ECJ Rules on Freedom of Member States to Consider Statutes Implementing EU Directives Mandatory Rules

On 17 October 2013, the Court of Justice European Union delivered its judgment in United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare (Case C-184/12).

The issue before the Court was again whether national laws implementing the EU Commercial Agency Directive could be found to be mandatory rules in the meaning of the 1980 Rome Convention (and indeed the Rome I Regulation).

The difference with the *Ingmar* case was that the parties had not chosen the law of a third state to govern their transaction, but rather the law of a Member state. However, the forum had chosen to go beyond the protection required by the Directive. The issue was therefore whether the choice of a national law which afforded the minimum protection required by the Directive could be overriden by a national statute which had gone farther than what the Directive required.

The Court held that it was possible.

> *49 Thus, to give full effect to the principle of the freedom of contract of the parties to a contract, which is the cornerstone of the Rome Convention, reiterated in the Rome I Regulation, it must be ensured that the choice freely made by the parties as regards the law applicable to their contractual relationship is respected in accordance with Article 3(1) of the Rome Convention, so that the plea relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned, as referred to in Article 7(2) of that convention, must be interpreted strictly.*
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> *50 It is thus for the national court, in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a 'mandatory rule', to take account not only of the exact terms of that law, but also of its general structure and of all the*

circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned. As the Commission pointed out, such a case might be one where the transposition in the Member State of the forum, by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive, offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals.

51 However, in the course of that assessment and in order not to compromise either the harmonising effect intended by Directive 86/653 or the uniform application of the Rome Convention at European Union level, account must be taken of the fact that, unlike the contract at issue in the case giving rise to the judgment in Ingmar, in which the law which was rejected was the law of a third country, in the case in the main proceedings, the law which was to be rejected in favour of the law of the forum was that of another Member State which, according to all those intervening and in the opinion of the referring court, had correctly transposed Directive 86/653.

Ruling:

Articles 3 and 7(2) of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 must be interpreted as meaning that the law of a Member State of the European Union which meets the minimum protection requirements laid down by 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 and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another Member State before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents, only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by that directive, taking account in that regard of the nature and of the objective of such mandatory provisions.