal Court in Prague as the Court of Appeal. The applicant then brought an appeal against the judgment of the Court of Appeal to the Supreme Court.

(*) The Commercial Code has been replaced by Act No. 89/2012 Sb., the Civil Code, as amended (the 'Civil Code'), in 2014; however, the respective provision is now included in Sections 2499-2509 of the Civil Code. Therefore, this case is still relevant under the current legislation.

B. Legal analysis

According to the Supreme Court, the purpose of the regulation enshrined in the Commercial Code is not to guarantee that the commercial agent is always assured of receiving the entire commission at the time of concluding the transaction, without the possibility of any subsequent correction of its amount and the necessity of its return in the event of non?performance of the brokered contract.

The purpose of this provision is to protect the agent from negotiating terms for the termination of the right to commission which would not respect the proportionality between the extent of the non-performance of the brokered contract and the extent to which the right to commission is terminated to the agent's disadvantage, or which would impose an obligation on the agent to repay the commission even if the non?performance of the brokered contract was due to circumstances attributable to the principal. Therefore, the commission to be reduced in a proportionate amount corresponding to the extent of the third party's failure to perform the contract does not contravene the mandatory provisions of the Commercial Code.

The Supreme Court referred to the decision of the European Court of Justice ('ECJ') in case no. C?48/16 in *ERGO Pois?ov?a*, in which the ECJ answered a preliminary question posed in the same vein by the Slovak courts in relation to Article 11 of the Directive. In its decision in *Ergo pois?ovna*, the ECJ interpreted Article 11 of the Directive in a way that the right to commission of the commercial agent is extinguished if it is established that the contract between the third party and the principal will not be executed, and that fact is due to a reason for which the principal is not to blame. According to the ECJ, the extinction of the right to commission does not only apply to cases of total non-performance of the contract concluded between the principal and the third party, but also to cases of partial non?performance such as failure with the volume of business or the duration specified in the contract. The ECJ further concluded that it would be contrary to the purpose of the Directive if, in the case of mediation of long-term contracts (including insurance contracts), the agent was guaranteed the entire commission

from the beginning of the performance of the contract, without taking into account the possibility of partial non-performance of the contract.

The Supreme Court considered that the conclusions of the ECJ are also fully applicable to the interpretation of the national legislation. That a commercial agent can influence the performance of a third party is not decisive. Similarly, it is not decisive whether the agent already knew at the time of concluding the mediated contract whether or not the contract would be fully performed in the future, since the termination of the right to commission occurs at the moment when it is clear that the contract will not be fully performed, i.e., at any time during the contractual relationship.

Therefore, the Supreme Court disagreed with the conclusions of the Court of First Instance and Court of Appeal. The Supreme Court annulled the judgment of the Court of Appeal, and the case was referred back to court for further proceedings.

Conclusion: A provision in a commercial agency contract, where the parties agree on the possibility of returning a reasonable part of the commission in the event that the mediated contract is not performed by a third party for a certain specified period of time, is in accordance with Czech law unless the situation of non-performance of the contract is due to circumstances attributable to the represented party.

2. RELEVANT LEGISLATION

- Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents
- Sections 2499-2509 of Act No. 89/2012 Sb., the Civil Code, as amended
- Sections 652-672a of Act No. 513/1991 Sb., the Commercial Code, as amended

3. RELEVANT LITERATURE

PETROV, J., VÝTISK, M., BERAN, V. et al., Ob?anský zákoník. Komentá? (*the Civil Code. Commentary*), 2nd edition (1st update), Prague, C. H. Beck, 2022

4. PRACTICAL SIGNIFICANCE

The Supreme Court confirmed the possibility to enter into an agreement with a commercial agent which includes a provision whereby the parties agree on the possibility of returning a part of the commission in the event that the

brokered contract is not performed by a third party for a certain specified period of time.

The commercial agency agreement in this case was governed by the provisions of the former Commercial Code, which has been replaced by Act No. 89/2012 Sb., the Civil Code, as amended (the 'Civil Code'). However, despite the new legislation, the decision of the Supreme Court in this case is also applicable to contractual relationships between companies and commercial agents governed by the Civil Code. In light of this case, the repayment of commission to the commercial agent can be demanded in case of partial non-performance of the mediated contract by a third part.