Forum Shopping and Post-Award Judgments

Such is the title of a recent article co-authored by L. Silberman (Martin Lipton Professor of Law, New York University School of Law) and M. Scherer (School of International Arbitration, Queen Mary, University of London; Wilmer Cutler Pickering Hale and Dorr LLP, m.scherer@qmul.ac.uk), published in *Forum Shopping in the International Commercial Arbitration Context*, ed. F. Ferrari, Sellier, 2013, pp.313-345. The abstract reads as follows:

> *Forum shopping has become increasingly common in the context of post-award judgments. Post-award judgments can take several forms, depending on whether the award is set aside, confirmed, recognized or enforced. Creative parties may forum shop for a set-aside, confirmation, recognition or enforcement judgment and seek to rely on its effects in subsequent proceedings relating to the same award in another country. The courts in that other country will have to assess the effects they give to the foreign post-award judgment, including under existing doctrines of res judicata, issue/claim estoppel. The paper examines how courts should respond to such forum shopping attempts. It assesses whether a decision to set aside, confirm, recognize or enforce an arbitral award might affect subsequent attempts to recognize or enforce that award elsewhere.*

The paper is also available on SSRN (click here).

Commission's Proposal for Amending the Small Claims

Regulation

On 19 November 2013, the European Commission issued its proposal for a Regulation amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

In a press release, the Commission insisted on the following amendments:

- Raise the threshold for filing a 'small claim' from €2 000 up to €10 000. This will notably benefit SMEs, making the procedure applicable to 50% of business claims (up from 20% today). Consumers also stand to benefit since about one fifth of their claims exceed €2 000.
- Widen the definition of what is a 'cross-border' case in order to help more consumers and businesses resolve their cross-border disputes.
- Cap court fees: Under the existing small claims procedure court fees can be disproportionate, in some cases even exceeding the value of the claim itself. Today's proposal will ensure that court fees do not exceed 10% of the value of the claim, and the minimum fee cannot be higher than €35. It will also require that court fees can be paid online by credit card.
- Cut paperwork and travel costs: The new rules will enable claimants to launch the procedure online: email will become a legally valid means of communication between the parties involved, and teleconferencing or videoconferencing will become natural tools in oral hearings, wherever these are necessary.

H/T: Maarja Torga

Vacancy at the University of

Zurich

Professor Tanja Domej from the Faculty of Law at the University of Zurich is seeking to fill the position of a Research and Teaching Associate (PhD candidate). Candidates should have an excellent academic track record and should be interested in the chair's main research areas (civil procedure, private law, private international law and comparative law). A thorough command of German is required. The successful candidate will have excellent knowledge of Swiss civil procedure or will at least be willing and able to acquire such knowledge quickly.

For more information click here.

Unfair Terms in Low-Cost Airline Contracts: A Spanish Court Takes a Bold Step

Many thanks to Cristian Oró Martínez, Senior Research Fellow at the MPI Luxembourg.

The Commercial Court (*Juzgado de lo Mercantil*) nº 5 of Madrid delivered on 30 September 2013 a judgment in an action brought by the Spanish consumer association *Organización de Consumidores y Usuarios* (OCU) against the Irish airline Ryanair. OCU asked the Commercial Court to declare that 20 of the general terms and conditions used by the airline are unfair, and hence should not be binding on consumers, as provided by the Spanish Law on the protection of consumers and users (which transposed Directive 93/13, on unfair terms in consumer contracts). OCU also sought an injunction to prevent Ryanair from continuing to use these allegedly unfair terms and conditions.

In its judgment, the Commercial Court held that 8 of the general terms issued by Ryanair are unfair, and hence void. These terms deal with a variety of issues

relating to the contract of carriage concluded between the airline and its customers: (i) the choice of Irish law and the submission to Irish courts (Art. 2.4); (ii) the limitation of accepted travel documents (Art. 3.1.1 and annex on travel documentation); (iii) the 40 € fee for the re-issue of a boarding card at the airport (annex with table of optional fees); (iv) the possibility for the airline to refuse to carry passengers or their baggage (Art. 7.1.1); (v) the prohibition to carry in the checked baggage certain items, including money, jewels, cameras, computers, medicines, glasses, mobile phones, tobacco or passports (Arts. 8.3.2 and 8.3.3); (vi) the possibility for the airline to charge a storage fee for luggage not collected within a reasonable time (Art. 8.8.1); (vii) the possibility for the company to change the flight timing without having to justify it, and without giving the passenger the option to terminate the contract (Arts. 9.1.1 and 9.1.2); and (viii) the prohibition to pay in cash any fee or tax charged at the airport (Art. 18). According to the judgment, Ryanair should refrain from using these terms in future contracts.

To date, all these clauses continue to appear on the airline's website. The judgment of the Commercial Court of Madrid can of course be appealed – and it is highly likely this has been the case. Its effective impact, therefore, remains to be seen. However, it may constitute a first step for the protection of consumers against alleged abuses by low-cost airlines.

Nevertheless, from a PIL perspective, the question which arises is whether the Spanish court was right in assessing the compatibility of the contract with Spanish consumer legislation. Ryanair claimed that the choice of Irish legislation was valid under Art. 5(2) of the Rome I Regulation, which allows parties to choose, among others, the law of the country where the carrier has its habitual residence. The court fails to address this allegation, and simply states that the choice of court and choice of law clause is invalid under Art. 90.3 of the Law on the protection of consumers and users. The reason would be that it causes a significant imbalance in the parties' rights and obligations and hinders the consumer's right to take legal action, insofar as it forces this weak party to litigate in a foreign country and under a foreign law, thus increasing the costs of the suit.

The Commercial Court bases its reasoning not only on the Spanish Law on consumer protection, but also on the provisions of Directive 93/13 and on some judgments in which the ECJ has interpreted it. It is arguable that, under Art. 23 of

the Rome I Regulation, the Directive on unfair terms could trump the conflictual solution of Art. 5(2) of the Rome I Regulation. However, even in such scenario, the Commercial Court should have justified the reason why the Spanish transposition of the Directive on unfair terms should prevail over the Irish transposition. The problem stems from the Spanish Law on the protection of consumers and users, which purports to apply when the contract is closely connected with the territory of a State party to the EEA, *irrespective of the law chosen by the parties* (Art. 67.1). It is arguable that this provision should be read in light of Art. 6(2) of Directive 93/13, which states that "Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law *of a non-Member country*". Thus, the Spanish legislation should only prevail over the parties' choice of a third-State law, but not over the choice of the law of a Member State. Indeed, in the latter case the protection granted by the Directive is in principle guaranteed – at least as long as the ECJ does not declare that that particular Member State failed to correctly transpose it.

Therefore, the assessment of all the allegedly unfair terms should have probably been carried out under Irish law. The ensuing question is: would they be held unfair under Irish law? Or even: should they be considered unfair under the Directive itself? If so, the ECJ may end up having its say in the issue. We shall keep an eye on future developments – just as low-cost airlines will surely also do.

German Federal Court of Justice refers question on lis-pendens-rule to ECJ

By Jonas Steinle, LL.M.

Jonas Steinle is a doctoral student at the chair of Prof. Dr. Matthias Weller, Mag.rer.publ. at the EBS University for Economics and Law in Wiesbaden and a

scholarship holder at the Max Planck Institute for Intellectual Property and Competition Law in Munich.

On 18 September 2013 the German Federal Court of Justice (*Bundesgerichtshof*) referred the question for a preliminary ruling to the European Court of Justice (V ZB 163/12) as to whether the *lis pendens*-rule in Art. 27 para. 1 Brussels I Regulation does apply even if the court second seised has exclusive jurisdiction under Art. 22 of the Brussels I Regulation.

The facts:

The claimant seeks to enforce a land charge (*Grundschuld*) against the defendant's real estate, which is located in Hamburg. He therefore brought an action in the regional court (*Landgericht*) of Hamburg. However, before this claim in Hamburg was launched, the defendant had already brought proceedings against the claimant in a court in Milan, seeking a negative declaratory relief that the land charge is invalid and that it therefore must not be enforced. As a result of this, two proceedings were pending simultaneously in Hamburg and in Milan.

The landlord and defendant in the Hamburg-based proceedings accordingly argued that the court in Hamburg must stay its proceedings according to Art. 27 para. 1 Brussels I Regulation until the court in Milan (which had been seised first) has ruled on its own jurisdiction. This application for suspension was rejected in all instances and finally was referred for final appeal (*Rechtsbeschwerde*) to the Federal Court of Justice.

The Federal Court of Justice takes the view that the regional court in Hamburg has exclusive jurisdiction under Art. 22 Brussels I Regulation to hear the case. However, as the regional court in Hamburg had been seised second, the Federal Court had doubts as to whether the regional court in Hamburg must stay its proceedings under Art. 27 para. 1 Brussels I Regulation even if it has exclusive jurisdiction under Art. 22 Brussels I Regulation.

Comments:

The manoeuvre which was performed by the defendant in this case is not new at all. The defendant launched what is called in international procedural law an 'Italian torpedo'. However, the circumstances in which this torpedo was used are new and therefore have set a precedent.

The ‘Italian torpedo’ is a litigation tactic whereby the presumptive defendant of a claim anticipates the proceedings against him by bringing an action against the presumptive claimant on his part. Such claim usually consists of an application for a negative declaratory relief in a jurisdiction other than the one where the presumptive defendant is going to be sued. The objective in doing so is simply to delay the proceedings in the venue where the proceedings in the end will take place, since the court at that place which has been seised second must stay its proceedings according to Art. 27 para. 1 Brussels I Regulation until the court first seised has ruled on its jurisdiction. Usually, the courts in the jurisdiction where the Torpedo-claim is brought are known for being somewhat slow on the draw.

In the case at hand, there was hardly any connection to the courts of Italy. The enforcement of the land charge is a purely domestic claim under German law and the reason why the negative declaratory relief was sought in the courts of Italy in particular seems more like a flimsy excuse than a real substantiation of that claim. Accordingly, the appeal court (*Beschwerdegericht*) in Hamburg rejected to stay the proceedings because it alleged that the defendant in the Hamburg-based proceedings hat brought a vexatious claim in the courts of Milan, solely to delay the proceedings in Hamburg. The situation at hand can therefore very well be classified as an example of an ‘Italian torpedo’-claim.

In the past, the tactic of the ‘Italian torpedo’ often was used to thwart a jurisdiction agreement according to Art. 23 Brussels I Regulation. This was due to the *Gasser* case (C-116/02) in which the ECJ had ruled that even where the court second seised had exclusive jurisdiction according to a jurisdiction agreement, it must nevertheless stay the proceedings until the court first seised has decided on its jurisdiction. This ruling had opened up a debate about the *lis-pendens*-rule which finally induced the European legislator to introduce an exception to the *lis-pendens*-rule for jurisdiction agreements under Art. 31 para. 2 of the revised version of the Brussels I Regulation (Regulation (EU) No 1215/2012) which for the most part comes into force on 10 January 2015. The revision of the Brussels I Regulation will finally bring an end to the ‘Italian torpedo’ in connection with jurisdiction agreements.

The case at hand shows however, that the story of the ‘Italian-torpedo’ is not yet finished. Although this case is based on the same tactical considerations, the context is a slightly different one. It addresses an issue that had been left open by the ECJ in previous cases (C-351/89 – *Overseas Union Insurance*, para. 20 et

seqq.; C-116/02 – *Gasser,* para. 44 *et seqq.*) and which has been subject to a controversial debate in legal literature (e.g. Weller in Hess/Pfeiffer/Schlosser, The Brussels I-Regulation (EC) No 44/2001, para. 403; see also the sources in para. 18 of the reference of the Federal Court of Justice).

It is conceivable that the ECJ will give precedence to the *lis-pendens*-rule yet another time and adopt the formal approach that it has been taking since the *Gasser*-case. The wording of Art. 27 para. 1 Brussels I Regulation does not provide for an exception in cases where the court second seised has exclusive jurisdiction under Art. 22 Brussel I Regulation.

The key consideration that justifies the very formal approach towards situations of *lis pendens* by the Brussels I Regulation is to avoid the risk of irreconcilable judgments in the European judicial area. Since decisions from other Member States are recognized and enforced on a regular basis under the Brussels I Regulation, the situation of irreconcilable judgments must by any means be prevented by hindering parallel proceedings from the scratch.

However, in the case at hand there appears to be one crucial difference to this argument and that is Art. 35 para. 1 Brussels I Regulation. According to Art. 35 para. 1 Brussels I Regulation a decision must not be recognised if it conflicts with Art. 22 Brussels I Regulation which is exactly the case in the proceedings at hand. If the ECJ is going to give precedence yet another time to the *lis-pendens*-rule, the Court cannot rely anymore on its argument that the *lis-pendens*-rule must prevail for the sake of hindering the issuance and recognition of conflicting decisions.

In fact, for the situation in the present case, the court in Milan is obliged to decline jurisdiction according to Art. 25 Brussels I Regulation if the Federal Court of Justice is right in holding that its requirements are fulfilled and the court in Hamburg therefore is competent to hear the case under Art. 22 Brussels I Regulation. One can however see in the case at hand that courts sometimes do not immediately use the tool provided in Art. 25 Brussels I Regulation (also the court of first instance in Milan did not use it) and that one possibly can litigate on whether the requirements of Art. 25 Brussels I Regulation are fulfilled. This does not make things easier for the present case and it is to be awaited how the European Court of Justice will decide on the issue. Eventually a decision can be expected in the near future since the higher regional court (*Oberlandesgericht*) München had already referred exactly the same question to the ECJ already in

February 2012 (OLG München, 16 February 2012 – 21 W 1098/11).

Territorial Laws in a Global Era

On November 22 and 23 the Research Project "The Architecture of Regulatory Competition" at the University of Helsinki will host a seminar on "Territorial Laws in a Global Era". The programme reads as follows:

Friday, 22 November 2013

- 8.45 – 9.15 Registration and Coffee
- 9.15 – 9.30 Opening
- 9.30 – 11.30 Session I
  Erin O'Hara O'Connor: Law markets in global commerce (Key note)
  Jan Smits: Law as a package: On the limits of choice
- 11.30 – 12.30 Lunch
- 12.30 – 14.30 Session II
  Giesela Rühl: Competition for contract laws: Fiction or reality? Dream or nightmare?
  Teemu Juutilainen: Competition theory for property law: From fragments to whole
- 14.30 – 15.00 Coffee
- 15.00 – 17.00 Session III
  Peter Cserne: National judicial styles: Do they persist and do they matter in a global law market?
  Katri Havu: No-one's law at the interface of EU rights and national remedies and procedure – insights
- 18.00 Seminar dinner at Spis (http://spis.fi/)

Saturday, 23 November 2013

- 9.00 – 11.00 Session IV
  Gralf-Peter Calliess: Transnational private law: Between uniform law, legal pluralism, and competition of jurisdictions

Lécia Vicente: Bringing the essence of lex mercatoria back: Evolving business practices, networking of market agents and competition as sources of European company law

- 11.00 – 12.00 Lunch
- 12.00 – 14.00 Session V
  Elaine Fahey: The EU as a direct and indirect rule-exporter and standard bearer: Between theory and practice
  Emilia Korkea-aho: Implementation of territorial laws in a global era: An emerging arena for regulatory competition

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ECJ Defines Concept of International Character of Consumer Contracts

On 14 November 2013, the Court of Justice of the European Union delivered its judgment in Armin Maletic and Marianne Maletic v lastminute.com GmbH and TUI Österreich GmbH.

The issue for the Court was whether the Brussels I Regulation applied to a consumer contract concluded with a professional based in the same jurisdiction as the consumer.

On 30 December 2011, two Austrian consumers, the Maletics, booked and paid for themselves, as private individuals, a package holiday to Egypt on the website of lastminute.com for EUR 1 858 from 10 to 24 January 2012. On its website, lastminute.com, a company whose registered office is in Munich (Germany), stated that it acted as the travel agent and that the trip would be operated by TUI, which has its registered office in Vienna (Austria).

The booking concerned the Jaz Makadi Golf & Spa hotel in Hurghada (Egypt). That booking was confirmed by lastminute.com, which passed it on to TUI. Subsequently, the Maletics received a ‘confirmation/invoice’ of 5 January 2012

from TUI which, while it confirmed the information concerning the trip booked with lastminute.com, mentioned the name of another hotel, the Jaz Makadi Star Resort Spa in Hurghada. It was only on their arrival in Hurghada that the applicants in the main proceedings noticed the mistake concerning the hotel and paid a surcharge of EUR 1 036 to be able to stay in the hotel initially booked on lastminute.com's website.

On 13 April 2012, in order to recover the surcharge paid and to be compensated for the inconvenience which affected their holiday, the applicants in the main proceedings brought an action before an Austrian Court seeking payment from lastminute.com and TUI, jointly and severally of the sum of EUR 1 201.38 together with interest and costs.

The Austrian court retained jurisdiction over Lastminute on the ground of Article 15 of the Brussels Regulation, but declined it with respect to the Austrian party, ruling that the Regulation did not apply to a domestic dispute, and that another Austrian court had jurisdiction pursuant to Austrian civil procedure.

The CJEU held that the dispute was international in character.

> *28 If, as stated in paragraph 26 of this judgment, the international character of the legal relationship at issue need not necessarily derive from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States, it must be held, as the Commission and the Portuguese Government have argued, that Regulation No 44/2001 is applicable a fortiori in the circumstances of the case at issue in the main proceedings, since the international element is present not only as regards lastminute.com, which is not disputed, but also as regards TUI.*
>
> *29 Even assuming that a single transaction, such as the one which led the Maletics to book and pay for their package holiday on lastminute.com's website, may be divided into two separate contractual relationships, first, with the online travel agency lastminute.com and, second, with the travel operator TUI, the second contractual relationship cannot be classified as 'purely' domestic since it was inseparably linked to the first contractual relationship which was made through the travel agency situated in another Member State.*
>
> *30 Furthermore, account must be taken of the objectives set out in recitals 13 and 15 in the preamble to Regulation No 44/2001 concerning the protection of*

the consumer as 'the weaker party' to the contract and the aim to 'minimise the possibility of concurrent proceedings … to ensure that irreconcilable judgments will not be given in two Member States'.

31 Those objectives preclude a solution which allows the Maletics to pursue parallel proceedings in Bludenz and Vienna, by way of connected actions against two operators involved in the booking and the arrangements for the package holiday at issue in the main proceedings.

Ruling:

The concept of 'other party to the contract' laid down in Article 16(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning, in circumstances such as those at issue in the main proceedings, that it also covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled.

Judiciary and Procedural Reforms in Spain, 2013

In his first appearance at the *Congreso de los Diputados* (House of Representatives), less than a year ago, the Spanish Minister of Justice announced a package of far-reaching measures or reforms for the Spanish justice: some address the judiciary, others affect the structure of different procedures, as well as complementary aspects. Among the former I'd like to highlight the already achieved amendment of the *Ley Orgánica del Poder Judicial*, Ley 6/1985, of July 1, by the Ley 4/2013, of June 28, reforming the *Consejo General del Poder Judicial*; and the proposal for a new *Ley de Demarcación y Planta Judicial* (the text prepared by the Institutional Committee established by Agreement of the Council

of Ministers in 2012 was recently published). The proposal is based on the creation of *Tribunales de Instancia*, which will gather the current uni-personal tribunals and work at a provincial district level. Appeal hearings will correspond to the *Tribunales Superiores de Justicia* (instead of the actual *Audiencias*), which will culminate the judiciary in the corresponding Autonomous Community.

Among the latter it is worth mentioning the draft Bill of the Ministry of Justice aiming to amend the *Ley de Enjuiciamiento Civil,* Ley 1/2000*,* of January 7. The draft is devoted almost entirely to the so called *procuradores* (attorneys). Another draft Bill, this time from the Ministry of Economic Affairs, targets the same group and has met (not surprisingly) with fierce opposition, as it removes the existing fees and eliminates the incompatibility that has so far prevented lawyers to also act as *procuradores*.

From the cross-border perspective I'd like to recall the draft Bill on *Jurisdicción voluntaria*. Chapter one (Articles 9 to 12 of the Act) addresses the rules of Private International Law, meaning grounds of international jurisdiction, conflict of law rules, and effects in Spain of foreign decisions adopted on non-contentious proceedings.

Finally, last Friday the Spanish government adopted the *Real Decreto* that regulates the *Registro de Resoluciones Consursales*, where the results and the handling of bankruptcy proceedings are to be published in order to ensure transparency and legal certainty. The Real Decreto includes a provision on the interconnection of Bankruptcy Public Registers of the European Union Members States.

So, something is on the move in Spain (although it's difficult to say whether in the good direction).

American Association of PIL Elects

New Officers

On 2 November 2013, the Assembly of the American Association of Private International Law (ASADIP) elected its officers for the period 2013-2016:

President: José Antonio Moreno Rodríguez (Paraguay)

Academic Vice President: Claudia M. Madrid Martínez (Venezuela)

Adjunct Academic Vice President: David Stewart (USA)

International Relations Vice President: Lauro Gama Jr (Brasil)

Adjunct International Relations Vice President: Ana Elizabeth Villalta (El Salvador)

Vice President of Communications and Publications: Paula M. All (Argentina)

Adjunct Vice President of Communications and Publications: Luis Ernesto Rodríguez Carrera (Venezuela)

Vice President of Finance: Laura Capalbo (Uruguay)

Adjunct Vice President of Finance: Guillermo Argerich (Argentina)

Secretary General: Nuria González Martín (México)

Adjunct Secretary General: Juan José Obando (Costa Rica)

Vocals:

- Virginia Aguilar (México)
- Carolina D. Iud (Argentina)
- José Luis Marín (Colombia)
- Geneviève Saumier (Canadá)
- Zhandra Marín (USA)
- Gonzalo Lorenzo (Uruguay)
- Fernando Cantuarias (Perú)
- Mirian Rodríguez (Venezuela)
- Augusto Jagger (Brasil)

- Taydit Peña Lorenzo (Cuba)

President of Honor: Didier Opertti Badán (Uruguay)

President of the Consultive Committee: Eugenio Hernández Bretón (Venezuela)

ECJ Rules on Effect of Icelandic Legislative Moratorium on Payments in France

On 24 October 2013, the Court of Justice of the European Union delivered its judgment in LBI hf, formerly Landsbanki Islands hf v Kepler Capital Markets SA and Frédéric Giraux (case C-85/12).

The Court issued the following press release:

The moratorium on payments granted to the bank LBI by the Icelandic authorities produces in France the effects which the Icelandic legislation confers on it

The directive on the reorganisation and winding up of credit institutions does not preclude that the effects of that moratorium retroactively cover interim protective measures in France

The directive on the reorganisation and winding up of credit institutions provides that, in the event of insolvency of a credit institution that has branches in other Member States, the reorganisation measures and the winding-up proceedings are part of a single insolvency procedure in the Member State where the institution has its registered office (known as the home Member State). Therefore, in principle, such measures are subject to a single law on insolvency and they are applied according to the law of the home Member State and are effective in accordance with that law throughout the EU, without any further formalities. For that purpose, States party to the Agreement on the European Economic Area, like

Iceland, are treated in the same way as Member States of the EU.

In the context of the collapse of the financial system in Iceland following the international financial crisis in 2008, the Icelandic legislature adopted a series of reorganisation measures for various financial institutions established in that country. In particular, a Law of 13 November 20082, first, prohibited proceedings from being brought against financial institutions under a moratorium on payments and, second, ordered the suspension of proceedings pending. By a Law of 15 April 20093, the Icelandic legislature placed financial institutions under a moratorium subject to transitional rules seeking to apply a specific winding-up scheme to their situation, without them being actually wound-up before the expiry of that moratorium.

LBI hf (formerly Landsbanki Islands hf) is an Icelandic credit institution to which a moratorium on payments was granted on 5 December 2008 by the District Court, Reykjavik. Shortly beforehand, on 10 November 2008, LBI was the subject of two attachment orders in France at the request of a creditor residing in that Member State. LBI contested those two attachments orders before the French courts and claimed that the directive made the reorganisation measures adopted in Iceland directly enforceable against its French creditor. In addition, the District Court, Reykjavik declared, on 22 November 2010, the opening of winding-up proceedings against LBI.

Against that background, the Cour de cassation (Court of cassation) (France), which considered that case at last instance, referred to the Court of Justice the question whether the reorganisation or winding-up measures resulting from the transitional rules in the Law of 15 April 2009 are also covered by the directive, the aim of which is the mutual recognition of reorganisation measures and of winding-up proceedings taken by the administrative and judicial authorities. Moreover, the French court seeks to ascertain whether the directive precludes the retroactive application of the effects of a moratorium on interim protective measures adopted in another Member State before it was declared.

In today’s judgment, the Court notes, first, that the administrative and judicial authorities of the home Member State are alone empowered to decide on the implementation of reorganisation measures for a credit institution and on the opening of winding-up proceedings against it. Accordingly, only the measures decided by those authorities are the subject, under the directive, of recognition in

the other Member States, with the effects which the law of the home Member State confers on them.

However, the legislation of the home Member State relating to the reorganisation and winding-up of credit institutions can, in principle, take effect in the other Member States only through specific measures taken by the administrative and judicial authorities of that Member State against a credit institution.

In today's judgment, the Court notes, first, that the administrative and judicial authorities of the home Member State are alone empowered to decide on the implementation of reorganisation measures for a credit institution and on the opening of winding-up proceedings against it. Accordingly, only the measures decided by those authorities are the subject, under the directive, of recognition in the other Member States, with the effects which the law of the home Member State confers on them.

However, the legislation of the home Member State relating to the reorganisation and winding-up of credit institutions can, in principle, take effect in the other Member States only through specific measures taken by the administrative and judicial authorities of that Member State against a credit institution.

As regards the transitional rules of the Law of 15 April 2009, the Court states that, by adopting those rules, the **Icelandic legislature did not order, as such, the winding-up of the credit institutions placed under a moratorium**, but conferred certain effects linked to winding-up proceedings on the moratoria which were in force on a specific date. Likewise, it follows from those transitional provisions that, unless a judicial decision has granted or extended a moratorium for the benefit of a credit institution before that date, they cannot produce any effects. Accordingly, **those rules take effect not directly but through a reorganisation measure granted by a judicial authority** for a credit institution. Therefore the moratorium granted to LBI is capable of producing, under the directive, the effects which the Icelandic legislation confers on it in the EU Member States.

As regards the question whether the transitional rules must be able to form the subject of an action in order to take effect in the EU Member States, the Court notes that the directive establishes a system of mutual recognition of national reorganisation and winding-up measures, without seeking to harmonise national

legislation on that subject. It points out that the directive does not make the recognition of reorganisation and winding-up measures subject to a condition that it be possible to bring an action against them. Similarly, the law of a Member State may not make that recognition subject to a condition of that type for which its national rules may provide.

Next, as regards the question whether the directive precludes the retroactive application of the effects of a moratorium on interim protective measures adopted in another Member State, the Court observes that the effects of reorganisation measures and winding-up proceedings are, in principle, governed by the law of the home Member State. That general rule does not, however, apply to 'lawsuits pending' which are governed by the law of the Member State in which the lawsuit is pending. As regards the scope of that exception, the Court states that **the words 'lawsuits pending' cover only proceedings on the substance and that individual enforcement actions arising from those lawsuits remain subject to the legislation of the home Member State**. In that respect, the Court states that the **interim protective measures taken in France** constitute individual enforcement actions and, therefore, the effects of the moratorium granted to LBI in Iceland on those interim protective measures **are governed by Icelandic law**.

Moreover, the fact that those measures were adopted before the moratorium at issue in the main proceedings had been granted to LBI cannot invalidate that conclusion as **it is Icelandic law which also governs**, under the directive, **its temporal effects**. The directive does not prevent a reorganisation measure, such as the moratorium, from having retroactive effect.