

## **THE CORMAN COLLINS CASE:**

# **THE LIKENING OF A DISTRIBUTION CONTRACT TO A SERVICE CONTRACT AND ITS IMPACT ON JURISDICTION RULES**

**IDI Conference**

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# **I – THE ORIGINS OF THE CASE**

- A. Background information regarding the C & C - LMDW case**
  
- B. Two legal procedures instituted by C & C before the Belgian courts**

## **A. Background information regarding the C & C - LMDW case.**

### **1. Who is who?**

- C & C

- Belgian company specialized in the sale of 'Brasserie' products in general

- active in the areas B to C and B to B (very diverse clientele)

- LMDW

- French company

- supplier active in the parallel trade of whiskies and other liquors

## 2. Commercial relationship between C & C and LMDW

- Since 2001, C & C has been purchasing from LMDW 6 brands of whisky within the framework of an informal commercial relationship.
- C & C placed weekly orders on a 'need to have basis' for its clientele
- C & C itself weekly picked up its orders from LMDW in France.
- LMDW has no exclusive rights of any kind in relation to the majority of the products which it offers for sale to C & C.
- C & C was not the only Belgian reseller in Belgium to deal with LMDW. Likewise, C & C purchased whisky from other suppliers.

### 3. Partial termination of the commercial relationship

- In 2010, LMDW made it known to C & C that it would stop supplying 2 brands of whisky to it. LMDW implemented the withdrawal of these 2 brands after respectively 7 months and 2 months.
- Justification of LMDW's decision: intention to professionalize and restructure its distribution network for these 2 types of whisky.
- As a consequence of this decision: 2 diverse legal procedures instituted by C & C versus LMDW before the Belgian Courts.

## **B. Two legal procedures instituted by C & C versus LMDW before the Belgian courts.**

### **1. Legal Procedure before the Judges of Cessation (First Instance and Court of Appeal)**

- C & C 's claim based upon the Belgian Act of Market Practices dated 6.4.2010 → request LMDW to be ordered to continue the delivery of all the 6 brands of whisky for which C & C contends to be the exclusive Belgian distributor.
- C & C 's claim has been rejected (first instance + appeal): courts' reasoning:
  - Refuse to sell= legitimate (nobody can be forced to conclude contracts)
  - Relationship between LMDW and C & C ≠ exclusive distribution contract (=simply sales orders on a weekly basis)
  - Freedom of trade implies liberty of supplier to change its sales policy

## 2. Proceedings on the merits of the case before the Commercial Court of Verviers:

- ***C & C as a claimant:***

- claims are based upon the Belgian Act on the unilateral termination of Exclusive Distribution Agreements of 1961 (hereafter Belgian Act on Exclusive Distribution Agreements).
- C & C claims that it has been the exclusive distributor of LMDW products and claims an indemnity in lieu of notice and a goodwill indemnity.

- ***LMDW as a defendant:***

- demands that the claims be rejected as it contests the existence of any exclusive distribution agreement with C & C
- it contests the competence of the Belgian courts. French courts are competent (art. 23 EU Regulation 44/2001 → general conditions, or art. 5.1.b, 1<sup>st</sup> indent of EU Regulation → location of delivery of the sold products).

- ***Interim judgment dated 20.12.2011 rendered by the Commercial Court of Verviers:***
  - The simple fact that C & C bases its claims on the Belgian Act on Exclusive Distribution Agreements means that, on the basis of article 4 of the said Act, the Belgian commercial court has international jurisdiction.
  - The Court of Verviers seems to assume that a distribution agreement does, in fact, exist and on that basis it addresses a number of prejudicial questions to the European Court of Justice (see Part II).
  - During the proceedings, LMDW has contested this ruling: not the particular qualification which the claimant (C & C) mentions in its summons = decisive to determine the international jurisdiction but, rather, the relationship that in the reality exists between the parties (in our opinion, in this case the simple purchasing and sales agreements and no distribution agreement in the sense of the Belgian Act on Exclusive Distribution Agreements).

- ***Pending proceeding before the Commercial Court of Verviers:***

→ The main question that is to say whether or not C & C is an exclusive distributor of LMDW, is still pending before the Commercial Court of Verviers. This qualification = decisive in terms of the international jurisdiction of the Belgian court.

→ In its interim judgment of 20.12.2011 the judge implicitly seems to recognize the existence of such a (exclusive) distribution agreement contrary to what has been decided by the judges of cessation.

## II - THE QUESTIONS REFERRED TO THE ECJ FOR A PRELIMINARY RULING

- **Q1:** does article 2 of reg. n°44/2001 preclude the special and exclusive jurisdiction of Belgium law?
- **Q2:** does article 5.1 a) of reg. n°44/2001 apply to a distribution agreement?
- **Q3:** if answer to Q2 is negative, does article 5.1 b) of reg. n°44/2001 refers to a distribution agreement?
- **Q4:** if the answer to Q2 and Q3 are negative, is the disputed obligation in case of termination of a distribution agreement, the obligation of the seller or the obligation of the buyer?

### **III– THE ANSWERS OF ECJ (with focus on Q 3)**

- The definition of a distribution agreement
- The definition of a contract for provision of services
- The likening of a distribution agreement to a contract for the sale of goods or to a contract for the provision of services

## 3.1. THE DEFINITION OF A DISTRIBUTION AGREEMENT

- “*Framework agreement*” vs. an informal commercial relation (§28),
- The purpose is to “*ensure the distribution of the grantor’s products*” (§27),
- “*The grantor **undertakes to sell** to the distributor the goods to be ordered (...) while the distributor **undertakes to purchase** from the grantor the goods he needs*” (§27),
- Characteristics:
  - “***lays down the general rules** applicable to the future relations between the grantor and the distributor as to their **obligations of supply and/or purchase** and prepare the subsequent sales agreement*” and
  - “***specific terms concerning the distribution** by the distributor of the goods*” (§28), refer to the opinion of the Advocate General.

## 3.1. THE DEFINITION OF A DISTRIBUTION AGREEMENT (CONTINUED)

How to translate the opinion of the ECJ?

- It is a written agreement,
- It is an agreement preparing other contracts (sales),
- It is an agreement where both parties commit themselves to sale and purchase the goods,
- The aim is the resale: i.e. the market where the clients of the distributor are located,
- It is an agreement which lays down specific terms relating to the distribution,
- A prior selection is made (an exclusivity is maybe necessary).

## 3.1. THE DEFINITION OF A DISTRIBUTION AGREEMENT (CONTINUED)

What is really a distribution agreement?

- It is most of the time a **written** agreement and a **long term** one,
- It is a framework agreement **preparing** other sales contracts,
- It is an agreement where the two parties need to cooperate in order to achieve their **common goal** : expand on the market of the distributor (the grantor want to see and go beyond its purchaser)

### 3.1. THE DEFINITION OF A DISTRIBUTION AGREEMENT (CONTINUED)

- It is a contract where the two parties **collaborate for their mutual interests** which implies cross duties and rights.
  - **As regards the sale and purchase of goods:** provisions will go beyond a normal relation: minimum quotas of purchase, forecast, specific terms of delivery, repurchase of stocks, etc.
  - **As regards the protection of the territory:** Sole or exclusive distributor? (but it could also a simple distributor)
  - **As regards the brand image:** Cooperation between the two parties to construct the brand image on the market (marketing actions, advertising, commercial fairs, etc.).
  - **As regards the exchange of information:** Information on new products from the supplier and information on the market from the distributor.

## 3.2. WHAT IS A SERVICE AGREEMENT ACCORDING TO ECJ?

- According to the **Falco case** (23.04.09, C-533/07):
  - A particular activity must be carried out,
  - A remuneration is paid for in return.
  
- According to the **Corman Collins/La Maison du Whisky case** (19.12.2013, C-9/12):
  - No longer a specific activity rendered to the co-contractor but services and benefits offered to... third parties,
  - No longer money but various advantages granted by one party to the other.

### 3.3. IS A DISTRIBUTOR AGREEMENT ASSIMILATED TO A SERVICE AGREEMENT?

- Which **activity** (§38) ?
  - The distributor carries out the distribution of the grantor's products,
  - The (exclusive ?) distributor is able *“to offer clients services and benefits that a mere reseller cannot “* thanks to the supply guarantee and maybe its involvement in the grantor's commercial planning.
  
- What **remuneration** as a counterpart (§39/40) ?
  - *“All those advantages, whose existence is for the court adjudicating on the substantive action to ascertain, represent an economic value for the distributor that maybe regarding as constituting remuneration”,*
  - advantages: selection of the distributor (on an exclusive basis?), assistance of the distributor with advertising, transfer of know-how through training, payment facilities.
  
- **Conclusion:**  
 If a distribution contract **provides for the “typical obligations”** mentioned in §27 and **28 of the decision**, it can be likened to a service agreement (§41).

### 3.3. IS A DISTRIBUTOR AGREEMENT ASSIMILATED TO A SERVICE AGREEMENT?

**(CONTINUED)**

- §27 refers mainly to commitments relating to purchase and sale (... like in sale contract).
- §28 refers to (i) general rules applicable to the relation between the two parties, (ii) to the subsequent sales agreement and (iii) to the “*specific terms concerning the distribution*” observed in... the opinion of the Advocate General Jääskinen.
- “In view of the diversity of distribution agreements, it is easier to give them a negative definition than a positive one. However, it is possible to isolate certain elements which are typically associated with that type of agreement, namely that the purpose of the agreement is the sale of the products concerned in the territory covered by the agreement; that the distributor is selected by the grantor; that the distributor is, at the very least, authorized to sell the grantor’s products and even enjoys an exclusive right; that the contractual relationship is long-standing, that there may be exclusivity of supply and/or provision for the grantor, that the distributor may have an obligation to purchase or sell; and that the parties may opt for the joint deployment of promotional techniques. “

### 3.3. IS A DISTRIBUTOR AGREEMENT ASSIMILATED TO A SERVICE AGREEMENT? (CONTINUED)

➤ “*Specific terms*” are:

- Selection of the distributor by the grantor,
- The distributor is authorized to sale the product and can have an exclusive right,
- Long standing relation,
- Maybe an exclusivity of supply and/or an exclusivity of distribution,
- Maybe a duty of minimum purchase,
- Maybe joint development of promotion techniques.

**Conclusion** : do we really have criteria / definition to conduct the Assimilation check?

### 3.4. CAN AN INFORMAL RELATIONSHIP BE ASSIMILATED TO A SALE CONTRACT?

Yes ! (in the meaning of art 5.1.b of Brussels I)

Provided that:

- it is a “*long term commercial relationship*”,
- “*where that relationship is limited to successive agreements, each having the object of the delivery and collection of goods*” (§36).

## **IV - PRACTICAL CONSEQUENCES OF THE NEW JURISDICTION RULES?**

- Which jurisdiction rules for which types of distribution relationships?
- What impact in Belgium and in France (example)?

## 4.1. Which jurisdiction rules for which types of distribution relationships?

- A dispute relating to **an informal relationship**:
  - made up of sale contracts can be brought in front of the **Court with jurisdiction over the sale** contracts (art. 5.1 b) 1<sup>st</sup> indent),
  - made up of sale contracts including specific advantages: **which court** (art. 5.1 a) or 5.1 b) 2<sup>nd</sup> indent)?
  
- A dispute relating to **a (written) distribution agreement**:
  - likened to a service agreement will be brought in front of the **Court with jurisdiction over the service** agreement (art. 5.1 b) 2<sup>nd</sup> indent),
  - not likened to a service agreement (does not meet the definition laid down in the Corman Collins case) will be brought in front of the **court with jurisdiction over other contracts** (art. 5.1 a) ?

## 4.2. Impact in Belgium and in France

- Impact of the Corman Collins ECJ case in Belgium :
  - In case of a distribution **agreement in the sense of the Belgian Act on Exclusive Distribution Agreements** = an agreement according to which the grantor gives the distributor special rights that must be exercised within the framework of a lasting and structured collaboration aimed at promoting the sale of the products of the grantor, and this to the mutual interest and advantage of the distributor and the grantor → qualified as **service agreement**.
  - In case of a distribution **agreement not in the sense of the Belgian Act on Exclusive Distribution Agreements** → **open question**: service agreement [art. 5.1 b) 2<sup>nd</sup> indent]?; sales agreement [art. 5.1 b) 1<sup>st</sup> indent]?; or application of art. 5.1 a)?
  - In case of a **simple succession of sales**, irrespective of the number of the same, the duration of the sales period and their frequency, without a framework agreement → qualified as **sale agreement**..

- Impact of the Corman Collins ECJ in France

In case on the “*sudden termination of established commercial relationship*” as defined in France (art. L442-6 I 5° of French Commercial code):

- from the court having jurisdiction over **tort law** matters  
(article 5.3) ...

- ... to the court having jurisdiction over **sale contract** (article 5.1 b) 1<sup>st</sup> indent) ?

# Thank you for your attention.

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