defect in the goods, has the effect of preventing them from relying on provisions of national legislation which allow them to limit their liability when unaware of the defect, whilst their competitors in the other Member States may do so on the basis of the provisions of their national law.

In the first place, Article 2 may not be relied upon by an individual before a national court. Secondly, such case-law, which was developed for reasons connected with the protection of buyers, is not liable to favour or facilitate the adoption of agreements contrary to Article 85. Finally, since it applies without distinction to all commercial relations governed by national law, the case-law does not have as its specific object or effect the restriction contrary to Article 34 of patterns of trade, thereby favouring domestic production or the domestic market; furthermore, in concluding an international contract of sale it is generally possible to choose the applicable law.

REPORT FOR THE HEARING
in Case C-339/89 *

I — Facts

A — Legal background to the main proceedings

1. In 1980 and 1981 the French company Alsthom Atlantique (hereinafter referred to as 'Alsthom') sold two cruise vessels to the Netherlands company Holland America Tours (hereinafter referred to as 'HAT'). As stipulated in the contract, the vessels were fitted with engines which Alsthom ordered from the French company Compagnie de construction mécanique Sulzer (hereinafter referred to as 'Sulzer'). Sulzer turned to a German subcontractor to fulfil the order. On delivery of the vessels HAT claimed that the equipment supplied by Sulzer was not functioning properly, and invoked the arbitration clauses contained in the contracts which it had concluded with Alsthom. Alsthom then brought various actions before the Tribunal de commerce, Paris, seeking, in particular, an order requiring Sulzer to indemnify it against any order which might be made against it on the application of HAT. Sulzer in turn served a third-party notice on its insurer Union des assurances de Paris (hereinafter referred to as 'UAP'), seeking indemnity in respect of any order made against Sulzer at the request of Alsthom.

2. In accordance with the case-law of the French Cour de cassation (Court of Cassation) (Cassation, Chambre commerciale, 4 June 1969, published in

* Language of the case: French.

Recueil Dalloz 1970, p. 51; Cassation, Première chambre civile, 5 May 1982, published in *Bulletin de la Cour de cassation*, I, No 163, p. 145; Cassation, Troisième chambre civile, 3 January 1984, published in *Bulletin de la Cour de cassation*, III, No 4, p. 3; Cassation, Chambre commerciale, 3 December 1985, published in *Bulletin de la Cour de cassation*, IV, No 287, p. 244), there is an irrebuttable presumption that a manufacturer or person selling goods by way of trade is aware of any defects in the goods sold which he can avoid only if the contract was concluded with a buyer in the same specialized field. That case-law is based on Articles 1641 and 1643 of the French Civil Code, which provide as follows:

'*Article 1641*

The vendor shall be liable for any latent defects in the goods sold which render them unsuitable for their intended use or which so restrict their intended use that the buyer would not have purchased them, or would have paid less for them, if he had been aware of such defects.

Article 1643

He (the vendor) shall be liable for any latent defects, even if he is unaware of those defects, unless he stipulates that he shall not be liable.'

The French Cour de cassation has interpreted Article 1643 of the Civil Code as meaning that a manufacturer or person selling goods by way of trade is deemed to be aware of defects in goods which he has sold and therefore he may not rely on a clause exempting or limiting in advance liability for latent defects. Under the case-law in question, clauses limiting liability are permissible only where they are included in contracts concluded between traders engaged in the same specialized field.

3. In its submissions to the Tribunal de commerce, Sulzer pointed out that it followed from that case-law of the Cour de cassation that Alsthom, a shipbuilder, cannot rely on a clause limiting its liability as against HAT, because they are not traders engaged in the same specialized field. It also claimed that there is no similar case-law in any other Member State. Consequently, according to Sulzer, there is *de facto* discrimination against companies subject to French law and thus a distortion of free competition. It maintains that the case-law in question is also contrary to the provisions of the Treaty concerning the elimination of quantitative restrictions as between Member States. It considers that this problem is particularly important in the case of the shipbuilding industry in France inasmuch as shipbuilders, and likewise their subcontractors, find themselves in a position of inferiority with regard to foreign undertakings with which they have concluded contracts, which rely on whichever law, French or foreign as the case may be, is more favourable to them.

B — The question referred for a preliminary ruling

4. The Tribunal de commerce considered that the dispute raised problems of interpretation of provisions of Community law and by judgment of 10 May 1989 it stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Are the provisions of Articles 2 and 3(f), read together with those of Articles 85(1) and 34, of the EEC Treaty to be interpreted

as prohibiting the application of a Member State's case-law which, by not allowing persons selling goods by way of trade to prove that on the date on which the goods were delivered they were unaware of a defect in the goods, has the effect of preventing them from relying on Article 1643 of the French Civil Code, which allows them to limit their liability when unaware of the defect, in the same way as their competitors in the other Member States may do under the provisions of their own national law?'

In the grounds of the judgment requesting a preliminary ruling, the national court stated that 'because of the discriminatory position in which French undertakings are placed in relation to their foreign competitors, the court cannot remain indifferent to the arguments advanced by the parties'.

II — Procedure

5. The judgment requesting the preliminary ruling was received at the Court Registry on 3 November 1989.

6. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted by:

Compagnie de construction mécanique Sulzer SA, represented by Michel Normand, Avocat at the Cour d'appel (Court of Appeal), Paris;

Union des assurances de Paris, represented by Alain Tinayre, Avocat at the Cour d'appel, Paris;

the Commission of the European Communities, by J. Curral, a member of its Legal Department, assisted by H. Lehman, a French civil servant on secondment to the Commission's Legal Department, both acting as Agents.

7. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

8. By decision of 13 June 1990, the Court referred the case to the Second Chamber under Article 95(1) and (2) of the Rules of Procedure.

III — Summary of the written observations submitted to the Court

9. *Sulzer* and *UAP* refer in the first place to the case-law of the French Cour de cassation which gave rise to the reference for a preliminary ruling from the Tribunal de commerce, Paris. In the light of that case-law, there are two parts to the question submitted:

'(a) Was it not contrary to the Treaty for the case-law of the French Cour de cassation to prohibit manufacturers and persons selling goods by way of trade from proving that they were unaware on the date of delivery of the defect in the goods they supplied?

(b) Is it contrary to the Treaty that the aforesaid case-law prohibits manufacturers and persons selling goods by way of trade from relying on the provisions of Article 1643 of the French Civil Code, under which a vendor may limit or exclude his liability when unaware of

the defect, in the same way as their competitors in the other Member States may do under the provisions of their own national law?'

10. Sulzer and UAP also claim that the clauses limiting liability contained in the contract between Alsthom and HAT should be set aside as between those two traders, which are not engaged in the same specialized field. Should there be a latent defect in goods supplied by a German subcontractor with whom Sulzer dealt under a contract also including clauses limiting liability, it is possible that Sulzer might have to bring third-party proceedings against that subcontractor and that the latter might rely on rules of German law under which clauses limiting liability are lawful. Thus, it is clear that, owing to the case-law of the French Cour de cassation, French parties to international contracts, irrespective of whether they relate to imports or exports, are placed in a discriminatory situation compared with parties from the other Member States with whom they have concluded contracts. Such discrimination is manifestly contrary to the EEC Treaty.

11. Furthermore, Sulzer and UAP consider Article 2 of the EEC Treaty to be directly applicable. Relying on Article 3(f), Article 85(1)(d) and Articles 30 and 34 of the EEC Treaty, Sulzer and UAP add that the case-law of the French Cour de cassation infringes the abovementioned provisions because of the discriminatory situation to which it gives rise.

12. Sulzer and UAP also cite the judgment in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 as authority for their view that the application of the case-law of a court of a Member State can give rise to an infringement of the Treaty. It follows from the judgments in Case 229/83 *Leclerc* v *Au blé vert* [1985] ECR 1, in Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305 and in Case 123/83 *BNIC* v *Clair* [1985] ECR 391 that Article 3(f) of the Treaty, in conjunction with Articles 5, 85 and 86 of the Treaty, imposes on the Member States, and thus on their national courts, a general duty not to jeopardize the effectiveness of the competition rules applicable to undertakings.

13. Sulzer and UAP claim, finally, that a decision of a court of a Member State manifestly constitutes a measure issuing from a public authority for the purposes of Article 2 of Commission Directive 70/50/EEC of 22 December 1969, based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ, English Special Edition 1970 (I), p. 17).

14. In conclusion, Sulzer and UAP ask the Court to reply in the affirmative to the question referred to it for a preliminary ruling by the judgment of the Tribunal de commerce, Paris.

15. The *Commission* observes, by way of preliminary remark, that although Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985, L 210, p. 29) is inapplicable in the present case, it contains rules from which the Community philosophy with regard to product liability can be identified. Thus, Article 1 of the

Directive is based on the principle of liability without fault on the part of the producer. According to the second recital of the Directive, that is the sole means of adequately solving the problem of a fair apportionment of the risks inherent in modern technological production. According to the Commission, Article 15 of the Directive allows each Member State, subject to compliance with a notification procedure, to maintain or provide in its legislation that the producer is to be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

16. In the Commission's opinion, Article 2 of the Treaty has no binding effect and, therefore, cannot be infringed by a prohibition by which a person selling goods by way of trade may not relieve himself from liability *vis-à-vis* a purchaser. The article in question, which is to be found in the part of the Treaty entitled 'Principles', sets out the task of the Community and the means which it is to use in order to attain its aims. Those means involve 'establishing a common market' and 'progressively approximating the economic policies of Member States'. The word 'progressively' implies that that approximation is to take place as the work of harmonization proceeds. Thus, according to the Commission, Article 2 does not contain directly applicable rules but establishes political objectives. In support of that view, the Commission cites the judgment in Case 126/86 *Giménez Zaera* v *Instituto Nacional de la Seguridad Social* [1987] ECR 3697, in which the Court stated that the 'promotion of an accelerated raising of the standard of living', within the meaning of Article 2 of the Treaty, was one of the aims which inspired the creation of the European Economic Community and which, owing to its general terms and its systematic dependence on the establishment of a common market and progressive approximation of economic policies, cannot impose legal obligations on Member States or confer rights on individuals.

17. According to the Commission, for the purpose of Article 34 of the Treaty, 'measures' means laws, regulations, administrative provisions, administrative practices, and all instruments issuing from a public authority. According to the Commission, consistently applied case-law can give rise to such a measure in so far as it constitutes a series of judicial decisions issuing from public authorities. In support of that argument the Commission cites the judgment in Case 58/80 *Dansk Supermarked* v *Imerco* [1981] ECR 181. The Commission infers from the judgments in Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409, Case 155/80 *Oebel* [1981] ECR 1993, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, Case 172/82 *Fabricants raffineurs d'huile de graissage* v *Inter-Huiles* [1983] ECR 555 and in Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483 that for a measure to fall within the scope of Article 34 of the Treaty there must be both a specific restriction of patterns of trade and a difference in treatment providing a special advantage for national production or for the domestic market of the State in question.

The Commission therefore maintains that it is necessary to establish whether the fact that the vendor cannot exempt himself from liability for latent defects in the goods sold is intended to restrict exports or has that effect. In the Commission's opinion, the case-law at issue certainly does not set out to achieve such a restriction of patterns of trade; its real aim is to ensure fair trading by providing better protection for purchasers of products. The purchaser is not

qualified to discover latent defects at the time of purchase. This aim is similar to the aim pursued by Council Directive 83/374, cited earlier.

Neither does the case-law of the French Cour de cassation have any effect on patterns of exports. Moreover, even if it did, all exports from the Member State concerned would be affected. The absence of any restrictive effect is due in the first place to the fact that export contracts are subject to the doctrine of autonomy, under which the parties to an international contract are free to choose the law governing their contractual relations. The Commission points out that that principle was established in France by a judgment of the Cour de cassation of 5 December 1910. Consequently, where an export contract is involved traders may choose a law which does not contain the rule at issue. Moreover, leaving aside the fact that a rule which is not binding cannot have any effect on commercial conduct, the Commission claims that it has not been established that the inability to exempt oneself from liability for latent defects, where such liability exists, is a factor which impedes sales. On the contrary, a better guarantee for the goods sold is a not inconsiderable selling point. The Commission concludes therefore that the inability on the part of the vendor to exempt himself from liability is not intended to impede intra-Community trade, nor does it have such an effect.

18. The Commission observes that it appears from the question referred to the Court that the alleged barrier to exports consists of a provision of national law or in the case-law relating thereto.

However, Articles 85 and 86 of the EEC Treaty concern only conduct of undertakings whose aim or effect is to impede trade between Member States. Moreover, it does not appear from the main proceedings that Article 1643 of the French Civil Code, or the case-law relating thereto, has the result of depriving provisions of the Treaty of their effectiveness or of favouring the adoption of agreements, decisions or concerted practices contrary to Article 85 of the EEC Treaty within the meaning of the judgments in Case 311/85 *VVR* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, and in Joined Cases 209/84 to 213/84 *Ministère public* v *Asjes* [1986] ECR 1425.

19. The Commission maintains that those considerations are sufficient to preclude the applicability of Article 85 of the Treaty. Article 85 is a concrete expression of Article 3(f) of the Treaty, the sole purpose of which is to set out the means to be used in order to achieve the aims of the Community as they are defined in Article 2 of the Treaty. According to the Commission, if Articles 85 and 86 are not applicable, then Article 3(f) cannot take their place.

20. The Commission proposes that the Court should give the following reply to the question referred by the Tribunal de commerce, Paris:

'Case-law under which a person selling goods by way of trade may not contractually exempt himself from liability *vis-à-vis* a buyer for latent defects in the goods sold is compatible with the provisions of Articles 2, 3(f), 34 and 85(1) of the Treaty establishing the European Economic Community.'

G. F. Mancini
Judge-Rapporteur