Oh evidence, where art thou?

Recent issues in international distribution litigation concerning the taking of evidence which is located in another European Member State.

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1. The importance of evidence in distribution litigation

Distribution litigation is like playing tennis against Roger Federer: you have to make the point 3 times before you win it. With a powerful serve, you have to convince the Court that your client is right and the other side is wrong. During the rally, you will have to 'valorize' your claim and your winning smash in the end will be the (successful) execution of the decision.

Most of the time, your client will be able to provide you with all necessary evidence to launch the serve. During the rally however, you will often notice you also need evidence which is in the hands of the adverse party. It can get complicated if this adverse party or the evidence itself is located in another European Member State.

Two recent cases in international distribution litigation under Belgian law show that after a good serve, you always have to wait for the return before cheering.

2. Case 1: National sovereignty of the State

i. Facts

The facts are rather simple: a German Company A was the commercial agent of a Belgian Company B (principal) for the German market. Company B terminated the agreement and Company A claimed before the German Courts the payment of the commissions for transactions concluded after the termination.

To calculate its claim, Company A needed (a copy of) the documents concerning its former clients, dating from after the date of termination.

ii. Decisions

On the hearing of February 15th, 2006, before the Landgericht Koblenz, the managing director of Company B declared that Company B was willing to hand over voluntarily the necessary evidence. The Landgericht Koblenz took notice of this confession and wrote it down in a decision of March 8th, 2006.

However, after the decision of the Landgericht Koblenz Company B did not move and Company A decided to demand before the Belgian Courts the exequatur for the German decision. This demand, which must be sought by an ex parte application under Belgian law, was granted by the Court of First Instance of Turnhout *(Rechtbank Eerste Aanleg te Turnhout)* on 22 November 2006.

On 28 March 2007, Company B instituted a third-party proceeding against this decision of the Court of First Instance of Turnhout. The argumentation of Company B was quite remarkable: although its managing director had declared to voluntarily present the documents before the Landgericht Koblenz, Company B now declared no longer willing to do so. Because of this refusal, Company B stated it can only be forced to present these documents. However, if the Landgericht Koblenz wanted to force Company B to present these documents, the Landgericht Koblenz should have followed the procedure as written down in the EC-Regulation No 1206/2001 of 28 May 2001 *on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (hereafter: EC-Regulation No 1206/2001)*.

Company B added that article 17, 2nd of the EC-Regulation No 1206/2001 foresees only one exception: when the direct taking is performed on a voluntary basis without the need for coercive measures. Company B made it clear that at this point it refused to voluntarily present the evidence and because the evidence was located in another European Member State (Belgium), the German Court infringed against the sovereignty of Belgium with what now turned out to be a demand for

direct taking of evidence in another European Member State without following the rules of EC-Regulation No 1206/2001.

With decision of March 6, 2008, the Court of First Instance of Turnhout agreed with Company B. The Court stated that it was irrelevant that the German decision followed after a confession of the managing director of Company B. At the time of its ruling, the Court of First Instance of Turnhout could only ascertain that Company B did not want to present on a voluntary basis and coercive measures would be needed. Therefore, the German decision infringed against the sovereignty of Belgium, which is part of the international public policy *('ordre public')*. According to article 34 of the EC-Regulation No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter: EC-Regulation No 44/2001)*, the recognition of a foreign judgment can be refused if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. The Court of First Instance of Turnhout reversed the earlier decision of the Court of First Instance of Turnhout of November 22, 2006, which granted the exequatur.

In accordance with Annex IV of EC-Regulation No 44/2001, Company A went in appeal against this decision of March 6, 2008, before the Belgian Court of Cassation. In its decision of April 29, 2010, the Court of Cassation referred to art. 36 EC-Regulation No 44/2001 which states that a foreign judgment may under no circumstances be reviewed as to its substance. The Court of Cassation ruled that the decision of March 6, 2008 of the Court of First Instance of Turnhout (reversing the exequatur) infringed against art. 36 EC-Regulation No 44/2001, because the Court of First Instance of Turnhout performed such an unlawful review of the contents of the German decision. On the basis of this unlawful review, the Court of First Instance of Turnhout also unlawfully verified if the German Court had applied correctly the European rules of law.

The Court of Cassation reversed the decision of the Court of First Instance of Turnhout of March 6, 2008 and referred the case to another Court of First Instance (*in casu* Antwerp), where it now awaits a new decision.

3. Case 2: Contrary to fundamental principles of law

i. Facts

The facts of Case 2 are a bit more complicated and also rather specific to the Belgian distribution law. Belgium is a member of the very select club of countries who have an explicit legislation on the termination of distribution agreements of indeterminate duration: the Act of July 27, 1961 *(Wet betreffende eenzijdige beëindiging van de voor onbepaalde tijd verleende concessies van alleenverkoop / La loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée)*.

The Act of July 27, 1961 protects three sorts of distribution agreements of indeterminate duration:

- Wholly exclusive distributorships, i.e. distributorships under which no other distributor is appointed within the contractual territory *('granted exclusivity')*;
- Quasi-exclusive distributorships, i.e. distributorships under which the distributor sells more or less all the contractual products which are sold within the contractual territory *('factual exclusivity')*;
- Distributorships imposing such substantial obligations on the distributor that the latter would suffer considerable hardship in the event of the termination of the distributorship.

Contrary to f.e. commercial agency litigation, the taking of evidence in distributorship litigation under Belgian law can be an issue not only when you have to valorize your claim, but also to prove that your client is protected (or not) under the Act of July 27, 1961. Lots of distributorships and commercial relationships are still based on oral agreements. The Belgian jurisprudence unanimously accepts that oral distributorships are always concluded for an indeterminate period. Without any written agreement however, it will be almost impossible to prove granted exclusivity or that substantial obligations were imposed. Such oral distributorships can therefore only fall under the protection of the Act of July 27, 1961, when they are qualified as quasi-exclusive distributorships.

Literature and jurisprudence vary about the exact figure behind the 'more or less'-part in the requirement of selling more or less all the contractual products within the contractual territory, ranging from not under 70%, not under 80% till not under 90% of the total sales.

There is also no uniform answer to the question which period the Court should take into consideration to calculate this percentage: only the last year before the year of the termination or the average over the last three years. Where the distributor can easily prove his own sales, he will need the figures in the sole possession of the manufacturer to calculate this percentage.

In Case 2, Company A found itself in a situation as described hereabove. Company A, a Belgian company, was reselling from begin '90s in Belgium the product of a German manufacturer, Company B. Parties never signed a written distribution agreement and things took a turn for the worse when Company B established Company C in Belgium to resell the same product in the same territory.

Company A sued Company B and Company C before the Court of Commerce in Kortrijk and claimed that there was a quasi-exclusive distributorship between Company A and Company B. Company B had now terminated this protected distributorship without giving notice, by the fact that Company B had established Company C and the latter sold products directly to the clients and in the territory of Company A (a so-called 'l'acte equipollent à rupture').

ii. Decisions

In litigation concerning the termination of distributorships, the Belgian Courts often follow the same steps. First, the Court will verify if the relations between parties can be categorized as a distributorship or are nothing more than consecutive but single purchase agreements, without any organization. When the relations are qualified as a distributorship, the Court will deal with the question whether the distributorship falls under the protection of the Act of July 27, 1961 or not.

In its decision of July 10, 2008, the Court of Commerce of Kortrijk deducted from the facts that the relations between Company A and Company B were a distributorship. To verify if this distributorship was protected under the Act of July 27, 1961, the Court ruled that Company B and Company C had to present the sales figures of the products over the years 2001-2002, 2002-2003 and 2003-2004 in Belgium. The case was postponed to 11 September 2008.

In the hearing of September 11, 2008, Company B and Company C refused to obey the Court's order. Company C stated it could not present these figures as it did not have these figures, being only a distributor itself from Company C. Company B refused as – being located itself in Germany – these figures were also located in Germany, and the Court had to follow the procedure out of the EC-Regulation No 1206/2001, which it did not.

The Court of Commerce of Kortrijk ruled a new decision on 30 October 2008. This time, the Court ordered Company B to present the sales figures, in accordance with the procedure out of the EC-Regulation No 1206/2001: the Court of Commerce of Kortrijk requested to the German central body (*in casu* the Amtsgericht Steinfurt) to take evidence directly in Germany (art. 17 EC-Regulation No 1206/2001).

With letter dated December 12, 2009, the Amtsgericht Steinfurt sent back the request of the Court of Commerce of Kortrijk without any evidence but with the remarks of Company B addressed to the Amtsgericht Steinfurt. Company B stated it could not fulfill the request of the Court of Commerce of Kortrijk, referring to article 17 of the German Unfair Competition Act *(Gesetzes gegen den unlauteren Wettbewerb, hereafter UWG)*. Article 17 UWG prohibits the presentation of evidence which contains trade or industrial secrets in certain situations. In accordance with the jurisprudence of the German Federal Supreme Court *(Bundesgerichtshof)*, the Courts have to verify if such a request is proportional and reasonable, taking into account the colliding interests of the parties.

According to Company B, there were 2 specific reasons in this case to reject the request from the Court of Commerce of Kortrijk. First, during the procedure Company A became a dealer of the biggest competitor of Company B. Second, the Court of Commerce of Kortrijk requested the sales figures of the products in Belgium over the years 2001-2002, 2002-2003 and 2003-2004. Company B referred to a judgment of the Court of Appeal of Brussels[1], in which the Court of Appeal of Brussels only took into account the sales figures of the year before the year of the termination to calculate the quasi-exclusivity. Because of the aforementioned reasons, the request of the Court of Commerce of Kortrijk was not reasonable as the disadvantages for Company B would outweigh the interests of Company A when presenting the requested evidence.

[1] Court of Appeal Brussels 30th January 2004, *T.B.H.* 2007, 965

In the hearing of June 10, 2010 before the Court of Commerce of Kortrijk, Company B stated that the Court of Commerce of Kortrijk had to recognize the decision of the Amtsgericht Steinfurt not to fulfill the request on basis of the remarks of Company B (article 33 EC-Regulation No 44/2001). In accordance to the jurisprudence of the European Court of Justice[2], the Court of Commerce of Kortrijk is – in the opinion of Company B – not even allowed to verify if the Amtsgericht Steinfurt applied correctly art. 17 UWG.

The Court of Commerce of Kortrijk will rule in this case not earlier than September 2010.

4. Final comments

Under Belgian litigation law, you have surprisingly little weapons to fight against these blocking strategies or to speed up the procedure.

Belgian literature states quite clearly that the Court cannot simply conclude – as a sort of sanction – that a fact is proven when the evidence which should prove this fact, is not presented.[3]

The only sanctions or measures possible are:

1. Compensation *ex aequo et bono* *(art. 882 Belgian Judicial Code)* ;
2. Penal sanction *(art. 495bis Belgian Criminal Code)* ;
3. Imposing of a (daily) fine for delay in performance *(art. 1385bis Belgian Judicial Code)*.

[2] European Court of Justice 28th March 2000, C-7/98, Krombach vs. Bamberski, *Jur.* 2000, I-1935 and European Court of Justice 11th May 2000, C-38/98, Renault, *Jur.* 2000, I-2973)

[3] P. BOGAERTS, *Bestendig Burgerlijk Handboek Procesrecht*, Kluwer, losbl. (june 2000), VII.2-25; G. DE LEVAL, *Eléments de procédure civile*, Brussels, Larcier, 2003, p. 182 n° 132 ; P. ROUARD, *Traité élémentaire de droit judiciaire privé – La procédure civile (2ième partie, tome 4ième)*, Brussels, Bruylant, 1980, p. 36 n° 31

In my opinion, none of these measures is effective. Option 1 leaves the valorization of your claim at the full discretion of the Court, which can lead to unpleasant surprises. Given the huge arrears at the Belgian Criminal Courts, option 2 can take years before you get a ruling. Personally, I also believe your client will show little interest in starting another (criminal) procedure to get only a penal conviction.

Option 3 looks most promising, but you risk driving into the same dead end street. First, not all Belgian literature is convinced that a Court can impose a fine for a measure to be executed in another European Member State.[4] Second, Belgian literature and jurisprudence disagree whether or not you will need an exequatur in the European Member State where you want to execute your measure.[5] If yes, why would the Court of another European Member State who originally refused the request of taking evidence, accept a new decision which imposes a fine with the same request? When you finally have your answers to these questions, a few years will have passed and you still have to end your original procedure.

Distribution litigation is like playing tennis against Roger Federer: it is not impossible to win, but the rally will take quite some time when he is standing on the grass of Wimbledon and yourself on the clay of Roland Garros.

[4] E. DIRIX, 'Executieproblemen met betrekking tot de dwangsom', in JURA FALCONIS (ed.), *De Dwangsom*, Leuven, Jura Falconis Libri, 1999, 60.
[5] T. SCHOORS en P. DEBAENE, 'De dwangsom in een grensoverschrijdende context', *R.W.* 2005-2006, 1005.