

Application of the Overriding Mandatory Rule at Commercial Agency Contract — Some Judgements in EU (summary)

Mihwa KIM

Associate Professor, Aomori Chuo Gakuin University

This article overview and tries consider the trend of the legislation and the judicial judgement of the EU argued extensively about the problem of application of the overriding mandatory rule at commercial agency contract.

The Council Directive 86/653/EEC on the Laws of the Member States relating to self-employed commercial agents (Directive) is incorporated in the law of all member states, and to realize the protection of commercial agents. Articles 17 and 18 of the Directive, in particular, are regarded as the provisions of protection to which compensation for damages and indemnity are given to the commercial agent after termination of the agency contract, and it's strong view today that the national provisions on the agent's protection implementing the Directive are the overriding mandatory rule in the EU.

In overview of the three main cases of the CJEU, the provisions of member states shall consistently prevail as the overriding mandatory rule after the *Ingmar* judgement and the self-employed commercial agent who is established and carries on his activity in the forum member state must be protected. Moreover, it may be inferred from the *Unamar* case that it was judged by the degree of the protection of agent whether the overriding mandatory rule could be applied, and with reservation conditions that the provision could not be applied in some cases. In other words, it is supposed that the relative application of the overriding mandatory rule have been adopted. However, according to the *Agro* case, the agent who is established and carries on his activities outside the EU should not be required protection by the provision implementing the Directive, even if the principal is established in a forum member state.

There are no express provisions for the overriding mandatory rule like Article 9 of the Rome I regulation in our country, but the Wengler's theory of special application of the mandatory rule is adopted as interpretation. This theory could also be adopted into the agency contract if three requirements are satisfied based on it. Furthermore, in recent years, publicization of private law is progressing, and conflict countries may all have mandatory rules. In such case, it is also possible that the mandatory rule will be applied rela-

tively by focusing on both degree of the protection of agent. In summary, as for application of the mandatory rule at commercial agency contract, it was found that the special application and the relative application are adopted depending on the situation.

But, the problem of this subject would not solved by the interpretation from the perspective of legal stability for the agent's protection in our country where is not considered for his protection. Therefore, it seems that a solution by legislation may be desirable on the above mentioned situation. Further, it should be considered problems on arbitration agreement and exclusive choice of court agreement in the legislation regarding the applicable law of commercial agency contract.