OPINION OF ADVOCATE GENERAL LÉGER

delivered on 11 May 2000 *

1. From 1989, the company incorporated under English law, Ingmar GB Ltd ('Ingmar'), was the commercial agent of Eaton Leonard Technologies Inc., a company incorporated under Californian law ('Eaton'), in the United Kingdom and the Republic of Ireland.

2. After the commercial agency contract came to an end in 1996, Ingmar instituted proceedings to obtain payment of commission and compensation for the damage suffered as a result of the termination of the relationship between the two companies.

3. In response to the claims made by Ingmar, based on the United Kingdom legislation implementing Directive 86/653/EEC, [1] Eaton contends that the applicable law cannot be that relied on by the applicant, since the contract binding the two companies contains a clause stipulating that the contract is governed by the law of the State of California, United States of America.

4. In the main proceedings, the Court of Appeal of England and Wales, United Kingdom, finds it necessary to ask the Court about the applicability of the Directive to the contract at issue, in the circumstances of the present case, where the parties had expressly chosen to submit that contract to the law of a non-EU State, rather than to the national legislation implementing the relevant Community legislation.

I — The legislation applicable

The Directive

5. The Directive, whose purpose is the coordination of the laws of the Member States relating to commercial agents, is justified by the fact that 'the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents *vis-à-vis*

* Original language: French.

1 — Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17; 'the Directive').

their principals and to the security of commercial transactions'. [2]

6. Again under the second recital in the preamble, 'those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States'.

7. Article 1(1) of the Directive provides that '[t]he harmonisation measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States governing the relations between commercial agents and their principals'.

8. Under Article 17(1) of the Directive, 'Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3'. Paragraphs 2 to 5 specify the conditions to which the payment of the indemnity and compensation is subject, and the way in which they are fixed.

9. Article 18 lists certain cases in which the indemnity or compensation is not to be payable: termination of the contract on the initiative of the principal, because of default attributable to the commercial agent, or termination on the initiative of the commercial agent, in the absence of specific justifications, or even, with the agreement of the principal, assignment by the commercial agent of his rights and duties under the agency contract to another person.

10. Under Article 19 of the Directive, '[t]he parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires'.

National law

11. In the United Kingdom, the Directive was implemented by the Commercial Agents (Council Directive) Regulations 1993, [3] which entered into force on 1 January 1994 in accordance with Regulation 1(1).

12. Regulation 1(2) states that the Regulations 'govern the relations between commercial agents and their principals and,

2 — Second recital in the preamble.

3 — Hereinafter 'the Regulations'.

subject to paragraph 3, apply in relation to the activities of commercial agents in Great Britain'.

13. Under Regulation 1(3), 'Regulations 3 to 22 do not apply where the parties have agreed that the agency contract is to be governed by the law of another Member State'.

II — Procedure in the main proceedings and the question referred

14. Ingmar brought the main proceedings before the High Court of Justice of England and Wales which delivered its judgment on 23 October 1997. It held that the Regulations did not apply, since the contract at issue was governed by the law of the State of California.

15. Ingmar appealed against the judgment to the Court of Appeal. Since that court took the view that the resolution of the dispute in the main proceedings depended on the interpretation of the Directive, it decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Under English law, effect will be given to the applicable law as chosen by the parties, unless there is a public policy reason, such as an overriding provision, for not so doing. In such circumstances, are the provisions of Council Directive 86/653/EEC, as implemented in the laws of the Member States, and in particular those provisions relating to the payment of compensation to agents on termination of their agreements with their principals, applicable when:

(i) a principal appoints an exclusive agent in the United Kingdom and the Republic of Ireland for the sale of its products therein; and

(ii) in so far as sales of the products in the United Kingdom are concerned, the agent carries out its activities in the United Kingdom; and

(iii) the principal is a company incorporated in a non-EU State, and in particular in the State of California, USA, and situated there; and

(iv) the express applicable law of the contract between the parties is that of the State of California, USA?'

III — The question referred for a preliminary ruling

16. By the question referred, the national court seeks to know, in substance, whether, since the provisions of the Directive require, after the termination of a commercial agency contract, the payment by the principal of an indemnity to his agent or compensation for the damage suffered by the agent, they apply to a contract under which the principal has given authority to an agent based in a Member State of the Community to sell his products, exclusively, in the Community, where, first, the principal is an entity established in a non-EU State and, second, the contracting parties have expressly chosen the law of that State as the law applicable to the contract.

17. As is clear from its wording, the question formulated by the Court of Appeal actually includes two questions.

18. First, the parties argued about whether the Directive can govern a contract, one of the parties to which is based in a non-EU State. At that time, Eaton contended in particular that international comity resisted the extra-territorial application of internal substantive laws. [4]

4 — Point 2.3 of the written observations of the defendant in the main proceedings. 'Comity' means 'rules of convention, usage or international courtesy which most often guide the conduct of States. These are not mandatory rules of law', D. Carreau, *Droit international*, Pedone, Paris (5th edn., 1997), paragraph 684.

That argument does not appear to be connected with the choice of law made by the parties to the contract. It is worth looking into it separately from the choice-of-law question in order to determine what impact the fact that the contracting parties are not both established within the Community might have on the law applicable. It is thus necessary to ascertain the territorial scope of the Directive since that is, in fact, the problem raised in this respect.

19. Second, if the Directive is territorially applicable, it must be determined whether the provisions thereof relating to the sums payable by the principal to the agent as a result of the termination of the commercial agency contract are materially applicable although the contract is expressly governed by the law of a non-EU State as chosen by the parties.

The territorial scope of the Directive

20. At the outset, it should be recalled that it is common ground that the dispute in the main proceedings concerns the material and temporal scope of the Directive.

The dispute, as we know, is between a commercial agent and his principal. [5] As is clear from Article 1(1) thereof, the Directive is intended to coordinate the laws of the Member States as regards the legal relationships between economic operators of that type. [6]

It follows, in addition, from a reading of Article 22(1) in conjunction with Article 22(3) of the Directive that, unlike the other Member States, who were required to implement the Directive before 1 January 1990, Ireland and the United Kingdom were to adopt implementing measures before 1 January 1994. Just as for the other Member States, by contrast, those measures were to apply, at the latest, to contracts in operation by 1 January 1994, which covers the contract at issue, since it was concluded in 1989 and terminated in 1996.

21. It is apparent from the order for reference that the High Court of Justice, the first court to adjudicate in the main proceedings, found that the Regulations applied only where both parties to a contract were Member State nationals, which is not so in this case. In that court's view, there was nothing in the Regulations or the Directive which led it to conclude that they were to have extra-territorial effect. [7]

22. In other words, the application of a norm of Community law to an economic operator established in a non-EU State would constitute, in the absence of a statutory provision to the contrary, an unacceptable extension of that law to persons who, in principle, are not subject to it by virtue of their geographical location.

23. While examining, amongst the provisions of the Directive, those which may help us to delimit its territorial scope in the case of a contract between parties one of which is established in a Member State and the other in a non-EU State, some facts about the *territorial scope of Community law in general* need to be borne in mind.

24. Under Article 227 thereof (now, after amendment, Article 299 EC), the Treaty is to apply to the Member States of the Community, which, in substance, makes its geographical basis dependent on the territory of those States. [8] That provision establishes a principle of coincidence

5 — Article 1(2) of the Directive states that '[f]or the purposes of this Directive, "commercial agent" shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal'.

6 — Case C-215/97 *Bellone* v *Yokohama* [1998] ECR I-2191, paragraph 10.

7 — Page 9 of the order for reference.

8 — See A. Stathopoulos: 'the territorial scope of the Community legal order is in principle that of the "territory", in the geographical and constitutional sense, of the Member States including its natural extensions of subsoil, maritime space (territorial waters) and air space', 'Commentaire du TCE, article 299' in Helbing and Lichtenhahn, *Commentaire article par article des traités UE et CE*, Dalloz, Bruylant (1999), p. 1887, No 3.

between the territorial scope of Community law and that of the law of the Member States. [9]

25. More specifically, the application of Community law depends on *the geographical location* of certain elements within the territory of the Member States. [10]

26. The idea of the location of economic operators or of their conduct within the territory of the Community has, in several articles of the Treaty, a place which cannot be overlooked for the purpose of their interpretation and application.

27. Article 85 of the EC Treaty (now Article 81 EC), for example, refers to agreements which may affect trade between Member States and which undermine competition 'within the common market'. In *Åhlström and Others* v *Commission*, the Court found it necessary to determine the territorial scope of that provision. [11]

28. In that case, the Commission had established that there existed concerted practices between wood-pulp producers on prices announced periodically to customers established in the Community and on actual transaction prices charged to such customers. By its decision, the Commission had imposed fines on the undertakings concerned, on the ground that the conduct found to exist constituted infringements of Article 85 of the Treaty.

29. The producers made an application to the Court for annulment of the decision taken by the Commission, claiming that the Community did not have jurisdiction to apply its competition rules to them since their registered offices were all situated beyond the limits of its territory.

In addition to the plea based on an incorrect assessment of the territorial scope of Article 85, the applicants relied on the existence of a contradiction between the contested decision and public international law. They claimed that public international law precludes the Community from regulating conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community.

30. The Court rejected those arguments. The alleged concertation on prices on the part of the applicants, whose activity consisted in selling their goods directly to

9 — Ibid., No 7.

10 — See J. Groux, '"Territorialité" et droit communautaire' [1987] 1 RTDE 5.

11 — Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Åhlström and Others* v *Commission* [1988] ECR 5193.

purchasers established in the Community, had undoubtedly restricted competition within the common market. [12] The Court found that what was crucial was the place where the offending agreement had been implemented and not the place where it had been formed. [13] In a clear expression of the legal basis and, at the same time, the criterion of reference underlying its judgment, the Court added that '[a]ccordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by *the territoriality principle* as universally recognised in public international law'. [14]

31. In ruling on another argument put forward by the parties, based on disregard of international comity, the Court simply observed that that argument amounted to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that which had been found to exist in that case and that, as such, that argument had already been rejected. [15]

32. In *Åhlström and Others* v *Commission*, the Court acknowledges the territoriality principle as a basis for certain essential competition rules laid down by the Treaty. But the main interest of that case, as far as the present case is concerned, lies in the fact that that principle appears to be such as to legitimise the Community's jurisdiction *in cases where economic operators have, with the territory of the Community, a link such that their conduct may affect the interests of the Community*. In that case, the territory of the Community was the place where the agreement had been implemented and had produced effects.

33. It should be observed that, in the present case, one of the objectives pursued by the Directive is to ensure *the harmonisation of the conditions of competition between economic operators* linked by a commercial agency contract, 'within the Community'. [16]

Although the legal basis of the norm to be interpreted is not formally the same in the present case and in *Åhlström and Others* v *Commission*, since the Directive is not directly based on the Treaty provisions relating to competition, the Community interest at stake, *based on the exercise of fair competition* (Article 3(g) of the EC Treaty, now, after amendment, Article 3(g) EC), is indeed the same.

34. Since it is a question of defending that principle in the Community, the presence of an economic operator or the pursuit of his business activity in a Member State cannot

12 — Ibid., paragraphs 12 and 13.

13 — Ibid., paragraphs 16 and 17.

14 — Ibid., paragraph 18, emphasis added. See also the Opinion of Advocate General Darmon in *Ahlström and Others* v *Commission*, cited above, and, more specifically, Part II thereof which is devoted to international law.

15 — Ibid., paragraph 22.

16 — Second recital in the preamble.

fail to have an effect on the solution to the dispute.

35. The principles of freedom of establishment and of freedom to provide services, laid down in Article 52 of the EC Treaty (now, after amendment, Article 43 EC) et seq. and in Article 59 of the EC Treaty (now, after amendment, Article 49 EC) et seq., are also among the Treaty rules which refer to the notion of territoriality.

36. The reference made by those provisions to the territory of a Member State of the Community reflects, in both regimes, the intention of the Community legislature to limit the benefit of the freedoms in question purely to economic operators already established on that territory, thereby promoting their mobility and the mobility of the services they provide throughout the common market. The territoriality of Community law constitutes, in this field, an objective connecting method for individuals which entitles them to pursue their economic activity free from any unjustified restriction.

37. The existence of a territorial link — either through the actual presence of one of the economic operators in the territory of a Member State, or through the pursuit of an economic activity in that territory — thus imposes Community jurisdiction on the legal relationship in question. In that situation, the logic of abolishing restrictions on the pursuit of economic activities between one Member State and another, which is a postulate of the Community regime of fundamental freedoms, must be able to be relied on by the economic operator concerned, whatever his relations outside the Community.

38. Specifically, in the case in the main proceedings, Ingmar is not only established in the United Kingdom, but also pursues there, and in the Republic of Ireland, its activity as Eaton's commercial agent, Eaton being based outside the Community.

As we know, Ingmar's activity is covered by the definition of commercial agents given in the Directive. The Directive coordinates the national laws which regulate their profession in the Community. It was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), which is applicable, under Article 66 of the EC Treaty (now Article 55 EC), *to matters both of establishment and of services.*

39. Thus the geographical basis which distinguishes Community law, according to the very terms of the Treaty, leads me to believe that the existence of an element of connection with Community territory in a legal relationship, even if it is contractual, is such as to justify the application of the norm of Community law in question.

40. That analysis in no way amounts to attributing an extraterritorial effect to the provisions of the Directive, contrary to Eaton's submission.

41. In my view, a legal norm would produce such an effect if it modified an operator's legal situation by reason of facts without direct links with the territory of the authorities which adopted it.

42. We have seen that if competition in the Community is affected by undertakings which are not resident there, it is legitimate to apply sanctions to them, precisely because of the territorial location of the offending conduct. There is thus nothing to preclude the actual pursuit of an economic activity, if it takes place in that territory, from being governed by the Community law which is materially applicable.

43. Eaton also observed that the express reference, in the second recital in the preamble to the Directive, to the establishment of the principal and the commercial agent 'in different Member States' constitutes an indication against a mandatory application of the Directive to legal relations formed with an operator established outside the Community.

44. The defendant in the main proceedings contends, in substance, that the coordination of the national laws which is sought by the Directive is designed to promote freedom of establishment and the free movement of services between Member States of the Community. Where they are established in different Member States, the two parties interested in concluding a commercial agency contract could be dissuaded from going ahead because of the differences between the laws applicable. If, however, the principal is not based in the Community, his relations with his commercial agent cannot be dealt with in the light of the principles of the freedom of movement of persons and the free movement of services.

45. In reality, the idea expressed in the second recital in the preamble to the Directive implies that, by virtue of the harmonisation of the laws applicable in the different Member States, principals and commercial agents based in different Member States will be able to enter into contracts more easily.

46. However, it does not necessarily follow that the territorial scope of the Directive does not cover a contract, one of the parties to which is not established in the Community.

47. The work of harmonisation undertaken is designed to promote the freedom of establishment, in other Member States of the Community, of commercial agents

established in the Community, even if they are already linked with principals established in a non-EU State, or their freedom to provide services in respect of other Community principals.

48. So long as one of the parties to the contract is based in the Community, he may thus benefit from the Directive's harmonising effects where he intends to rely on its provisions in order to develop his activity in that territory. It is not necessary to make the territorial application of the Directive conditional on the presence of all the parties to the contract in the Community. The reference, in the second recital in the preamble, to the location of the principal in a Member State cannot, in those circumstances, be regarded as fixing a general condition for such an application.

49. It should also be recalled that an increase in business relations between principals and commercial agents established in different Member States constitutes only one of the objectives pursued by the Directive.

50. The harmonisation also seeks to reduce the differences affecting, as we know, the conditions of competition and to ensure a minimum level of social protection for commercial agents. [17]

51. In these fields too, of course, the coordination of national laws is such as to promote the mobility of those operators or the services which they provide. The purpose of the approximation of national laws is to abolish obstacles which may dissuade them from pursuing their activity in other Member States or for principals established in those States, on the ground that the social benefits would not ensure a sufficient level of protection or that those unjustified restraints on the pursuit of their activity would disadvantage them as against their competitors.

52. But the exercise of fair competition and the need for a minimum level of social protection do not constitute merely means at the service of the Community freedoms. They constitute free-standing objectives, which justify the fact that the Directive applies to situations in which the movement of economic operators within the Community is not directly and immediately at issue.

53. We have noted that respect for equal competition, a principle to which the Directive expressly refers, cannot be restricted merely to relations between

17 — Second recital in the preamble to the Directive. In *Bellone*, cited above, the Court pointed out that 'the Directive is designed to protect commercial agents, within the meaning of the Directive' (paragraph 13).

operators established within the Community. [18] This is also what is apparent, as regards the protection available to commercial agents, from the fifth recital in the preamble to the Directive, which states that 'it is appropriate to be guided by the principles of Article 117 of the Treaty and to *maintain improvements already made*, when harmonising the laws of the Member States relating to commercial agents'. [19]

54. The second recital in the preamble to the Directive corroborates that interpretation. That recital distinguishes between two categories of interest at stake. The second part of the recital, by the express reference which it makes to the place of establishment of the contracting parties and to the difficulty it causes for the carrying-on of the commercial agent's activity, is clearly linked to the aim of freedom of movement which underlies the Directive. On the other hand, the first part, relating to the differences in national laws, deals with the conditions of competition and the level of protection available to commercial agents. It makes no reference at all to the location of the contracting parties, which lends credibility to the idea of taking account of those issues in a way which is not strictly dependent on the principles of freedom of establishment and freedom to provide services. The second part, furthermore, is different from the first not only in content, but also in wording, as is evident from the use of the word 'moreover'.

55. In the light of the foregoing, I conclude that the Directive must be interpreted as meaning that it is, in principle, territorially applicable to a commercial agency contract where, as in the case in the main proceedings, the commercial agent is based in a Member State and pursues his activity in one or more Member States.

56. I do not, however, mean to make the territoriality principle of the Directive absolute. It is necessary to determine the effect to be given to a contractual clause by which the contracting parties have, as in the main proceedings, displayed their common intention to avoid the national legislation adopted to implement the Directive.

18 — Point 33 of the present Opinion.

19 — Emphasis added. Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC. The purpose of the first paragraph of Article 117 is clear: 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'. Although the social objectives laid down are 'essentially in the nature of a programme', the Court has held that they are not devoid of all legal effect and that they constitute an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary Community legislation in social matters (Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887, paragraph 26). In the present case, the Directive pursues such an objective while undertaking harmonisation under Article 100 of the EC Treaty (now Article 94 EC). The second paragraph of Article 117 makes express reference, moreover, to that type of action. It provides that improved working conditions and an improved standard of living for workers must ensue not only from the functioning of the common market but also from the procedures provided for in the Treaty and *from the approximation of Member States' provisions laid down by law, regulation or administrative action*. In other words, the harmonisation of national rules, even where they are based on particular considerations linked to the pursuit of specific Community objectives, can provide the Community legislature with the opportunity to improve the level of protection of the working conditions of economic operators. The lack of restrictive conditions in that provision, other than purely procedural ones, and *the express affirmation by the legislature of its intention to improve the general level of social protection ensured by the Member States in the field concerned* lead me therefore to believe that social measures such as those in the Directive must be interpreted independently, without taking account of the fact that they form part of Community legislation which also seeks to attain the objectives of freedom of movement of persons and free movement of services (for an example of a directive based exclusively on Article 100 of the Treaty and referring to Article 117, see Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16)).

The impact of the choice of the law of a non-EU State on the legal rules applicable when the contract is terminated

57. Like all those who have submitted observations, I believe that account must be taken of the principle of freedom of contract and of the resulting right for the parties to avoid the legal rules applicable.

58. By including in the contract a clause stipulating that it is governed by the law of the State of California, the parties have clearly shown their intention not to submit their contractual relationship to the scheme of the Directive.

59. The question referred by the Court of Appeal seeks to have the precise scope of that agreement clarified in the light of the requirements of the relevant Community legislation.

60. In its question, the national court refers to the rules of English law under which effect is to be given to the applicable law as chosen by the parties, unless there is a public-policy reason for not so doing.

61. In order to interpret the Directive I will adopt a comparable method. That approach assumes a determination on the binding force which the Directive requires the national implementing provisions to have in respect of contracting parties. It is thus necessary to distinguish, among the provisions of the Directive, those which, if any, do not allow of derogations.

62. Before interpreting the Directive according to traditional criteria,[20] it is necessary to specify the reasons for which I do not believe that a text like the Rome Convention of 19 June 1980 on the law applicable to contractual obligations,[21] which is relied on for different purposes by those who have submitted observations, can be regarded as decisive.

63. The Rome Convention is to apply to contractual obligations in any situation involving a choice between the laws of different countries.[22] It entered into force, including with respect to the United Kingdom, on 1 April 1991. However, Article 17 thereof states that the Rome Convention is to apply to contracts made after the date on which it entered into force, so that the contract concluded in 1989 between Ingmar and Eaton is not subject to the rules it lays down.

64. In those circumstances, that Convention cannot be relied on as a source of

20 — See, for example, as regards interpretation according to the wording, context and aim of the Directive, Case C-104/95 *Kontogeorgas* v *Kartonpak* [1996] ECR I-6643, paragraphs 16 and 25.

21 — OJ 1998 C 27, p. 34.

22 — Article 1(1).

positive law. I will refer to it, however, purely for guidance, in so far as it usefully supplements the interpretation of the Directive which might be derived from its own content.

65. Let us return to the *objectives pursued by the legislature by means of the Directive*. In harmonising the national laws which govern the relationship between commercial agents and their principals, the legislature intended to create equivalent conditions for the carrying-on of the profession of independent commercial agent for all those who pursue it within the Community. In the same way, the approximation of the different national legal frameworks seeks to ensure a minimum level of protection for commercial agents, which, as I have said, also amounts to promoting the exercise of competition, freedom of movement of persons and free movement of services, since economic operators are then subject to the same social constraints. [23]

66. Those objectives assigned to the Directive result in the approximation of national laws as regards the conditions for carrying on the activity of commercial agents. In particular, Member States, in accordance with Article 17 of the Directive, are required to put in place a system for indemnifying the commercial agent in the event of the contract's being terminated. That provision constitutes both a guarantee for the agent and a burden for his principal.

67. It is clear that a contractual clause by which parties intend to remove their relationship from the scope of legislation designed to establish a uniform legal framework for the same type of agreement as that which links them brings about a rupture of the desired harmonisation. By definition, the idea of a general right to choose the law applicable clashes head-on with any process of normative coordination.

68. The choice, by the parties, of a law which omitted the obligation to indemnify or which neglected it by establishing a less favourable regime, would reduce the protection available to the agent. In that case, the law would place him at a disadvantage as compared with his competitors while at the same time placing his principal at an advantage as compared with other principals. The rupture of the conditions for harmonising the legislation applicable would thereby bring about a disequilibrium in the competition between economic operators pursuing their activity within the Community, which would run counter to the objectives of the Directive.

69. In ruling on the scope of Article 85 of the Treaty in *Åhlström and Others* v *Commission*, cited above, the Court formulated the following reasoning: '[i]f the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions'. [24] The reasoning followed by the Court can be applied, *mutatis mutandis*, to the present case.

23 — See Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 17 to 19.

24 — Paragraph 16.

In this case, it is not a question of a regime based on prohibition, but of a regime of contractual indemnification. In both cases, however, it is a question of determining the relevant legal rules while ensuring that the purposes of the territorially applicable legal rules are not compromised. Giving contracting parties the right to choose a law which is less protective of the interests of the commercial agent would reflect an incorrect assessment of the reasons underlying the Community legislation.

70. The competitive advantage ensuing from the choice of a different law would encourage any principal, provided that he was in a position of economic superiority *vis-à-vis* the other prospective contracting party, to insert in the contract a clause designating the law of a non-EU State in order to benefit thereby.

71. The need not to impede the work of harmonisation through Community law *must not, however, lead to the automatic condemnation* of any intention to derogate from the ordinary legal rules applicable within the Community.

72. The principle of autonomy, which, under the Rome Convention, cited above, [25] is to prevail in contractual matters, would be compromised if the Community process of harmonisation were systematically to prevail, in this field, over the freedom afforded to economic operators to decide on the law applicable to their legal relationship.

73. The validity of a derogating contractual clause depends first on the binding force of the norm which it seeks to replace. The extent of the mandatory nature of that rule must be assessed according to *its wording and the general scheme of the Directive.*

74. Article 19 of the Directive provides that the parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.

75. That provision must be understood as meaning that it does not allow the parties to a contract, even by common accord, to avoid the application of the provisions of the Directive relating to the indemnity at the end of the contract or to the compensation for the damage suffered, in such a way that the commercial agent's financial situation would be adversely affected thereby.

It follows that Articles 17 and 18 cannot be disapplied in favour of rules which are less favourable to the commercial agent. On the other hand, any other provision which finds no counterpart in the Directive could

25 — The first sentence of Article 3(1) thereof states that '[a] contract shall be governed by the law chosen by the parties'.

prevail over the Directive if it were shown that it worked to the advantage of the commercial agent. [26]

76. A problem of interpretation remains, however, which needs to be resolved if a precise meaning is to be given to Article 19.

77. The fact that it is impossible for the parties to derogate from Articles 17 and 18 'before the agency contract expires' leads me to wonder about the suitability of an interpretation *a contrario* of that provision. It seems to follow from a reading to that effect of Article 19 that the rules laid down by those articles could be ignored once the contract had come to an end.

If understood in that way, Article 19 would prohibit any derogation from the Directive's indemnity regime which took place during the agency contract. On the other hand, once the contract had expired, the parties would be entitled to agree on a regime less favourable to the commercial agent, or even to relieve the principal of any indemnification.

Such an interpretation does not seem to me plausible. It is difficult to see what could lead a commercial agent to give up his right to indemnification in a situation where he is, by definition, freed of any obligation towards his principal, since the contract has come to an end. Conversely, in a case where, on the expiry of the contract, negotiations took place with the purpose of renewing the contract, recognition of a right to derogate from the Directive's indemnity regime would be tantamount to rendering Article 19 purely and simply meaningless. [27]

78. Consequently, Article 19 must be read as precluding the contracting parties from substituting for the indemnity regime defined in Articles 17 and 18 of the Directive indemnity arrangements which are less

26 — At the hearing, Eaton put forward the argument that the court's task, where it is required to assess the relative merits of one law as compared with another, with the purpose of determining which is most advantageous for the commercial agent, would face major practical difficulties. The obligation to undertake a complex economic analysis of the whole relationship between the contracting parties would lead to unforeseeable results, which would cause real legal uncertainty. In truth, an evaluation of the respective advantages of one law as against another is doubtless a complicated exercise. That requirement is evident, however, from the very letter of Article 19, as, moreover, from that of other articles of the Directive (Articles 10(4), 11(3), 12(3)). It cannot, therefore, be ignored. It is even less possible to avoid the clearly expressed intention of the Community legislature in the light of the fact that it reflects the general philosophy of the Directive seeking to preserve the balance of the commercial agent's interests against those of his principal. Furthermore, the difficulty of the exercise of comparison which the court must undertake does not appear to be such that it cannot be resolved, where appropriate, by recourse to an expert.

27 — An explanation for that uncertain drafting can be found in the initial proposals for the Directive submitted by the Commission (OJ 1977 C 13, p. 2; and OJ 1979 C 56, p. 5). Article 30(5) of those proposals provided that '[t]he right to goodwill indemnity *shall not by prior agreement be contracted out of or restricted*. It may be exercised only during the period of three months following cessation of the contract'. The preceding paragraphs of that article fixed the method for calculating the goodwill indemnity. A distinction was drawn, in paragraph 4, between the indemnity owed in the event of ordinary termination, by notice, and in the event of termination for exceptional reasons (principal's conduct or legitimate reasons particular to the agent), giving rise to indemnities of different amounts, the maximum in the first case being lower than in the second. That difference of method in fixing the indemnity explains the reference made in that article to a restriction on the right to the indemnity. It may explain why, in both the initial and final versions of the Directive, the legislature remitted to the time when the contract had expired the exercise of the right to restrict the indemnity, except that, in the final version of the Directive, the possibility of restricting the indemnity or compensation has disappeared.

favourable than those which it lays down. Such is the case whatever the origin of the rules chosen by the parties to the contract, since the text of Article 19 does not, in this respect, draw a distinction between the legal norms of a non-EU State or those which are simply drawn up, *ab initio*, by the parties themselves.

79. The general scheme of the Directive confirms the mandatory nature of that provision.

80. It should be recalled that, although directives leave to the national authorities the choice of form and methods, they are binding, as to the result to be achieved, upon each Member State to which they are addressed (the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC)). The binding force of their content can, however, be a question of degree.

81. A reading of the Directive shows us that two types of provision may be distinguished in this respect.

82. The first category covers rules coupled with a *right of derogation*. They may be laid down in the absence of any agreement between the parties and without prejudice to the compulsory norms laid down by national laws.

That is true, for example, of the provisions of Article 6(1) of the Directive, which fix the criteria for evaluating the commercial agent's remuneration by reference to what 'commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities'. The same is true of Article 13, the effect of which is, as the Court has held, that the agency contract is not subject to any formal requirement, whilst it is left open to the Member States to require it to be in writing. [28] Similarly, each party is entitled to receive from the other on request a signed written document.

Those rules sometimes confer on the Member States a right of derogation which the parties to the contract do not enjoy. Thus, Article 2(2) of the Directive confers only on '[e]ach of the Member States... the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State'.

83. That type of norms corresponds to those which the Community legislature has deliberately chosen to leave to the discretion of the national authorities. They fall within the sovereign power enjoyed by the Member States in the performance of

28 — *Bellone*, cited above, paragraph 14.

their task of implementation. As such, those rules reflect the Member States' freedom to choose the methods for attaining the objectives fixed by the Directive.

84. It should be pointed out that the Court has found that whenever the Directive allows the Member States to derogate from its provisions, express provision is made to that effect. [29] The Member States are therefore entitled not to follow certain provisions of the Directive or to supplement them as they see fit.

85. It can thus be considered that that first group of norms follows a particular pattern which might be described as 'complementary to intention', it being understood that it is a question of the intention either of the parties or of the Member States and that those intentions are clearly not inspired by the same motives.

86. A second group, it seems to me, requires to be identified, which includes *rules of a mandatory nature*. Those rules do not refer to any right of derogation. On the contrary, they clearly specify that the parties may not contract out of them.

87. Article 19 of the Directive belongs to that category of mandatory norms, as is clearly shown by the prohibition which it lays down on derogating from Articles 17 and 18.

88. I would add that, as the United Kingdom rightly pointed out, such a categorisation concords with what is laid down in Article 7(2) of the Rome Convention, cited above, which states that '[n]othing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract'.

89. It appears that Article 19 of the Directive may be compared with the category of laws which, in international law, are categorised as 'mandatory rules', that expression denoting 'the device of applying a domestic rule to an international situation according to its intention to be applied and regardless of its designation by a rule of conflict'. [30]

90. Article 19 of the Directive requires the application of mandatory provisions notwithstanding any choice to the contrary, even where that choice relates, as in the present case, to the selection of the law of a non-EU State.

29 — Ibid., paragraph 15.

30 — B. Audit, *Droit international privé*, Economica, Paris (1997, 2nd edn.), p. 97.

91. The interests which the provisions in question seek to protect, namely competition within the Community and the protection of commercial agents who carry on their activities there, are the reason for the Community legislature's firmly expressed intention to make those provisions prevail over any expression to the contrary on the part of the contracting parties. It is thus necessary to propose that the Court rule to that effect.

Conclusion

92. In the light of those considerations, I propose that the Court answer the question referred by the Court of Appeal as follows:

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that, in accordance with Article 19 of that directive, Articles 17 and 18 thereof are applicable to a contract under which a principal has given authority to a commercial agent based in a Member State of the Community to sell his products, exclusively, in the Community, even if, first, the principal is an entity established in a non-EU State and, second, the contracting parties have expressly chosen the law of that State as the law applicable to the contract.