JAN. 20

INFORMATIVE NOTE

DISPUTE RESOLUTION AND ARBITRATION

Commercial concession agreements

Application by analogy of article 33(1)(c) of Decree-Law 178/86 of 3 July governing agency agreements

On 4 November 2019, the Supreme Court of Justice issued judgment no. 6/2019 on an appeal for standardisation of case law. This followed the identification of two decisions of that court, handed down under the same legislation, that contain a contradiction regarding the following fundamental question of law: whether article 33(1)(c) of the law on agency agreements can be applied by analogy to concession agreements.

The above legal rule, which sets out the requirements for clientele compensation, provides the following:

"Without prejudice to any other compensation that is due, under the preceding provisions, the agent has the right, after the termination of the agreement, to clientele compensation, provided they meet all the following requirements:
(...)
c) The agent ceases to receive any payment for contracts negotiated or concluded, after the termination of the agreement, with the customers referred to in sub-paragraph a)."

The Supreme Court of Justice (SCJ) first made a few remarks on the treatment in case law and doctrine (i) of the conceptualisation of the commercial concession agreement, (ii) of the extension by analogy of the legal rules on agency agreements, and (iii) clientele compensation and the requirements for it. The SCJ then concluded that there was a divergence in relation to the application by analogy (to commercial concession agreement) of the requirement laid down in article 33(1)(c) of the legal rules on agency agreements.

The SCJ began by noting that a literal interpretation of the rule under analysis would point to the absence of grounds for the application by analogy, because the concessionaire buys products for resale from the grantor, at its own expense and risk, that is, without any type of remuneration paid the grantor to the concessionaire.

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"The Supreme Court of Justice emphasises that the rationale behind the requirement contained in article 33(1)(c) of the law on agency agreements is to avoid the duplication of benefits (...)"

However, the SCJ held that it must demand compliance with the requirement in article 33(1)8c) of that law, to award the clientele compensation to the concessionaire, provided the necessary changes in interpretation of this legal rule are made.

Therefore, starting from a scenario in which, upon the termination of the agreement and the consequent transfer of clientele to the grantor, the concessionaire loses the profit margin on the sales activity, the SCJ holds that it would be giving the term "*retribuição*" (payment) the meaning of compensation, in such a way that it can include the profit obtained by the concessionaire in engaging in its activity.

The SCJ emphasises that the rationale behind the requirement contained in article 33(1)(c) of the law on agency agreements is to avoid the duplication of benefits. It emphasises that clientele compensation, in the case of concession agreements, is only justified when the former concessionaire ceases to receive any proceeds from its previous activity.

In defence of this understanding, the judgment under analysis highlights the teachings of Pinto Monteiro (in Revista de Legislação e Jurisprudência, Ano 144.º, pages 376 and 377), (in Estudos Jurídicos (Pareceres), Almedina, pages 215 to 217), Rui Pinto Duarte (in Themis, II, n.º 3 (2001), A Jurisprudência Portuguesa sobre a aplicação da indemnização de clientela ao contrato de concessão commercial – Algumas Observações, page 320) and Miguel J. A. Pupo Correia (Direito Comercial, Direito da Empresa, 9.ª Edição, October 2005, Coimbra Editora, page 526).

"Consequently, the clientele compensation will not be due in cases in which, after the termination of the agreement, the former concessionaire will continue to be paid under contracts made with the clients brought in while the agreement was in force."

Regarding case law, it cited, by way of example, the following judgments of the Supreme Court of Justice: of 11 November 2010 (case no. 4749/03.8 TVPRT.P1.S1); of 29 March 2012 (case no. 913/07.9TVLSB.L1.S1 – the foundation judgment); of 18 December 2013 (case no. 2394/06.5TBVCT.P2.S1); of 18 June 2014 (case no. 4189/09.5TBOER.L1.S1); of 9 September 2015 (case no. 2368//07.9TBVCD.P1.S1); of 4 October 2018 (Case No. 19656/15.3T8PRT.P1.S1).

The standardising response that proved most appropriate as a result of the background set out and which the SCJ held should be applied to resolve the case under consideration is:

"The application, by analogy, to the commercial concession agreement of article 33(1) of Decree-Law 176/86 of 3 July, amended by Decree-Law 118/93 of 13 April, includes its point c), adapted to this agreement."

Consequently, the clientele compensation will not be due in cases in which, after the termination of the agreement, the former concessionaire continues to be paid – that is, continues to earn a profit – from contracts made with clients brought in while the agreement was in force. ■