Comparative table
on the application of article 17 of the 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 in various European Union countries

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Preliminary remarks : it should be noted that, as it is clear from its Article 1, Directive 86/653 harmonises the laws, regulations and administrative provisions of the Member States governing the relations between the parties to commercial agency contracts and in particular, in Articles 13 to 20, those regulating the conclusion and termination of such contracts.

With regard to the termination of commercial agency contracts, Article 17 of that Directive requires Member States to put in place a mechanism for providing compensation to the commercial agent, allowing them to choose between two options: either an indemnity determined according to the criteria set out in Article 17(2), namely, the system of indemnity in respect of customers brought to the principal, or compensation according to the criteria set out in Article 17(3), namely the system of compensation for damage suffered by the agent.

	France	United Kingdom	Germany	Belgium	Luxembourg
Indemnity ("German system" of Article 17(2) of the Directive No 86/653/EEC (*hereinafter referred to as 'the Directive'*) **or compensation** ("French system" of Article 17(3) of the Directive)	Compensation	Under English law, a hybrid of the French mechanism and the German mechanism has been adopted. In essence, the parties to the contract can agree to apply the German indemnity system, but if such an agreement is not included in the agency agreement or is not agreed, then the default position in English law is that the French compensatory system shall automatically apply	Indemnity	Indemnity	Indemnity
Applicable law regarding termination of the agency contract	Articles L. 134-12 and seq. of the French Commercial Code http://www.wipo.int/wipolex/en/text.jsp?file_id=180801 (in English) « *Article L134-12* *If their relationship with their principal ceases, commercial agents shall be entitled to an indemnity for the loss suffered.* *Commercial agents shall lose the right to this compensation if they have not notified the principal, within one year of the cessation of the contract, that they intend to use their rights.* *The legal successors of commercial agents shall also benefit from the right to compensation when the cessation of the contract is due to the death of the agent.* *Article L134-13* *The compensation specified in Article L.134-12 shall not be due in the following cases:* *1° The cessation of the contract is caused by the serious negligence of the commercial agent.* *2° The cessation of the contract is initiated by the agent unless this cessation is justified by circumstances attributable to the principal or due to the age, infirmity or illness of the commercial agent, as a result of which the continuation of the latter's activity can no longer be reasonably required;* *3° In accordance with an agreement with the principal, the commercial agent cedes to a third party the rights and obligations held under the agency contract.* »	Article 13 and seq. of the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) http://www.legislation.gov.uk/uksi/1993/3053/contents/made « ***Entitlement of commercial agent to indemnity or compensation on termination of agency contract*** ***17.*** *(1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.* *(2) Except where the agency conrtact otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.* *(3) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to an indemnity if and to the extent that—* *(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and* *(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.* *(4) The amount of the indemnity shall not exceed a figure equivalent to an*	Articles 84 to 92c of the German Commercial Code https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0318 (in English) Under Paragraph 89b(1) of the Commercial Code (Handelsgesetzbuch): « *The commercial agent may, after termination of the contractual relationship, demand from the principal a reasonable indemnity if and to the extent that:* *1. the principal continues to derive substantial benefits, even after termination of the agency contract, from the volume of business with new customers which the commercial agent has brought; and* *2. the payment of an indemnity is equitable having regard to all the circumstances, particularly the loss of the commission of the commercial agent from the business transacted with those customers.* *It is equivalent to acquiring a new customer if the commercial agent has expanded the volume of business with an existing customer so significantly that, in commercial terms, it is equivalent to acquiring a new customer.* »	Articles X.1 to X.25 of the Code of Economic Law http://www.wipo.int/wipolex/en/text.jsp?file_id=420775 (available only in French)	Articles 17 and seq. of the Luxembourg law dated June 3, 1994, governing the relations between self-employed commercial agents and their principals and transposing the Directive No 86/653/CEE http://legilux.public.lu/eli/etat/leg/loi/1994/06/03/n3/jo (available only in French) « *Art. 19.* *(1) Après la cessation du contrat, l'agent commercial a droit à une indemnité d'éviction si et dans la mesure où :* *- il a apporté de nouveaux clients au commettant ou développé sensiblement les opérations avec les clients existants et que le commettant a encore des avantages substantiels résultant des opérations avec ces clients et* *- le paiement de cette indemnité est équitable, compte tenu de toutes les circonstances, notamment des commissions que l'agent commercial perd et qui résultent des opérations avec ces clients, ainsi que de la restriction de ses activités professionnelles due à l'existence d'une clause de non-concurrence.* *(2) Le montant de l'indemnité ne peut excéder un chiffre équivalent à une indemnité annuelle calculée à partir de la moyenne annuelle des indemnités touchées par l'agent commercial au cours des cinq dernières années de ses activités dans le cadre du contrat qui le lie au commettant. Si le contrat remonte*

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		indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question. *(5) The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.* *(6) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.* *(7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which—* *(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or* *(b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.* *(8) Entitlement to the indemnity or compensation for damage as provided for under paragraphs (2) to (7) above shall also arise where the agency contract is terminated as a result of the death of the commercial agent.* *(9) The commercial agent shall lose his entitlement to the indemnity or compensation for damage in the instances provided for in paragraphs (2) to (8) above if within one year following termination of his agency contract he has not notified his principal that he intends pursuing his entitlement.* »			*à moins de cinq ans, l'indemnité annuelle est calculée sur la moyenne de la période du contrat en cause.* *(3) L'octroi de cette indemnité ne prive pas l'agent commercial de faire valoir des dommages et intérêts.* *(4) Le droit à l'indemnité visé ci-dessus naît également lorsque la cessation du contrat intervient à la suite du décès de l'agent commercial.* »

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How is calculated the indemnity/compensation following termination of the agency contract?	Under Article 17(3) of the Directive, the agent is entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal. Such damage is deemed to occur particularly when the termination takes place in circumstances: . depriving the agent of the commission which proper performance of the agency contract woulld have procured him whilst providing the principal with substantial benefits linked to the agent's activities, . and/or which have not enabled the agent to amortize the costs and expenses he had incurred for the performance of the agency contract on the principal' s advice. **There is no maximum level of compensation.** The compensation system is inspired from French law and in particular a Decree of 23 December 1958 whose aim was to compensate the agent for the loss he suffered as a result of the termination of the agency contract. As for the indemnity system in Germany, a body of case-law has developed in France concerning the right and level of compensation. Various judgments of the French courts have justified the payment of compensation on the ground that it represents the cost of purchasing the agency to the agent's successor or on the ground that it represents the time it takes for the agent to re-constitute the client base which he has been forcefully deprived of. **According to established case-law, the level of compensation is fIxed as the global sum of the last two years commission or the sum of 2 years commission calculated over the average of the last three years of the agency contract which conforms with commercial practice.** However, the French courts retain a discretion to award a different level of compensation where the principal brings evidence that the agent's loss was in fact less, for example, because of the short duration of the contract or where, for example, the agent's loss is greater because of the agent's age or his length of service. The indemnity is calculated on all remuneration, not just commission.	When calculating compensation (i.e., based on Article 17(3) of the Directive), the UK considers the future income stream that the contract would have provided for the agent. The calculation is therefore performed on a 'loss of value' basis. Lonsdale v Howard & Hallam Ltd [2007] UKHL 32 confirms that compensation is not capped at a maximum amount, and ended the debate about whether the UK should follow the French approach to calculating compensation, with a negative answer: Lonsdale established that the damage suffered by the agent on termination of the agency relationship was the loss of the value of the agency relationship. The value of the agency lies in the future income stream that it would have generated and it is this which must be valued. Valuing the agency relationship requires the parties to assess what a hypothetical purchaser might reasonably have been willing to pay for the agency as at the date of termination. When calculating the 'loss of value': • It must be assumed that the agency would have continued and that the hypothetical purchaser would have been able to take over the agency contract and properly perform it even if, in reality, there were no dealings in such agencies or the agency was non-assignable as a matter of contract. • Future earnings should be discounted by an appropriate rate of interest. • Account should be taken of whether the market in the products in which the agent dealt was expanding or declining. • The agency should be valued on a net basis. If the agent has to incur any expense or do any work in earning commission, the value should be reduced accordingly. • If the agent has more than one agency, his expenses should be apportioned fairly between them. • If the former agent is likely to entice customers away to a competing	The indemnity is determined in accordance with the criteria set out in article 17(2) of the Directive (see Section 89b para. 2 of the German Commercial Code). But in practice, German courts mostly do not simply calculate the indemnity from the commercial agent's average annual remuneration over the preceding five years, as suggested by Article 17 (2) of the Directive. as suggested by Article 17 (2) of the Directive. They rather take account of the immediate payment of the indemnification by discounting the interest to day value. This means that there is mostly roughly a 10% discount. Other reductions may apply: If the principal does not have material benefits from the time of termination to the extent that newly solicited customers move and therefore cannot be counted as regular customers for the entire time, this detriment will lead to a reduction of the compensation. This so-called defecting-quote requires a forecast. The estimation is based on an individual case consideration. German courts commonly deduct an amount between 20% and 30 %. As a decisive aid, courts often take the sales-fluctuation, which refers to the customers and has to be determined from the past. Several other deductions have to be taken into account, e.g., if the agent's "losses" due to the termination of the contract are not related to the compensation, because they do not belong to his solicitation activities, but merely to his administrative obligations; these items (administration, stock maintenance, adjustment of damages, storage, etc.) have also to be deducted. On the other hand, those sales which the agent would have received in future in case of a hypothetically assumed continuation of his solicitation activities, will add up to the compensation. Hereto, also a projection is needed, which can	The indemnity is determined in accordance with the criteria set out in article 17(2) of the Directive. Additionally, Article X.18 of the Code of Economic Law provides: *"After termination of the contract, the commercial agent shall be entitled to an goodwill indemnity if he has brought the principal new customers or if he has significantly increased the volume of business with existing customers, in so far as the principal can continue to derive substantial benefits therefrom.* *If the contract contains a no-competition clause, the principal shall be deemed, unless it is proved otherwise, to receive substantial benefits.* *The amount of the indemnity shall be fixed taking into account both the extent to which the volume of business has been increased and the extent to which the customer base has been expanded.* *The indemnity may not exceed the amount of one year's remuneration, calculated on the basis of the average for the past five years or, if the term of the contract is less than five years, on the basis of the average for the preceding years "* Belgium opted for the solution laid down in Article 17 (2) of the Directive. The goodwill indemnity is calculated taking into account both the importance of business development and the introduction of new clients. The goodwill indemnity may not exceeed the amount of one year's remuneration as calculated from the average of the past five years or if the duration of the commercial agency contract is less than five years, according to the average of these previous years. It seems clear that a decrease in sales will surely have an impact on the quantum of indemnity that a court may determine and which will be calculated	Pursuant to article 19 of the aforementioned law, the commercial agent shall be entitled to an indemnity determined in accordance with the criteria set out in article 17(2) of the Directive.

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	It is based on the gross figure. No distinction is made between old and new customers and it includes special commission. There is no practice to reduce for professional costs. Finally, outstanding commissions must also be included in the calculation. The indemnity represents that part of the market lost to the agent and his loss is fixed at that moment. Accordingly, future occurrences are not taken into account, such as the principal ceasing to trade, or the agent continuing to work with the same clients. Similarly, the agent is not required to mitigate his loss. A contractual clause by which the agent will renounce in advance to the payment of his indemnity or limiting in advance its amount will be judged null and void.	principal, this circumstance would be reflected in the process of valuation. • What matters in the valuation process is what appears likely at the date of termination and not what happens afterwards.	turn out proportionally high in case of a continuous increase of revenues. However, the existing customers who may shortly order again will not be added to this item.	inevitably on the basis of reduced commissions earned during the last five years of the relationship (and in any case with a maximum of one year of commissions).	
For countries where regulations provide for an indemnity, examples of heads of loss eligible for reparation in the context of an action for damages brought under Article 17 (2) c) of the Directive	Even though the Directive does not expressly allow for the allocation of damages in addition to compensation, the agent may be granted additional damages on the basis of the Civil Code, for example if the agency contract has been terminated in an improper manner or before its term, i.e. indemnity for the loss of the agent's commissions until the term determined by the agreement.	It is established in English law that an agent may still claim for common law damages (i.e. breach of contract or speculative damages) even where he has received an indemnity or compensation under the UK Regulations (McQuillan & another v McCormick & others [2010] EWHC 1112). There is no suggestion that the agent may be barred from making such a claim due to the English law of double jeopardy. When the parties have chosen the indemnity mechanism in particular, Article 17(5) allows the agent to seek damages in addition to the grant of an indemnity. Article 17 (7) (a) and (b) sets out the heads of loss eligible for reparation in the context of an action for damages, using the wording of article 17(3)(c) of the Directive.	Article 17(3)(c) of Directive 86/653 is not applicable in Germany. However, the agent may have damage claims against his (former) principal in case of a breach of contract or other obligations under the law on commercial agents as well as the Civil Code.	Article X.19 of the Code of Economic Law provides: *"In so far as the commercial agent is entitled to the goodwill indemnity referred to in Article 20 and the amount of such indemnity does not fully indemnify the agent for the loss actually incurred, the commercial agent may, subject to proof of the actual extent of the loss claimed, obtain damages, in addition to that indemnity, not exceeding the difference between the amount of the loss actually incurred and the amount of that indemnity."* The European Court of Justice, in a judgment dated 3 December 2015 (Case C 338/14) ruled upon a request for a preliminary ruling from the Brussels Court of Appeal, that: *"1. Article 17(2) of 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 not precluding national legislation providing that a commercial agent is entitled, on termination of the agency contract, both to an indemnity for customers limited to a maximum of one year's remuneration and, if that*	According to articles 23 and 24 of the aforementioned law, the commercial agent shall have the right to further damages if the contract was terminated without observing its duration or the legal or conventional notice period and without the consent of the other party, unless such termination if justified on serious grounds, brought without delay to the knowledge of the agent. Such damages shall be calculated on the basis of expected remuneration and previous commissions. In a court case dated October 19, 2011, the Appeal Commercial Court of Luxembourg faced a litigation between a commercial agent and the oil company SHELL. The agent claimed an indemnity for the termination of the contract AND damages for violation of the legal notice period. In this case, the Appeal Court considered that the conditions of Article 19 for the allowance of the indemnity were not satisfied (the agent failed to prove that he had brought new customers or increased significantly the volume of business). However, the Court allowed damages for the violation of the legal notice period.

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				indemnity does not cover all of the loss actually incurred, to the award of additional damages, provided that such legislation does not result in the agent being compensated twice for the loss of commission following termination of the contract. *2. Article 17(2)(c) of Directive 86/653/EEC must be interpreted as meaning that it does not make the award of damages conditional upon the demonstration of the existence of a fault attributable to the principal which caused the alleged harm, but does require the alleged harm to be distinct from that compensated for by the indemnity concerning clients."* As a result, the additional indemnity granted in accordance with Article X.19 of the Code of Economic Law should only cover damages suffered by the agent due to the termination of the contract, except for damages for clientele. The damages that might therefore be compensated according to Article X.19 have to be limited to, for example: - investments and other costs incurred by the agent that have now become useless and that have not yet been set off, - damages that the agent has to pay to third parties because of the termination of his relationship with them due to the termination of his own relationship with his principal (sub-agents, employees, lease agreements, etc.)	
Case law and examples where the indemnity / compensation shall not be payable because the agency was terminated due to a default attributable to the commercial agent	The agent's gross misconduct allows the principal to terminate the agency without compensation. *"Gross misconduct means a misconduct which justifies immediate termination of the contract because it impaired the unity of purpose of the mandate of common interest and made it impossible for the parties to maintain their contractual relationship"* (Cass. Com., 21 June 2011, n°10-19902). Examples: - The fact that the agent has contacted in a very disorganised way his clients,	The agent has no right to an indemnity or compensation where the principal terminates the agency because of a serious breach by the agent which would justify summary termination at common law. In the UK the idea of justification for termination has generally been equated to the concept of "fundamental breach of contract". Examples include: - Breaches that go to the heart of the agent's fulfilment of their core functions;	- Example of an agent who starts to promote the products of a competitor (German Federal Court BGH, Neue Juristische Wochenschrift 1984, p. 2101) - Example of an agent insulting the principal (Appellate Court of Celle, Betriebsberater 1963, p. 711).	Examples of a serious breach attributable to the Agent: · Failure to pay bills and issue of bad checks by an agent who had the power to make direct purchases from the Principal; · The bank's agent who appropriated the sum of €2,231 belonging to the bank to temporarily deal with a private cash matter, although he was able to return the funds and that he actually did return them at the end of the month following the withdrawal; · Accepting bribes; · Representing other companies although the contract prohibits the	In a court case dated July 14, 2010, the Appeal Commercial Court of Luxembourg faced a litigation where the principal terminated the agency contract because of default attributable to the commercial agent. According to the Court, the default should consist in such a serious failure that the collaboration between the parties is no longer possible. Therefore, the party willing to invoke such a default against the other party shall terminate the contract within a very short period. The termination is irrevocable and the allowance of a notice period does not comply with the breaking conditions under article 18 of

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	making them promises he could not keep regarding the procurement of products, despite repeated warnings by the principal, and the fact that he refused to follow the sales procedure and gave his customers discounts superior to those recommended on a national level (Appellate Court of Paris, 4th Ch. B, 4 Oct. 1996, Socopral v. Sté Domaines Michel Bernard). - Misappropriation of money (Appellate Court of Nîmes, 4 Sept. 2014, No 14/00719). - The fact that the agent neglected his activities to the point that he lost an important client (Cour de cassation, commercial chamber, 9 June 2015, No 14-14.396). - The representation of another principal who competes with his existing principal (Cour de Cassation, Commercial Chamber, 29 March 2017, No 15-26.476) - The fact for the agent of selling at a loss, of proposing prices no longer in effect for 3 years, of taking technical decisions without informing the principal, which obliges him to rectify or to cancel orders, to transmit to clients fake delivery addresses and to undertake to deliver goods within a certain period that cannot be respected are serious negligences which justify an immediate termination of the agency contract and the absence of compensation for the agent (Cour de Cassation, Commercial Chamber, 5 January 2016, No 14-210.628) In all cases, the burden of proof lies on the principal.	- Breaches relating to the goals that the principal intended from the contract; - Breaches as regards to the agent's ethics and honesty; - The agent taking on an agency with a direct competitor of the principal (Rossetti v Diamond Sofa Company Limited [2012] EWCA Civ 1021) But the principal must be careful when terminating the agency, as illustrated in the following cases: • Crocs Europe BV v Anderson and another (t/a Spectrum Agencies) [2012] EWCA Civ 1400 / Crane v Sky in Home Ltd [2007] EWCH 66 - Principals need to ensure that, if terminating an agency contract on the grounds of the agent's breach of contract, the agent's breach is a repudiatory breach under English common law rules. Breaches of contract which are outside the core duties envisaged by the contract or which don't go to the ethics or honesty of the agent may not be sufficient to justify immediate termination, as they are not serious enough to constitute 'fundamental breach'. • Cooper and others v Pure Fishing (UK) Ltd [2004] EWCA Civ 375 - The principal must take the positive step of terminating. If the agent very seriously breaches the agreement very close to the end of the agency agreement and the principal does not terminate, but simply lets the agreement run on and expire and does not renew, the agent will have the right to compensation or an indemnity. • Volvo Car Germany Gmbh v Autohof Weidensdorf GmbH, Case C-203/09 - Once a principal has given contractual notice to terminate, he cannot withhold an indemnity if the principal subsequently discovers a breach of contract by the agent during the notice period that would have entitled the principal to withhold the indemnity.		agent to do so. · The refusal from the agent to inform the principal about market conditions; · The excessive use of alcohol during working hours, directly related to a decrease in business; · The fact that the agent employs the principal's money for his own private use; · The agent counterfeiting the principal's products; On the other hand, here are some examples where the Belgian courts did not admit serious breach: · The turnover decreases in the agent's sector, whilst the turnover increased in other sectors; · The transmission of only few orders or the lack of achievement of sales targets set up in the contract; . The insufficient results of an agent will not be considered as a serious breach per se, but it may be so if elements establish that he/she has made characterised errors, which are the main reason of this insufficiency; . When the contracting parties have determined what they consider a serious breach, this does not limit the discretion of the judge. However it can be considered as an indication for the judge as to what the parties regarded as an essential obligation. The non-attainment of the contractually established minimum turnover quota, in principle, will not be considered a serious breach, if there is not at the same time a manifest and persistent failure by the commercial agent, not making any or insufficient efforts to promote the interests of the principal.	the Luxembourg law. The condition of "seriousness" of the default must be appreciated globally, taking into account all mitigating or aggravating circumstances, as well as the consequences of the default. Also, both objective and subjective criteria shall be taken into account in this assessment (for instance: the definitive breach of confidence between the parties). In this particular case, the default of the commercial agent consisted notably in the sale of very similar products as those defined in the agency contract (moreover, the packaging was very similar too). However, the principal took more than three months before breaching the contract, so the Appeal Court considered the termination as wrongful.
Enforceability of choice of law, choice-of-court clauses and arbitration clauses	I. The choice of law clause has to be respected, in accordance with Regulation (EC) No 593/2008 (Rome I). 1. The right to compensation is of	The parties to the contract can agree that the agency contract will be governed by the law of another Member	Choice of law and choice of forum clauses will have to be respected. However, the indemnification is regarded as such a fundamental rule	Under Regulation (EC) No 593/2008 (Rome I) on the law applicable to contractual obligations, Belgian Courts will have to respect choice of law clauses	The Court will have to respect the choice made by the parties. Concerning the choice of law clause, however, as stated in article 3 of the

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	mandatory nature only within the domestic leval but not at the international level. Therefore, if the agent performs his activities in Germany and the governing law is the German law, then the law of this other country will have to be applied by French courts even though both the agent and the principal were French natural or legal persons The German law may not be rejected by the French court, i.e. the court of another Member State before which the case has been brought, in favour of the law of the forum, i.e. the French law (Cour de Cassation, Commercial Chamber, 5 Jan. 2016, No 14-10.628). 2. However, if the agent performs his activities in France but the governing law is that of a non-EU country, then the Regulations will apply, at least in respect of its mandatory aspects (CJEU Ingmar GB Ltd c/ Eaton Leonard Technologies Inc., 9 Nov. 2000, No C-381/98). II. The choice of jurisdiction clause has to be in accordance with Regulation (EU) No 1215/2012 ("Brussels I bis") III. The choice of jurisdiction clause has to be in accordance with the New York Convention on Arbitration of 1958	State and the EU conventions on choice of law and jurisdiction will apply. However, specifically in relation to the application of the agency regulations: 1. If the agent performs his activities in Great Britain but the governing law is that of another EEA country, then the law of the EEA country will apply. 2. If the agent performs his activities in Great Britain but the governing law is that of a non-EEA country, then the Regulations will apply (at least in respect of the mandatory aspects). The law of a Member State can only be overridden by the law of the chosen forum if the Member State deems it crucial to grant the commercial agent additional protection. If the choice of law is that of another Member State which has implemented the Directive, it will be for the forum court to determine if the commercial agency laws of the forum will override the choice of law. In respect of choice of an arbitral forum, the High Court held that a Canadian arbitration and choice of law clause was unenforceable because it did not give effect to the mandatory provisions of the Regulations, and as a result the arbitration award could not be enforced (*Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB)*).	that this cannot be excluded, not even by choice of a law which does not have such concept. With regard to the choice of an arbitral forum, in Germany, this is simply inevitable with contracts with States where there is no bilateral or multilateral treaty with Germany (e.g. China or Iran), because a judgement in either country will not be acknowledged, not to mention, enforced. Since, however, most of these countries are signatory States of the New York Convention on Arbitral Awards, an arbitration is the only practically eligible way to workable remedies.	in accordance with the principles of this Regulation (with the exception of the mandatory rules). As to forum clauses, Article 25 of the EU Regulation No 1215/2012 ("Brussels I bis") will apply. Belgian Courts may hold arbitration clauses unenforceable in relation to commercial agency agreements which have their effect in Belgium, unless the arbitrators will apply Belgian Law	Rome Convention on the law applicable to contractual obligations (replaced today - without substantial change - by Regulation (EC) No 593/2008 - Rome I), "*The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules' "*. Such 'mandatory rules' are, however not defined under Luxembourg Law and most of known case law concerns employment contracts. Furthermore, a clause conferring jurisdiction reflects the common will of the parties and is therefore recognisable under Luxembourg Law, unless the ordinary rule of jurisdiction is considered as "mandatory".
Additional observations	According to the established case-law of the French Cour de cassation, where termination of the commercial agency contract occurs during the trial period provided for in that contract, no compensation is due to the agent. However, the validity of such an exclusion raises some questions since the Court of Justice ruled in its decision C-315/14 dated April 7, 2016 « *that directive seeks, inter alia, to protect the*		1. A commercially important aspect is that German courts apply many provisions of the German commercial agents' law (Sections 84 et seq. of the German Commercial Code) may be applied by analogy to the distributor (reseller), in particular the agent's indemnification right, to the distributor. However, certain additional conditions have to be met. The main condition is that the distributor is contractually	See following article: http://www.marinusvromans.com/distribution-law-in-belgium/. This article deals with the Act on unilateral termination of exclusive and quasi-exclusive distribution agreements of 27 July 1961. By law of 2 April 2014 this Act was without material changes inserted in the Code on Economic Law (Book X.Title 3. Artt. 35-40). This Act grants the exclusive or quasi-exclusive distributor,	

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	commercial agent in his relations with the principal. The Court has already held that Article 17 of that directive is, in that regard, of particular importance It is therefore necessary to interpret the wording of Article 17(2) in a manner which contributes to that protection of the commercial agent… » In consequence, on December 6, 2016, the French Cour de cassation made the following request for a preliminary ruling before the Court of Justice (case C-645/16) : "*Does Article 17 of 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 apply where termination of the commercial agency contract occurs during the trial period provided for in that contract?* » This case is pending at the date of printing of this article. For the time being, the case-law of the the Cour de cassation regarding the validity of the trial period is still valid. A foreign principal, who wishes to appoint a French commercial agent, may have an interest in negotiating with him a trial period. Indeed, if the foreign principal terminates the contrat during this period, he shall not be required to pay any compensation, it bezng said that the Cour de cassation has accepted trial periods of 6 to 8 months. Even though this decision was largely criticized, the Cour de Cassation, in a decision rendered on January 20, 2015, ruled that the power to negotiate which confers the status of commercial agent means that the agent has the right to modify the contract. Therefore, if a principal negotiates to prevent his contractual partner to negotiate the price and sales' conditions in the name and on behalf of the principal, this partner will be excluded from the very protected French status of commercial agent.		bound to disclose its customers to the principal, at least after the termination. Recently, the Federal Court (BGH) even adjudicated that this indemnification right is a fundamental rule and, as a consequence, is even applicable by analogy to the distributor if another EU law has been chosen which does not know this form an analogy (BGH as of 25 February 2016 – VII ZR 102/15, BeckRS 2016, 04974)! 2. In case one should represent the principal towards a German agent (and under certain circumstances also towards a distributor), it would be preferable to choose German law since the amount of indemnification to be paid is obviously lower than the damages to paid under French law to the agent.	as defined in the Act, substantial protection similar to the protection offered to a commercial agent. There are also special provisions on precontractual information (Book X, Title 2, art. 26-34 Code on Economic Law) in relation to commercial cooperation agreements which may also apply to commercial agency and distribution agreements.	

	France	United Kingdom	Germany	Belgium	Luxembourg
	However this case-law might be reversed in the future.				

2. Additional remarks concerning Poland and Denmark

These two countries adopted the “German” practice of indemnity.

This indemnity is determined in accordance with the criteria set out in Article 17 (2).

In such connection, Article 764 of the Polish Commercial Code and Article 25 of the Danish Law of Commercial Agents are the exact reproduction of Article 17 (2) of the Directive.

Danish courts and Polish courts must respect choice of law clauses and choice of court clauses in accordance with the provisions of Rome I and Brussels I Bis EU Regulations. However, article 1 of the Danish Law of Commercial Agents states that the mandatory rules (articles 25-27) must prevail if the foreign chosen law gives less protection to the agent.

It is also interesting to note that Article 17 (3) c) of the Directive is not applicable in Denmark. However, the agent can claim damages against his (former) principal in case of breach of contract or other obligations under commercial agents law as well as the Danish civil code, like unjustifiable annulment of the agency contract by the commercial agent (DK: Ugesskrift for restsvaen 2001.1653).

3. Recent judgments of the Court of Justice relating to commercial agents

The Court of Justice of the European Union issued several decisions in 2016 and 2017 on commercial agents which are worth quoting hereunder because of their legal and practical interest:

3.1. Judgment of the Court (Fourth Chamber), 7 April 2016, Case C-315/14 :

« **The first indent of Article 17(2)(a) of 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 customers brought in by the commercial agent for the goods that he has been assigned by the principal to sell must be regarded as new customers, within the meaning of that provision, in the case where, even though those customers already had business relations with that principal in relation to other goods, the sale, by that agent, of the first goods required the establishment of specific business relations, this being a matter for the referring court to determine.** »

3.2. Judgment of the Court (First Chamber), 16 February 2017, Case C-507/15:

"***This request for a preliminary ruling concerns the interpretation of 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),* ***and of the Agreement establishing an Association between the European Economic Community and Turkey****, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1) ('the Association Agreement').*

The request has been made in proceedings between Agro Foreign Trade & Agency Ltd ('Agro'), established in Turkey, and Petersime NV, established in Belgium, concerning payment of various forms of compensation owed as a consequence of the termination, by Petersime, of the commercial agency contract between those two companies.

Agro is a company incorporated under Turkish law, established in Ankara (Turkey), which operates in the importation and distribution of agricultural products sector. Petersime is a company incorporated under Belgian law, established in Olsene (Belgium), which is involved in the development, production and supply of hatcheries and accessories for the poultry market.

On 1 July 1992, Petersime concluded a commercial agency contract with the predecessor of Agro, which was subsequently replaced, under a contract signed on 1 August 1996, by Agro itself. Pursuant to that contract, Petersime, as principal, assigned to Agro, as commercial agent, the exclusive sales rights of its products in Turkey. The contract, which was initially concluded for a period of 1 year, provided for an automatic extension, every year, for a further 12 months, unless cancelled by either of the parties by registered letter at least 3 months before the end of the 1-year period. Moreover, that contract stated that it was subject to Belgian law and that only the courts of Ghent (Belgium) had jurisdiction in case of disputes.

By letter of 26 March 2013, Petersime notified Agro of the termination of the commercial agency contract with effect from 30 June 2013. On 5 March 2014, Agro brought legal proceedings before the rechtbank van Koophandel te Gent (Commercial Court, Ghent, Belgium) seeking an order requiring Petersime to pay compensation for termination of the contract and a goodwill indemnity, the repossession of the remaining stock as well as the payment of outstanding claims.

It is apparent from the order for reference that, in support of its claims, Agro relies on the protection provided for commercial agents by the Law of 1995. In that regard, Agro claims that the provisions of the latter are applicable in the present case, given that the parties validly chose Belgian law as the law applicable to the contract which they concluded. By contrast, Petersime contends that only Belgian general law is applicable, on the ground that the ***Law of 1995 applies only to the extent that the commercial agent operates in Belgium, which is not the case in the present situation.***

For the Court of Justice, in order to answer the question posed by the referring court, as regards Directive 86/653, it is necessary to determine whether a commercial agent carrying out activities under a commercial agency contract in Turkey, the principal of which is established in a Member State, comes within the scope of application of that directive.

The Court has held already that it is essential for the European Union legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the European Union, cannot evade the provisions of the Directive by the simple expedient of a choice-of-law clause*. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the European Union, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed (judgment of 9 November 2000, Ingmar, C-381/98, EU:C:2000:605, paragraph 25).*

Where, as in the main proceedings, ***the commercial agent carries out its activities outside the European Union, the fact that the principal is established in a Member State does not present a sufficiently close link with the European Union for the purposes of the application of the provisions of Directive 86/653****, in the light of the objective pursued by the latter, as stated in the Court's case-law.*

It is not necessary, for the purposes of making the conditions of competition between commercial agents within the European Union uniform, to provide commercial agents who are established and carry out their activities ***outside the European Union with protection comparable*** *to that of agents who are established and/or carry out their activities within the European Union.*

Consequently, the Member States are not obliged to adopt harmonisation measures, solely under Directive 86/653, concerning commercial agents in situations like those at issue in the main proceedings. That Directive therefore does not preclude national legislation such as that at issue in the main proceedings.

On those grounds, the Court (First Chamber) hereby ruled:

> ***«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 the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 must be interpreted as not precluding national legislation transposing that directive into the law of the Member State concerned, which excludes from its scope of application a commercial agency contract in the context of which the commercial agent is established in Turkey, where it carries out activities under that contract, and the principal is established in that Member State, so that, in such circumstances, the commercial agent cannot rely on rights which that directive guarantees to commercial agents after the termination of such a commercial agency contract.***

3.3. Judgment of the Court (Fourth Chamber), May 17, 2017, Case C-48/16

« This request for a preliminary ruling concerns the interpretation of Article 11 of 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.

The request has been made in proceedings between ERGO Poist'ovňa a.s. ('ERGO') and Ms Alžbeta Barlíková concerning a demand for payment of the sum of EUR 11 421.42, sent by ERGO to Ms Barlíková, in respect of the repayment of commissions.

The dispute in the main proceedings and the questions referred for a preliminary ruling

On 13 March 2012, ERGO, a company operating in the insurance sector, and Ms Barlíková concluded a contract that they entitled 'Mediation agreement with a tied financial agent' ('the contract at issue'). That contract referred to Paragraph 642 of the Commercial code (Slovak law).

By that agreement, Ms Barlíková undertook to carry on 'mediation in the insurance sector' for ERGO. That activity consisted, inter alia, in submitting offers to conclude insurance contracts proposed by that company with customers. Ms Barlíková was also authorised to conclude those contracts in the name and on behalf of ERGO.

Ms Barlíková was to receive a commission for the conclusion of each insurance contract, consisting in a percentage of the premium amount or the annual premium of such contract. **She was entitled to advance payment of that commission as soon as the contract with the customer was concluded. However, the entitlement to the commission was acquired definitively only if the insurance contract was not terminated before three or five years.**

Moreover, the contract at issue stipulated that the non-payment of premiums by the customers would result in the ceasing of the entitlement to commission, if it occurred during the first few months of the insurance contract, or a proportional reduction of the amount of the commission, if it occurred after the first three months of the execution of that contract.

Ms Barlíková brought several clients to ERGO. In accordance with the contract at issue, when the insurance contracts were concluded with those clients, she received, in advance, the commissions payable to her. However, three to six months after those contracts were signed, certain clients ceased to pay the premiums relating to those contracts and failed to react to the letter of formal notice demanding payment, referring to the settlement of the sums payable, sent by ERGO. Consequently, those contracts ceased automatically, pursuant to Paragraph 801 of the Civil Code. Certain clients indicated to ERGO that they had ceased to pay those premiums after losing the confidence that they initially had in that company, because it had treated them inappropriately.

Following the ceasing of the insurance contracts concerned, pursuant to the contract at issue, ERGO asked Ms Barlíková to pay back the commissions received in respect of those insurance contracts, for a total amount of EUR 11 421.42. Since Ms Barlíková did not pay that sum, ERGO brought an application before the Okresný súd Dunajská Streda (District Court, Dunajská Streda, Slovakia) seeking an order for payment of that sum.

Before that court, Ms Barlíková claimed that the ceasing of those insurance contracts was the fault of ERGO. In that context, the referring court seeks to ascertain whether Paragraph 662 of the Commercial code, which transposes Article 11 of Directive 86/653, precludes the clauses of the contract at issue pursuant to which non-payment of the premiums provided for in the contract concluded between the principal and the third party, as the case may be, terminates entitlement to commission or gives rise to a reduction of the amount of that commission in proportion to the period of execution of that contract.

Consideration of the questions referred

The first question

By its first question, the referring court asks, in essence, whether the first indent of Article 11(1) of Directive 86/653 must be interpreted as meaning that it covers not only cases of complete non-execution of the contract between the principal and the third party, but also cases of partial non-execution of the contract, such as non-compliance with the volume of transactions or the duration envisaged by that contract.

However, it is apparent from Article 7(1) of Directive 86/653, read in conjunction with Article 10(1) thereof that, although the commercial agent is entitled to commission in respect of transactions that the principal concludes with clients that the agent has found, that right materialises only at the time that the transactions in question are executed or that those transactions should have been executed. It may thus be inferred from this that the commission becomes due as that execution progresses, which, in the case of long-term contracts in which execution is ongoing, such as the insurance contracts at issue in the main proceedings, is spread out over time. If the commission becomes due only in the proportion to which those transactions are executed, the right to commission is extinguished to the extent that those transactions have not been executed. The first indent of Article 11(1) of that directive must therefore be interpreted as covering also cases of partial non-execution of the contract concluded between the principal and the third party.

(…) It follows from Article 3(1) and Article 4(1) of that directive that the commercial agent and the principal must **act dutifully and in good faith in their mutual relations**. Similarly, it is apparent from Article 10(1) of that directive that the legislature intended to make **commission becoming due subject to the execution of the contract rather than to its conclusion**.

An interpretation of the first indent of Article 11(1) of Directive 86/653, as relating solely to cases of complete non-execution of the contract, would run counter to the purpose of the provisions of that directive cited in the previous paragraph of this judgment and of that directive in general, if, for long-term contracts, such as the insurance contracts at issue in the main proceedings, **the agent were to be guaranteed all his commission from the beginning of the execution of those contracts, without any account being taken of a possible partial non-execution of those contracts.**

In the light of the foregoing considerations, the answer to the first question is that the first indent of Article 11(1) of Directive 86/653 must be interpreted as meaning that it covers not only cases of complete non-execution of the contract concluded between the principal and the third party, but also cases of partial non-execution of that contract, such as non-compliance with the volume of transactions or the duration envisaged by that contract.

The second question

By its second question, the referring court asks, in essence, whether Article 11(2) and (3) of Directive 86/653 must be interpreted as meaning that the clause of a contract for commercial agency, pursuant to which the agent is required to refund, on a pro-rata basis, a part of his commission in the event of partial non-execution of the contract concluded between the principal and the third party constitutes a 'derogation to the detriment of the commercial agent', for the purposes of Article 11(3) of that directive.

(…) The fact that the contract for commercial agency requires the agent to reimburse, on a pro-rata basis, a part of his commission, in the event that the contract concluded between the principal and the third party is executed only partially, cannot, as a general rule, be considered a 'derogation to the detriment of the commercial agent', for the purposes of Article 11(3) of Directive 86/653. On the contrary, that obligation is consistent with the requirements of Article 11(1) and (2) of that directive.

Nonetheless, it should be specified that the obligation to refund the commission must be strictly proportionate to the extent to which the contract has not been executed. An obligation to refund a part of the commission proportionately greater than the extent of that non-execution would constitute a derogation to the detriment of the agent, prohibited by Article 11(3) of Directive 86/653. By contrast, **a derogation to the advantage of the agent**, consisting in requiring the refund of a part of the commission proportionally smaller than the extent of the non-execution of the contract remains possible.

In the light of the foregoing considerations, the answer to the second question is that Article 11(2) and (3) of Directive 86/653 must be interpreted as meaning that the clause of a contract for commercial agency pursuant to which the agent is required to refund, on a pro-rata basis, a part of his commission in the event of partial non-execution of the contract concluded between the principal and the third party does not constitute a 'derogation to the detriment of the commercial agent', for the purposes of that Article 11(3), if the part of the commission subject to the refund obligation is proportionate to the extent to which that contract has not been executed and <u>on condition that that non-execution is not due to a reason for which the principal is to blame</u>.

The third question

By its third question, the referring court asks, in essence, whether the second indent of Article 11(1) of Directive 86/653 must be interpreted as meaning that the concept of 'a reason for which the principal is to blame' relates only to the legal reasons which led directly to the termination of the contract concluded between the principal and the third party or whether that concept covers all the legal and factual circumstances for which the principal is to blame, which are the cause of the non-execution of that contract.

In that regard, It should be recalled that, according to the order for reference, in the case in the main proceedings, the non-execution of the insurance contracts giving rise, according to ERGO, to the refund of the commissions received by Ms Barlíková results from the non-payment of the premiums relating to those contracts by certain clients. **Under the law of the Slovak Republic, that alone leads, in accordance with Paragraph 801 of the Civil Code, to the automatic termination of the contracts concerned. According to the referring court, in the case in the main proceedings, the non-payment of those premiums by the clients concerned was allegedly prompted by a loss of confidence in the principal, which 'lacked professionalism' with respect to those clients**.

It was stated, in paragraphs 41 and 42 of this judgment, that **that directive seeks, inter alia, to protect the commercial agent** and refers, moreover, to the relations, based on fairness and good faith, between the commercial agent and the principal. **The condition that non-execution must not be due to reasons for which the principal is to blame contributes to the achievement of those objectives**, by ensuring that that principal is not released from his obligation to pay the commission to the agent, when the principal was the cause of the non-execution of the transaction.

A narrow definition of the concept of 'a reason for which the principal is to blame', relating only to the legal reasons which led directly to the termination of the contract, irrespective of the legal or factual circumstances accounting for that termination, is not consistent with those objectives. Indeed, such a narrow definition would not make it possible to assess whether, in actual fact, the principal is the cause of the termination of the contract, nor whether blame for the non-execution of that contract must lie with the principal. There would therefore be situations in which the principal might evade payment of the commission, when that termination results from his own conduct.

That would be the case in particular in relation to legislation such as that at issue in the main proceedings, which provides that the non-payment of the premiums leads, in accordance with Paragraph 801 of the Civil Code, to the insurance contracts concerned being extinguished automatically. Under such legislation the termination of the contract is due to the non-execution of the contractual obligations by the third party who ceases to pay the premiums relating to that contract, **without however account being taken of the cause of the termination of payment.**

It follows that the concept of 'a reason for which the principal is to blame', set out in the second indent of Article 11(1) of Directive 86/653 cannot relate only to the legal reasons which led directly to the termination of the contract, but refers to the reasons which led to that termination, which must be assessed by the national court on the basis of all the relevant facts and points of law, for the purposes of determining whether the non-execution of the contract is due to a reason for which the principal is not to blame.

Consequently, as regards in particular the facts at issue in the main proceedings, in order to adjudicate on the application brought by ERGO for refund of commissions and on the possible extinction of Ms Barlíková's right to commission, it is for the referring court to take into consideration all the facts of the present case, beyond the mere failure of the insured parties in their obligation to pay the premiums relating to the insurance contracts concluded, in order to establish whether that company is to blame for the non-execution of those insurance contracts.

In the light of the foregoing considerations, the answer to the third question is that the second indent of Article 11(1) of Directive 86/653 must be interpreted as meaning that the concept of 'a reason for which the principal is to blame' does not relate only to the legal reasons which led directly to the termination of the contract concluded between the principal and the third party, but covers all the legal and factual circumstances for which the principal is to blame, which are the cause of the non-execution of that contract. »

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