Chapter 15
‘Compensation’ and ‘Indemnity’ under the Agency Regulations: How the Common Law System Copes with the Invasion of Civilian Concepts

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INTRODUCTION

In February 2003 the European Commission published its Action plan for a more coherent European contract law.¹ The following year the European Commission, jointly with the EU Parliament and Council of Ministers, published the communication, European contract law and the revision of the acquis: the way forward.² This document proposed the preparation of a ‘common frame of reference’ to be used in the preparation of European legislation in the field of contract law. The EU has, of course, been legislating in the field of contract law for many years now. The publication of the Action Plan and, especially, the proposal for a common frame of reference recognise the weaknesses of the existing body of legislation and the difficulties of producing legislation to be

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² Com (2004) 654 final, see Eurlex, document No. 52004DC0651.
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applied across the European Union in Member States with different legal traditions in the absence of shared concepts or a common legal vocabulary.

Much of the existing legislation has been concerned with consumer protection rather than with contract law more generally or commercial contracts. In 1986, however, the Council of Ministers enacted Directive 86/653 on the coordination of the laws of the member states relating to self-employed commercial agents. Although the Directive shares some features with those concerned with consumer, or, perhaps, more accurately employment, protection, being based on the premise that commercial agents are in need of protection against their principals, it is essentially a piece of commercial legislation, in that its impact is on a purely commercial contract, made between two businesses. The Directive was implemented in the UK by the Commercial Agents (Council Directive) Regulations 1993 (to which we hereinafter refer as ‘the Regulations’), which came into force on 1st January, 1994.

The experience of the Directive and its implementation in the UK illustrate rather nicely the forces that led to the publication of the Action Plan and proposal for a common frame reference. Not only the vocabulary of the Directive but its very rationale and philosophy are alien to the common law. The assumption that commercial agents need protection against their principals is an essentially civilian one. It stands in marked contrast to the traditional common law attitude, which assumes that the principal must be protected against the risk of the agent’s abuse of power, and affords such protection via the stringent fiduciary duties imposed on the agent. Indeed, the absence of a common vocabulary is vividly illustrated by the view expressed by the English Law Commission in 1977, a year after the Directive was first proposed, that ‘commercial agents’ were not known as a separate category to English law.

Consistent with the policy of protecting commercial agents, the Directive gives the commercial agent the right, on termination of the agency relationship, to receive payment of either ‘compensation’ or ‘indemnity’, the two concepts drawing on French and German law respectively.

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4 Although both parties are businesses, commercial agents are, usually, smaller businesses than principals and therefore in similar need of protection as consumers.
7 See article L 134-12 French Commercial Code. For an English translation, see <www.legifrance.gouv.fr>.
8 See §89b German Commercial Code.