

# The *Unamar* case: what is the actual meaning of the decision of the ECJ?

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IDI Annual Conference  
Torino  
14 June 2014

# Background: Rome Convention (+ Rome I Regulation)

- Cornerstone : freedom of the parties to select the applicable law (article 3.1)
- 1<sup>st</sup> exception: purely national situations (article 3.3)
- 2<sup>nd</sup> exception: purely intra-community situations (article 3.4)
  - N.B. *Ingmar* (9 June 2000) : art. 17 & 18 1986 Agency Directive
- 3<sup>rd</sup> exception: special mandatory laws (“lois de police”)
  - Not defined in Rome Convention (but well in Rome I)
  - Difference of treatment of foreign mandatory laws and mandatory laws of the *lex fori*

## *UNAMAR*: the facts

- Belgian maritime agent v. Bulgarian principal
- Agreement governed by Bulgarian law + arbitration in Sofia
- Agent sues principal before Commercial Court of Antwerp, claiming termination compensation under Belgian 1995 Agency Law
- Commercial court disregards arbitration clause & choice of law stressing that 1995 Law must be applied regardless of the parties' choices
- Antwerp Court of Appeal reverses
- Review by Supreme Court (*Hof van Cassatie / Cour de cassation*) – 5 April 2012

## *UNAMAR*: the preliminary question

- Belgian Supreme Court first stresses that – in principle – arbitration is possible only if arbitrators must apply Belgian law or a law offering similar protection to the agent
- BUT what if the designated law is the law of a country that implemented the 1986 Directive?
- Preliminary question:
  - ‘(...) must Articles 3 and 7(2) of the Rome Convention, read, (...) be interpreted as meaning that special mandatory rules of law of the forum that offer wider protection than the minimum laid down by [Directive 86/653] may be applied to the contract, even if it appears that the law applicable to the contract is the law of another Member State of the European Union in which the minimum protection provided by [Directive 86/653] has also been implemented?’



## *UNAMAR:* the ECJ's reasoning

- Art. 7.2 Rome Convention: no specific conditions for applying mandatory rules of the *lex fori* (§ 45), BUT
- Does not affect the Members States' obligation to ensure conformity of national law with EU law (§ 46)
- Exceptions to the parties' freedom to agree on applicable law must be strictly interpreted (§§ 47 to 49)

## *UNAMAR:* the ECJ's reasoning

- Requirement of a detailed assessment of the law alleged to be mandatory, 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. (¶50)
- 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.(¶50)

## *UNAMAR:* the ECJ's ruling

Articles 3 and 7(2) of the [Rome Convention] 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 [the 1986 Directive] 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.



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## *UNAMAR:* conclusions

- *Unamar* considerably restricts the possibility to apply mandatory rules of the *lex fori*
- Criteria for mandatory laws: legislation adopted in order to protect an interest judged to be **essential** by the Member State concerned.
- Belgian courts will have to decide if 1995 law (as opposed to Bulgarian Agency law) is **crucial** for the protection of an **essential** interest for Belgium
- Doubtful as Belgian agency law was never deemed to be part of public policy (the agent can waive the protection once the contract is terminated)



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# Thank you!

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