Giuditta Cordero Moss (ed) : Common Law Contract Models and Commercial Transactions subject to Civilian Governing Laws

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Circulation of Common Law Contract Models in Europe : the Impact of European Union System

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1. European Union System and Circulation of Common Law Contract Models – There are several ways to assess the reception by a legal system of contract models from another legal system.

The easiest way is to examine how a national judge applies his law to a foreign contract model. For instance, within the area of contracts law could be considered the case-law of the *Cour de Cassation* or the appellate courts and tribunals, in their ability to enforce contract models from different systems of *Common Law*.

While not strictly speaking as a specialist in contract law but rather in European Union & Comparative Law, I will suggest another line of enquiry. My aim will be to try to show that the European Union law and, particularly, the case-law of the Court of Justice of the European Communities, compels national lawyers to welcome in their systems , legal situations located in another Member State. Thus, European law promotes the movement of models and leads the national lawyer to handle rules of foreign system.

2. An almost perfect example: the "Courage" case – In an attempt to illustrate my demonstration, I will rely on an almost "perfect" example: the "Courage" ruling: ECJ, 20 September 2001, Case C-453/99[1].

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[1] See in the appendix, the decision.

The dispute, at the origin of the referral for a preliminary ruling to the Court of Justice, opposes in England a brewery and a publican, both bound by a lease agreement and an exclusive purchasing clause. The disagreement concerns the settlement of various bills corresponding to deliveries of beer. Pursued for payment, the publican opposes the nullity of the contract under Article 81 § 1 & 2 EC and counter-claims for damages. Both the defence claim and the counter-claim, raise a difficulty in terms of English law.

According to the national judge (*Court of Appeal – England & Wales*), two obstacles arise. The first one relates to the ability of a party to an illegal agreement to plead the nullity of a contract to which it had consented. The second concerns the ability of that same party to claim damages due to an abnormally high price practiced against it by its co-contracting party.

In both situations, the English judge finds that the defendant's participation in an illegal agreement is potentially such as to deprive him of the possibility of invoking an exception of nullity and, *a fortiori*, of the counter-claim for damages. While asking itself on the compatibility of that solution with EU Law, the *Court of Appeal* refers to the Court of Justice the following four questions:

> "1). Is Article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?
>
> 2) If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?
>
> 3) Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with EU Law?
>
> 4) If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with EU Law, what circumstances should the national court take into consideration?" (par. 16).

3. The context of the case in European Union law – The questions posed by the English court are in line with the broader theme of the relationship between national law and European Union law.

In this case, it is specifically about determining how the first two paragraphs of Article 81 EC – which lay down respectively: 1° a rule prohibiting agreements restricting competition and 2° a principle of automatic nullity – should be implemented, especially in a basic contractual litigation.

The procedural treatment of the nullity of the contract which is contrary to the rules of the economic public order (main action, exception of nullity), its nature (absolute or relative), its extent (partial or total), its consequences (restitutions and possibly damages); are they solely abandoned to the cautiousness of the laws and state judges of each Member State or is the EU Law likely to intervene in one way or another ?

The answer is known. It bears the name of the "*principle of procedural autonomy*" which was formulated more than twenty five years ago by the Court of Justice[2].

The reasoning behind this principle consists of two stages[3] :

> 1° in the absence of Community rules [EU Law], it is up for the domestic legal order of each Member State to designate the courts that have jurisdiction and to lay down procedural rules (…and, quite often, substantive rules, the border between "procedural" and "substantive" being somewhat blurred in the present case situation, so that the principle of "procedural autonomy" does not exclude any reference to considerations of substantive law), designed to safeguard the rights which individuals derive from the direct effect of EU Law;
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> 2° however, these rules must not be less favourable than those governing similar domestic actions (principle of equivalence), and, most of all, they must not render practically impossible or excessively difficult the exercise of rights conferred by the European legal order (principle of effectiveness).

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[2] See in particular the first rulings on recovery of charges and taxes unlawfully collected by Member States: ECJ, 16 December 1976, *Rewe*, case 33/76, ECR. p. 1989; ECJ, 16 December 1976, *Cornet*, case 45/76, ECR, p. 2043.

[3] For a reminder see for ex. the *Courage* ruling, par. 29.

In other words, when the law fails to deliver all means of its implementation, it relies on different national laws. Still, EU Law, does not entirely step aside. It continues to ensure compliance with its rules in the name of a double necessity of legal effectiveness and uniform application.

4. The three lessons drawn from the *Courage* case – One is allowed to draw different lessons from how the EU Law seeks to understand national law of contracts through the use of a framework governing the principle of procedural autonomy.

The most important lesson for our research is the third one. But to understand it, it is necessary to introduce the two others beforehand.

5. In contracts law, the use of the principle of procedural autonomy is rather exceptional and of a subsidiary nature : first lesson – Since it takes different paths from those traditionally used in national law, since it involves new protagonists, more remote and less familiar than those we are used to be close to at the domestic level, the EU Law may be perceived with some excessiveness. Yet, the caricature is not always appropriate as suggested by the principle of procedural autonomy, which, in contractual matters, plays a rather exceptional and altogether subsidiary role.

What is the importance of the phenomenon we are studying here? In the field of contracts law, the European judge had rarely recourse to the principle of procedural autonomy. If one puts aside the (beautiful) purely procedural issues, in particular those relating to the definition of the position of the national judge as it regards the implementation of the European rule[4], two areas of EU Law which affect contracts law are mainly called upon. The first one, which we will not consider here, relates more or less, to the European principle of free movement and the manner in which national regulations may be declared inapplicable in relations between individuals, including co-contractors[5]. The second area concerns us more, since it is in direct contact with the theme of this column: it is the law of free competition.

[4] For an overview of solutions, see for example the collective work under the supervision of S. Guinchard, *Droit processuel*, Précis Dalloz, 4th ed.

[5] For a summary analysis of this very abundant question, see, in French, with numerous references cited, the analysis suggested by L. Soubelet *in "Le rôle conféré par le droit*

In this matter, barring any error on our part, there are only two case-law manifestations of the principle of procedural autonomy, the very same ones that are the subject of this column. Yet, even through these two illustrations, one notes that the principle is called upon as a last resort, in a simply subsidiary manner.

As we have seen it in the (aforementioned) *Courage* case, different questions were posed to the Court of Justice. For the record, the matter was whether, under EU Law, a party to an illegal agreement must be granted the right to plead the nullity of the legal relationship to which it is party and, if so, if it has the liberty, and under what conditions, to fill a claim for damages. Despite appearances, these two questions do not equally concern the principle of procedural autonomy. The Court of Luxembourg understood it perfectly, as it takes special care to make the division between what concerns the pure and simple principle of primacy of EU Law and what is solely delimited by it. In this regard, the Court considers that only the second question is likely to concern the principle of procedural autonomy[6]. Indeed, without any hesitation, the ruling is based on several major decisions of European case law in order to reaffirm: 1° the autonomous dimension of the European legal order (par. 19), 2° the essential nature of the competition policy as it regards the functioning of the internal market (par. 20) and finally 3° the direct effect, including in relations between individuals, of Article 81 § 1 EC (par. 23). Hence the conclusion, according to which:

> "any individual can rely on a breach of Article 81 § 1 of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision" (par. 24).

When primary or secondary EU Law delivers with sufficient strength and precision the principles that guide its implementation, there is no need to have recourse to a necessarily more subtle concept of a framework governing the Member States' procedural autonomy. The EU Law is partially self-sufficient, without having necessarily a need to interfere with the national law.

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communautaire aux droits nationaux des États membres", Chronique de droit européen n° III of the CEJEC, Université de Paris Ouest –Nanterre La Défense, *Les Petites Affiches*, 19 May 2003, n° 99, p. 6.

[6] See below our comments on this point.

6. The European framework governing the principle of procedural autonomy aims at establishing a correlation between legal systems partly autonomous and partly hierarchised : second lesson – Among different ways of approaching the relationship between EU Law (in this case competition law) and national law (in this case contracts law), the most widespread consists in opposing systems, bringing them into conflict, so as to determine whether, within the scope of EU Law, national law is compatible or not. However, this way of understanding the relationship between sets of rules does not allow to grasp all of the legal reality. There are indeed situations where the primacy of EU Law does not totally deprive national law of its autonomy and, conversely, where a certain autonomy of national law survives the primacy of EU Law.

Consequently, the idea is not any more to find an antinomy but rather a correlation between systems. It is neither more nor less than finding a way to make live together national solutions with those from EU Law.

The European framework governing the principle of procedural autonomy is unquestionably one of those situations, since it has no other aim than the one to establish a dialogue between EU Law and national law. It reflects a will to seek "balance between the principle of "judicial subsidiarity", which implies that the procedural autonomy of national law is respected, and the principle of the primacy of EU Law, which requires that an effective judicial protection of rights resulting from EU Law is ensured"[7].

The *Courage* decision illustrates in its own way this inseparable double movement of autonomy and primacy.

As it regards autonomy, the power of the Member States has been reasserted in defining the consequences on civil law grounds, attached to a violation of Article 81 of the Treaty, such as the obligation to repair the damage caused to a third party or a possible obligation to contract (an implied, but hardly questionable, solution in the *Courage* ruling).

As it regards primacy, the Court of Justice takes care to clarify that the effectiveness of European competition law would be called into question:

[7] D. Simon, *Le système juridique communautaire*, PUF, 3rd ed., n° 335, p. 425.

"(…) if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the European competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU and (…) there should not (…) be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules." (*Courage* ruling, par. 26-28)

Ultimately, it is in the conciliation of contrary requirements that the intervention of EU Law is emerging in a close relationship with national solutions. EU Law does not entirely squash national law. To the contrary, it draws from it useful tools, sometimes necessary, for its implementation. The situation is not that of an irreducible conflict of rules; of an antinomy. It is more likely a search of a concordance between a specialised European legal order, therefore incomplete, and national legal orders that have made the choice to confer primacy upon it.

7. The intervention of EU Law leads to a rereading of national laws, which is rather nuanced and has a broad meaning : third lesson – With these broad guidelines, the understanding of national law conducted through the European prism, may finally begin. There is no room here for snap judgements or attempts to retreat into oneself. The approach is deliberately nuanced. It also carries a broad meaning.

The analysis is unquestionably nuanced considering how, in the *Courage* case, the Court of Justice construes the rule of effectiveness contained in the European principle of procedural autonomy. The question posed to it by the English judge, was to find out under what circumstances the EU Law concedes that the national law may refuse to a party to an illegal agreement, the possibility of seeking damages. In the present case, the action of the publican aimed at obtaining compensation for damage suffered as a result of high tariff conditions offered by the other contracting party is determined, in accordance with national law, by his degree of liability in the conclusion

of a contract considered as potentially contrary to the competition rules[8]. Yet, it is precisely on the manner to asses the degree of liability, that the Court of Justice is asked to give its opinion.

In order to do so, the Court proceeds in three steps. Firstly, it starts to draw all the resources from its case-law so as to guide it towards the solution. For this reason, it notices in particular that a certain room has already been made in the past for the maxim according to which a litigant should not profit from his own unlawful conduct, where this is proven (par. 31). Secondly, the Court examines the circumstances that could be such as to let a national judge to allow an action of the co-contracting party that is the victim of an illegal agreement. Based on the information added to the debate by the United Kingdom, it notes, for example, that a co-contracting party that is found to be in a markedly weaker position is as if deprived of his ability to avoid damage resulting from the illegal agreement, so that it must be able to engage the liability of the other contracting party (par. 33). Finally, the Court rejects the objection according to which the reasoning conducted on the consequences in civil law of a breach of art. 81 CE would be in contradiction with the European definition of the agreement. In reality, there is no interference between the two parts of the reasoning, quite distinct one from another, since the first is solely part of EU Law, whereas the second is more modestly delimited by the principle of procedural autonomy.

In the end, the Court finds that EU Law:

> "does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition".

One may see that EU Law gives, as a general guideline, indications that should enable a correct implementation of the national law of contracts. It is up to the state judge who is the European common law judge, to implement them, which gives him a substantial margin of manoeuvre.

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[8] For the presentation of this English rule and the use of the *Ex turpi causa non oritur actio* adage, see for ex. G. Samuel, *Law of Obligations and Legal Remedies*, Cavendish Publishing, London, 2nd ed., 2001, p. 239 ff.

The approach of the Court of Justice is not simply nuanced, it also carries a broad meaning. Indeed, the decision does not exclusively apply to the English law of unlawful contracts. It can be transposed to all national laws of the Member States, and leads to understanding in a particular way – probably too little exploited – the comparative approach.

Thus, for the French lawyer, the Court of Justice's ruling is an invitation to assess the adequacy of its rules with the European principle of procedural autonomy. Yet, to notice that this ruling of the Court of Justice undoubtedly reinforces our national solutions, is not the least reassuring of the lessons in these times of great European hesitation. As it regards, first of all, the ability of a party to an illegal contract to seek its annulment and to act, if necessary, in tort, nothing in our civil law, as a rule, stands in the way of an action by the co-contracting party, victim merely because it had participated in the conclusion of an unlawful legal act. The exception of indignity, formulated by the famous maxim *Nemo auditur propriam turpitudinem allegans*, has a reduced scope of application in our law. It affects, as we know, only claims for restitution resulting from the nullity of the prohibited contract[9].

But there is more. Should one stick only to the restitutions field, it is striking to notice how our national law is willing to adhere to the analysis used by the Court of Justice in an entirely different legal environment. Indeed, one knows that the expression *Nemo auditur* has a somewhat misleading nature[10]. It gives willingly way to the Roman maxim *In pari causa turpitudinis, cessat repetitio* and its variants, which allow to explain why, when the indignity is unequal between the parties to the contract, the claim for restitution is sometimes opened only to the least guilty of them.

Is this not the same reasoning as that implemented by the Court of Justice in the context of English law? In these two totally different situations, it comes, ultimately, to ensuring that legal action is not totally closed to the party which, far from having orchestrated the illegal agreement, suffers from its consequences. Clearly the Court of Justice's analysis exceeds by its meaning the data from a single state law. On the contrary, it intends to enable us to hold dialogue between different national legal systems. There is nothing more normal, when it comes to participate, albeit modestly,

[9] For an overall analysis, see with numerous references cited: Ph. le Tourneau, *Juris-Classeur Civil*, App. art. 1131 to 1133.
[10] See in particular on this discussed question: Ph. le Tourneau, *op.cit.*, n° 121 ff.

by small touches, to a European construction which necessarily requires finding renewed forms of community or unity of rights.

8. Conclusion – The “Courage” case help us to think about that other way through which European Union law promotes the movement of national models in Europe and their comparison

Comparative law is no longer only concerned with comparing national laws. There is also an international dimension of the comparison and, as far as we are concerned, a European one.

The European framework modifies the comparative method. Comparing laws has become a triangular process: a contract model, which has been designed according to the rules of one particular national system is taken into account in another one, because a third one, the EU system, requires such a circulation.

The search for a proper implementation of EU law in each Member State fosters interactions between national laws.

APPENDIX /

Judgment of the Court of 20 September 2001. - Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. - Reference for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) - United Kingdom. - Article 85 of the EC Treaty (now Article 81 EC) - Beer tie - Leasing of public houses - Restrictive agreement - Right to damages of a party to the contract. - Case C-453/99.
European Court reports 2001 Page I-06297

Parties

In Case C-453/99,
REFERENCE to the Court under Article 234 EC by the Court of Appeal (England amd Wales) (Civil Division) for a preliminary ruling in the proceedings pending before that court between
Courage Ltd
and
Bernard Crehan
and between
Bernard Crehan
and
Courage Ltd and Others,
on the interpretation of Article 85 of the EC Treaty (now Article 81 EC) and other provisions of Community law,
THE COURT,
composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet (Rapporteur) and V. Skouris (Presidents of Chambers), D.A.O. Edward, P. Jann, L. Sevón, F. Macken and N. Colneric, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,
Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,
after considering the written observations submitted on behalf of:
- Courage Ltd, by N. Green QC, instructed by A. Molyneux, Solicitor,
- Bernard Crehan, by D. Vaughan QC and M. Brealey, Barrister, instructed by R. Croft, solicitor,
- the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Parker QC,
- the French Government, by K. Rispal-Bellanger et R. Loosli-Surrans, acting as Agents,
- the Italian Government, by U. Leanza, acting as Agent,
- the Swedish Government, by L. Nordling and I. Simfors, acting as Agents,
- the Commission of the European Communities, by K. Wiedner, acting as Agent, and N. Khan, Barrister,
having regard to the Report for the Hearing,
after hearing the oral observations of Courage Ltd, represented by N. Green and M. Gray, Barrister, of Bernard Crehan, represented by D. Vaughan and M. Brealey, of the United Kingdom Government, represented by J.E. Collins and K. Parker, and of the Commission, represented by K. Wiedner and N. Khan, at the hearing on 6 February 2001,
after hearing the Opinion of the Advocate General at the sitting on 22 March 2001,
gives the following
Judgment

Grounds

1 By order of 16 July 1999, received at the Court on 30 November 1999, the Court of Appeal (England and Wales) (Civil Division) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 85 of the EC Treaty (now Article 81 EC) and other provisions of Community law.

2 The four questions have been raised in proceedings between Courage Ltd (hereinafter Courage) and Bernard Crehan, a publican, concerning unpaid supplies of beer.

Facts of the case and the questions referred for a preliminary ruling

3 In 1990, Courage, a brewery holding a 19% share of the United Kingdom market in sales of beer, and Grand Metropolitan plc (hereinafter Grand Met), a company with a range of catering and hotel interests, agreed to merge their leased public houses (hereinafter pubs). To this end, their respective pubs were transferred to Inntrepreneur Estates Ltd (hereinafter IEL), a company owned in equal shares by Courage and Grand Met. An agreement concluded between IEL and Courage provided that all IEL tenants had to buy their beer exclusively from Courage. Courage was to supply the quantities of beer ordered at the prices specified in the price lists applicable to the pubs leased by IEL.

4 IEL issued a standard form lease agreement to its tenants. While the level of rent could be the subject of negotiation with a prospective tenant, the exclusive purchase obligation (beer tie) and the other clauses of the contract were not negotiable.

5 In 1991, Mr Crehan concluded two 20-year leases with IEL imposing an obligation to purchase from Courage. The rent, subject to a five-year upward-only rent review, was to be the higher of the rent for the immediately preceding period or the best open market rent obtainable for the residue of the term on the other terms of the lease. The tenant had to purchase a fixed minimum quantity of specified beers and IEL agreed to procure the supply of specified beer to the tenant by Courage at the prices shown in the latter's price list.

6 In 1993, Courage, the plaintiff in the main proceedings, brought an action for the recovery from Mr Crehan of the sum of GBP 15 266 for unpaid deliveries of beer. Mr Crehan contested the action on its merits, contending that the beer tie was contrary to Article 85 of the Treaty. He also counter-claimed for damages.

7 Mr Crehan contended that Courage sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie. He contended that this price difference reduced the profitability of tied tenants, driving them out of business.

8 The standard form lease agreement used by Courage, Grand Met and their subsidiaries was notified to the Commission in 1992. In 1993, the Commission published a notice under Article 19(3) of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-1962, p. 87), stating its intention to grant an exemption under Article 85(3) of the Treaty.

9 That notification was withdrawn in October 1997 following the introduction by IEL of a new standard form lease agreement, which was also notified to the Commission. The new lease is, however, not at issue in the main proceedings, as the actions brought concern the operation of the beer tie under the old lease.

10 The considerations which led the Court of Appeal to refer questions to the Court of Justice for a preliminary ruling were as follows.

11 According to the referring court, English law does not allow a party to an illegal agreement to claim damages from the other party. So, even if Mr Crehan's defence, that the lease into which he entered infringes Article 85 of the Treaty, were upheld, English law would bar his claim for damages.

12 Moreover, in a judgment which predated the present order for reference, the Court of Appeal had held, without considering it necessary to seek a ruling from the Court of Justice on the point, that Article 85(1) of the EC Treaty was intended to protect third parties, whether competitors or consumers, and not parties to the prohibited agreement. It was held that they were the cause, not the victims, of the restriction of competition.

13 The Court of Appeal points out that the Supreme Court of the United States of America held, in its decision in Perma Life Mufflers Inc. v International Parts Corp. 392 U.S. 134 (1968), that where a party to an anticompetitive agreement is in an economically weaker position he may sue the other contracting party for damages.

14 The Court of Appeal therefore raises the question of the compatibility with Community law of the bar in English law to Mr Crehan's claims set out at paragraph 6 above.

15 If Community law confers on a party to a contract liable to restrict or distort competition legal protection comparable to that offered by the law of the United States of America, the Court of Appeal points out that there might be tension between the principle of procedural autonomy and that of the uniform application of Community law.

16 In those circumstances, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Is Article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?

2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?

3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law;

4. If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?

The questions

17 By its first, second and third questions, which should be considered together, the referring court is asking essentially whether a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that provision before a national court to obtain relief from the other contracting party. In particular, it asks whether that party can obtain compensation for loss which he alleges to result from his being subject to a contractual clause contrary to Article 85 and whether, therefore, Community law precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages.

18 If Community law precludes a national rule of that sort, the national court wishes to know, by its fourth question, what factors must be taken into consideration in assessing the merits of such a claim for damages.

19 It should be borne in mind, first of all, that the Treaty has created its own legal order, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal order are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case

26/62 Van Gend en Loos [1963] ECR 1, Case 6/64 Costa [1964] ECR 585 and Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 31).

20 Secondly, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market (judgment in Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraph 36).

21 Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void (judgment in Eco Swiss, cited above, paragraph 36).

22 That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) of the Treaty (on the latter point, see inter alia Case 10/69 Portelange [1969] ECR 309, paragraph 10). Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (see the judgment in Case 22/71 Béguelin [1971] ECR 949, paragraph 29). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (see the judgment in Case 48/72 Brasserie de Haecht II [1973] ECR 77, paragraph 26).

23 Thirdly, it should be borne in mind that the Court has held that Article 85(1) of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (judgments in Case 127/73 BRT and SABAM [1974] ECR 51, paragraph 16, (BRT I) and Case C-282/95 P Guérin Automobiles v Commission [1997] ECR I-1503, paragraph 39).

24 It follows from the foregoing considerations that any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

25 As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see inter alia the judgments in Case 106/77 Simmenthal [1978] ECR 629, paragraph 16, and in Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

26 The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27 Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

28 There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

29 However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals

having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-261/95 Palmisani [1997] ECR I-4025, paragraph 27).

30 In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, paragraph 14, Case 68/79 Just [1980] ECR 501, paragraph 26, and Joined Cases C-441/98 and C-442/98 Michaïlidis [2000] ECR I-7145, paragraph 31).

31 Similarly, provided that the principles of equivalence and effectiveness are respected (see Palmisani, cited above, paragraph 27), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 Commission v Italy [1973] ECR 101, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.

32 In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.

33 In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.

34 Referring to the judgments in Case 23/67 Brasserie de Haecht [1967] ECR 127 and Case C-234/89 Delimitis [1991] ECR I-935, paragraphs 14 to 26, the Commission and the United Kingdom Government also rightly point out that a contract might prove to be contrary to Article 85(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article 85, particularly where in practice the terms of the contract were imposed on him by the party controlling the network.

35 Contrary to the submission of Courage, making a distinction as to the extent of the parties' liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article 85 of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function (see inter alia Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 382). That case-law concerns the conditions for application of Article 85 of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.

36 Having regard to all the foregoing considerations, the questions referred are to be answered as follows:

- a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party;

- Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract;
- Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.
Decision on costs

Costs
37 The costs incurred by the United Kingdom, French, Italian and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.
Operative part

On those grounds,
THE COURT,
in answer to the questions referred to it by the Court of Appeal (England and Wales) (Civil Division) by order of 16 July 1999, hereby rules:
1. A party to a contract liable to restrict or distort competition within the meaning of Article 85 of the EC Treaty (now Article 81 EC) can rely on the breach of that provision to obtain relief from the other contracting party.
2. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract.
3. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.
