Hammonds

Spanish Legal Update

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JUDGMENT ORDERS A BANK TO PAY DAMAGES TO ITS CLIENT FOR LACK OF INFORMATION REGARDING FALL IN SHARE VALUE

A Judgment rendered by Court of First Instance number 53 of Barcelona has ordered a Spanish Bank to pay damages to one of its clients for lack of information regarding the client's investments.

On 9 February 2007 the client bought a total of 2,784 shares of a company at a price of €19.75 per share through the bank. On 5 July 2007 the share value amounted to €21.12. Therefore, the profitability stood at 6.94%.

On 27 August 2007, the client requested the bank to report on the current value of his investment. On 30 August 2007, the Bank reported an important loss in share value.

On 7 September 2007 the client requested the termination of the investment agreement.

The client filed a claim against the Bank for breach of contract, specifically, for infringing its obligation to inform, as well as its diligence and loyalty obligations vis-à-vis the investor. The investor claimed that he subscribed company shares on the assumption that the bank would accurately and timely inform him on all changes in value, so that the investor could decide what to do in the event of loss of share value. The Bank did not notify the claimant that the value of his shares was falling.

Moreover, the claimant argued that there was a conflict of interests, since the Bank had the obligation of informing its client but was, at the same time, interested in having his client maintain his investment since that meant that the Bank could get the relevant commission.

The Bank argued that it was not its responsibility to manage clients' investments, stating that its obligations were limited to the scope of a share deposit agreement. The Bank also challenged the remaining claims.

The Judgment initially considered that there are two different types of investment administration agreements according to the Securities Exchange Act: advised investment administration and pure investment administration agreements. In the case of advised investment administration agreements, the administrator suggests the client a series of operations and the client then decides which one is more convenient for him or her. Under the second type of agreement, the administrator operates without the previous consent of the client.

Considering the kind of operations undertaken by the claimant and the Bank, the Judgment concluded that the relationship between the parties fell under the scope of advised investment administration.

The Court considered that the Bank was subject to the obligation of informing its client

about the existence of interesting products. However, the Bank was also subject to the Securities Exchange Act, which establishes that the Investments and Securities administrator must always inform his or her clients about stock exchange conditions and must also act with diligence and loyalty.

Moreover, the client was protected by the Advertising Act as well as the Consumers Act. The advertising of the Bank stated that the Bank offered customized advice to its clients.

The Judgment concluded that the claimant decided to invest based on the assumption that the Bank would always keep him duly informed. Therefore, the Bank breached its duty of informing the client, especially when the market conditions were adverse. Moreover, the Judgment established that the mere act of sending periodical reports to the client does not fulfill this obligation. The Bank is obliged to report on any important event, such as the fall in share value.

It must be considered that the claimant was aware of the risks involved in the operation when he decided to buy the shares. However, what the Judgment argued was that the Bank had failed to provide relevant information to its client.

However, the Judgment denies the existence of a conflict of interests, since there was no evidence that the Bank had hidden information to the client or that it had suggested the client not to sell the shares.

The claimant requested the Bank to pay the value of the investment at the date of the last positive report. However, the Judgment reduced the compensation, considering that the client had had the chance to check the state of his finances through the Bank's website.

Fernando González

SERVICE OF DOCUMENTS IN THE FRAMEWORK OF LEGAL PROCEEDINGS BETWEEN EU MEMBER STATES

Given the considerable difficulties that have been long associated with the transmission of documents pertaining to court proceedings when the recipient is a resident of a country different to that of the sender, in 2000 the EU adopted a regulation providing for rules of procedure to facilitate the transmission of documents from one Member State to another.

Broadly speaking, this regulation established the existence of “transmitting agencies” and “receiving agencies” in each Member States. These agencies would be responsible for the serving of documents, which would have to be accompanied by the corresponding translations, together with a series of standard forms, included in said regulation as Attachments, which would have to be completed in the language specified by the receiving country.

The aim was to ensure maximum efficiency and speed in judicial procedures in civil matters, i.e. ensuring that judicial and extrajudicial documents would be transmitted swiftly and directly between the local bodies designated by the Member States.

However, given that communication problems were far from being solved, mainly due to administrative hurdles in both recipient and sending countries, Regulation No. 1393/2007 of the European Parliament of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), which repeals Regulation (EC) No 1348/2000, was adopted to improve and streamline the notification or transmission of documents.

This Regulation, effective as of 13 November 2009, is applicable to all EU Member States including Denmark, and introduces a number of changes aimed at improving and accelerating the service of documents.

The amendments introduced are essentially the following:

1. The service of a document should be effected as soon as possible and in any event within one month of receipt by the receiving agency.

2. Introduction of a standard form to inform the recipient of its right to refuse any document within a week of its service. The possibility of refusing service of documents should be confined to exceptional situations.

3. The introduction of a provision regarding the costs incurred by the participation of an officer or person responsible for the transmission.

4. Lastly, another amendment that is worth mentioning and that is aimed at ensuring uniform conditions in the notification and transmission of judicial documents is the possibility of serving documents directly through postal services (registered letter with acknowledgement of receipt or equivalent).

This will presumably streamline the reporting process and contribute to solve the problems caused by the delays in court proceedings, proceedings that are often interrupted for long periods of time due to this very reason.

Paula Casado

JUDGMENT OF ACQUITTAL ON CLIENT'S COMPENSATION AFTER TERMINATION OF DISTRIBUTION AGREEMENTS IN SPAIN

In the previous issue of this publication a Supreme Court judgment regarding the termination of client's compensation in the event of termination of a distribution agreement was analyzed. Subsequently, we identified the existence of contradictory rulings of the Supreme Court on this matter, and therefore, the need to establish a unanimous position regarding this subject. This Judgment confirmed the case law in favour of client compensation based on the imbalance in parties' assets; however, it made it clear that this could not be automatically applicable, and that each case must be analyzed on an individual basis.

This time, in the Judgment that we are now considering, the Supreme Court decided to act following the advice that established that client compensation should be individualized, and added a new nuance to the application by analogy of the Agency Contract.

The claimant is a sub-distributor of Coca-Cola products who brought a claim for compensation against a Coca-Cola's licensee company due to the claimant's investments on facilities and work-related expenses and to the loss of clientele by the distributor, all of which was due to contract termination.

The Judgment of the court of first instance dismissed the claim. The grounds for this decision were that a non-liability clause in case of termination was included in the original agreement, and that the defendant had satisfied his obligation to give the claimant a seven-day notice, as established by law.

The claimant appealed and the second instance court accepted the claim, and the defendant was ordered to pay compensation.

In spite of the freedom to agree provided under distribution agreements – and thus the liability exclusion – the judgment, on the grounds that the Agency Contract must be applied by analogy and inspire the interpretative criteria of distribution agreements, considered that a seven day notice was unfair, given the imbalance in the parties' assets.

Finally, the case was referred to the Supreme Court. The Supreme Court's judgment considered that respect to what the parties had agreed according to article 1255 of the Spanish Civil Code should prevail over client compensation, thus rejecting the application by analogy of the Agency Contract. This time, contrary to the previous judgment, what led the Supreme Court to decide against compensation was the fact that the defendant did indeed give a seven day notice, as established by law. Furthermore, the Supreme Court established that the Agency Contract shall inspire distribution agreements but not specifically prevail over them.

In short, as had been previously advised by the Supreme Court, client compensation shall not be considered to be automatic and shall thus be examined on an individual basis.

Hector Romero

ANTI-SUIT INJUNCTIONS WITH REFERENCE TO ARBITRATION AGREEMENTS

Last February the 10th, 2009, the Court of Justice rendered its decision on Case C-185/07 regarding a preliminary ruling referred by the United Kingdom's House of Lords with reference to whether or not it was consistent with Regulation No 44/2001 for a Member State court to issue an order to restrain a person from initiating or continuing proceedings in another Member State on the grounds that said proceedings are breaching an arbitration agreement.

The dispute in the main proceedings arose when a vessel owned by West Tankers and chartered by Erg, collided in Syracuse (Italy) against a jetty owned by Erg, causing damages in the latter. The freight agreement was governed by English law and contained a clause providing for arbitration in London.

Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance coverage. Once they had paid Erg the compensation for damages as established under the insurance policies, Allianz and Generali brought proceedings against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. West Tankers raised an objection of lack of jurisdiction based on the existence of the arbitration agreement.

Similarly, West Tankers brought proceedings before the High Court of Justice of England and Wales and sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to interrupt the proceedings that they had brought before the Tribunale di Siracusa.

The High Court of Justice of England and Wales granted the anti-suit injunction sought against Allianz and Generali. The latter appealed against said ruling before the House of Lords, who decided to refer the case to the Court for a preliminary ruling.

Both West Tankers and the United Kingdom Government argued that said injunction was not incompatible with Regulation No 44/2001 given that the latter excludes arbitration from its scope of application.

The Court of Justice assumes that even if proceedings do not fall within the scope of

Regulation No 44/2001, they may nevertheless have consequences that end up undermining its effectiveness.

The Court of Justice considers that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the issue of the validity of said agreement, falls within the scope of Regulation No 44/2001 and that it is therefore that court's exclusive responsibility to rule on said objection and on its own jurisdiction.

Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Regulation No 44/2001, from ruling on the very applicability of the regulation to the dispute brought before it, is clearly a way of depriving the court of the power to rule on its own jurisdiction as established under Regulation No 44/2001.

In the light of the foregoing considerations, The Court of Justice has answered that it is incompatible with Regulation No 44/2001 for a court of a Member State to issue an order to restrain a person from initiating or continuing proceedings before the courts of another Member State on the grounds that such proceedings would be contrary to an arbitration agreement.

This finding is supported by the New York Convention, according to which it is the court of a Contracting State, when submitted an action in a matter in respect of which the parties have executed an arbitration agreement that will, and at the request of one of the parties, refer the parties to arbitration.

Jesús Carrasco

RYANAIR VS. TRAVEL AGENCIES

RYANAIR LIMITED, Europe's major international low-cost airline, has seen all of its claims rejected in full by Commercial Court no. 2 of Barcelona, in a recent ruling dated 21 January 2009.

The airline sued the online travel agency ATRÁPALO, S.L. arguing that the sale of flight tickets through the agency's website violated its intellectual property rights, thus being an act of unfair competition as well as a breach of contract.

The key issue has to do with the process used by ATRÁPALO to obtain the information that it subsequently provides to its customers: a process known as screen scraping. The agency uses its own software to register into RYANAIR's website as a legal user, then obtains all required data by means of a series of selection criteria and finally offers this information to its customers.

Firstly, and following the order of analysis established under the ruling, the court deemed that it was impossible to prove a breach of contract on behalf of ATRAPALO under the criteria established by Spanish Act 7/1998 regarding General Trading Conditions given that there was no contractual relationship between both companies**.** The contract is executed between RYANAIR and the consumer; the defendant is therefore a mere intermediary.

As to the violation of intellectual property rights, the court concluded that ATRAPALO has not reproduced, transformed nor distributed RYANAIR's IT program. Furthermore, the court ruled that RYANAIR's database is not, in itself, an intellectual creation that can enjoy the protection provided under the Intellectual Property Act, since it lacks the originality required to enjoy this

protection and the "sui generis" database right only corresponds to the manufacturer and does not extend nor apply to its contents. Based on these reasons, the court considered that the defendant's actions did not violate any intellectual property rights.

Furthermore the Court considered that ATRAPALO's activities did not violate Spanish Act 3/1991 regarding Unfair Competition. The defendant neither copies nor reproduces the plaintiff's services. Thus, there is no act of imitation, which is something that is considered to be inherent to all unfair competition acts. The agency does not use RYANAIR's distinctive logos, which means that there is no link between the airline and the agency, and by extension, no risk of associating both parties. Moreover, no business diversion has been identified. Actually, RYANAIR benefits from all the users who purchase their plane tickets through ATRAPALO's website and receives the full price of each ticket.

Finally, the court rejected RYANAIR's claim that ATRAPALO was taking advantage of its reputation by hiding RYANAR's name during the purchasing process. It is not possible to argue that this is an alleged omission that may mislead the consumer. This omission can only be described as misleading, and therefore be considered to be an unfair practice, if it leads the average consumer to make a decision that he or she would not have made under different circumstances. However, this is not the case because the user acknowledges and freely accepts that he or she will only be informed of the flight operator once the transaction is completed.

The ruling concludes that the activity of the online travel agency is lawful and pro-competition because it enables users to compare offers from different operators.

In conclusion, if RYANAIR chooses to take advantage of the Internet to sell its products through a free access system, it must also accept the drawbacks of the Internet, among them the partial loss of control over marketing channels, a loss of control that Ryanair seems reluctant to accept.

Sara Antolín

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