European Parliament adopts Legislative Resolution on the Common European Sales Law

On 26 February 2014 the European Parliament adopted a legislative resolution on the Proposal for a Common European Sales Law. The full text is not yet available. However, you can find a comment on the plenary debate on "European Private Law News".

Further information on the procedure is available in the Procedure File 2011/0284(COD) on the website of the European Parliament.

The UNCITRAL Rules on Transparency in Investor-State Treaty-based Arbitration

Many thanks to Ana Koprivica, research fellow of the MPI Luxembourg

In July 2013 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Rules on Transparency in Investor-State Arbitration.

The Rules shall enter into force on 1st April 2014 and apply to all investor-state disputes initiated under UNCITRAL Arbitration Rules pursuant to international investment agreements concluded prior to or after this date.

At the outset it should be noted that the range of potentially applicable rules in international investment arbitration today is extremely wide and provides the parties with a lot of room to tailor their procedure in accordance with their specific needs. Consequently, they also make it possible for the parties to limit or constrain transparency in the dispute between them. This triggers the concerns of

not having a proper mechanism to safeguard transparency. To that end, the UNCITRAL Working Group II (Arbitration and Conciliation) adopted two approaches when drafting the Rules: one would be the possibility for States to offer to arbitrate disputes under those arbitration rules that *require* transparency (which has so far only been a theoretical possibility) and the other, the option for States to conclude a new treaty which would supplement or replace the already existing investment treaties and require arbitration pursuant to rules requiring transparency. The first approach is reflected in the newly adopted Transparency Rules, whilst the second will possibly result in the adoption of the Transparency Convention, the second reading of which took place two weeks ago in New York at the 60th UNCITRAL session.

Main Features

The New Transparency Rules have become an integral part of the UNCITRAL Arbitration Rules, but they are also made available as a stand-alone instrument for application in disputes that are governed by other arbitral rules. The main aim of the Rules is to make proceedings transparent. In that respect, the provisions mandating disclosure and openness (Articles 2, 3, 6 and 7) and those that govern participation by non-disputing parties (Articles 4 and 5) appear to be the most important features of the Rules.

Access to Documents

As soon as the arbitral proceedings commence, i.e., once there is evidence respondent has received the notice of arbitration (which itself is subject to automatic mandatory disclosure), a basic set of facts will be disclosed: names of the parties, economic sector involved and the underlying treaty (Art.2). The Rules further distinguish between the mandatory automatic disclosure that certain documents are subject to (all statements and submissions by the disputing parties and non-disputing State parties or third persons; transcripts of hearings; and orders, decisions and awards of the arbitral tribunal); mandatory disclosure on request of any person (witness statements and expert reports), and the disclosure of other documents (such as exhibits) which depend on the exercise of the particular tribunal's discretion (Article 3). To balance the Transparency Rules' provisions on disclosure, Article 7 specifies that disclosure is subject to exceptions for confidential or protected information. It further lists four categories of such information. Whether and what information will fall under the

exceptions will be an issue to be decided on a case-by-case basis. Tribunals are also permitted to restrain or limit disclosure when necessary to protect the "integrity of the process", which is only intended to *restrain* or *delay* disclosure in exceptional circumstances.

Amicus Curiae and Submissions from non-disputing Parties

In line with standard practices by tribunals, the Transparency Rules now expressly affirm the authority of investment tribunals to accept submissions from *amicus curiae*, while incorporating detailed rules and guidelines under Article 4. This however concerns "written submissions" and does not address other forms of participation, such as statements at hearings. The Transparency Rules also require that tribunals accept submissions on issues of treaty interpretation from non-disputing State parties to the relevant treaty, provided that the submission does not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party" (Article 5). In addition to this, the tribunal may accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty.

Open hearings

The most noteworthy feature of the Transparency Rules is contained in Article 6 and concerns the openness of the hearings. The tribunal is granted authority to determine how to make hearings open, including the option of facilitating public access through online tools. The disputing parties—alone or together—**cannot veto** open hearings. There are, however, three limitations to this: (1) protection of confidential information; (2) protection of the "integrity of the arbitral process"; and (3) logistical reasons.

Significance of the Rules and Open Questions

In what seems to be a great struggle to achieve full transparency for investor–State treaty-based arbitration, the UNCITRAL Transparency Rules represent a huge and important contribution, by making openness a rule rather than an exception and shifting the presumption of confidentiality, much more suitable for commercial arbitration, towards transparency. It seems that the Rules should in the first place bring some advantage to investors by enabling them to assess the risk to their investments in different host States to a more accurate extent, as their application would introduce more consistency and more cohesion,

which is something that international investment arbitration still lacks. On the other hand, there is also a fear of the so-called "re-politicisation" of the investor-State disputes as well as the possibility that the investors would rather have their disputes resolved in private. It remains to be seen how this would affect the attractiveness of the UNCITRAL Rules.

Further, granting the right of public access to hearings and documents is important for the institutions' perceived legitimacy. By having more consistent decisions and therefore forming more consistent reasoning in arbitral awards, the whole arbitration system would ensure legal certainty, promotion of effective democratic participation, good governance, accountability, predictability and the rule of law which investors and host States would consequently benefit from. This is of the utmost importance when vital public concerns are involved such as environmental issues or human rights. Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where vital public concerns were involved or illegal or corrupt business practices were uncovered. In other settings, this level of transparency may also be used as a "scare technique" and a means to extract a settlement from another party.

In relation to this, it will be exciting to see some practical developments, more precisely: the potential change in the way parties draft their pleadings as a consequence of the higher level transparency imposed on them, or the limitation concerning the number or types of documents parties may submit and refer to, resulting from the intention to avoid potential disclosure requests.

In terms of the applicability of the Rules, it should be noted that even though they apply automatically to claims brought under a treaty concluded after 1st April 2014, parties will still have the possibility to opt out from transparency provisions. It will be interesting to see what the outcome of discussions on the Transparency Convention draft will be, since the impact of the Transparency Rules still largely hinges on the political outcome. It is also not certain what kind of an impact this will have on the attractiveness of investment arbitration under UNCITRAL Arbitration Rules and on arbitration under treaties which contain a reference to UNCITRAL Transparency Rules as opposed to those initiated under contracts that contain no such disclosure requirements.

It is further submitted that the Rules leave less room for the abuse of proceedings

by reducing the scope of procedural arguments surrounding access to documents. Indeed, by providing a detailed list of documents subject to disclosure, the Transparency Rules will undoubtedly diminish the possibility for such arguments. Nevertheless, the Rules still leave open the likelihood for such discussion in relation to witness statements, expert reports and exhibits, as these are not to be automatically disclosed. Needless to say, when there is discretionary power of tribunals to restrict disclosure in order to protect confidential or protected documents and the integrity of the arbitral process the potential abuse of such powers is often an issue. In any case, it remains to be seen how frequently and in what circumstances the tribunals will exercise this power.

Therefore, the UNCITRAL Arbitration Rules represent a big step in the direction of increasing transparency. Their biggest achievement seems to be the shift in the underlying presumption toward openness, whereas in other terms they do not seem to introduce much novelty compared to some other international investment arbitration rules. The question that is yet to be answered in the future is if by balancing the public interest and the principle of confidentiality in arbitration we have gone one step too far and have let the former prevail over the latter to a too great an extent.

French Conference on Parallel Proceedings and Decisions in International Arbitration

The students and alumni in International Law of the University Panthéon-Assas will organize a conference on Parallel Proceedings and Contradictory Decisions in International Arbitration on March 21st, 2014 in the premises of the International Chamber of Commerce in Paris.

The morning will be dedicated to Investment Arbitration. The afternoon will focus on Commercial Arbitration and International Private Law. Speeches will be in

French.

This event is organized by three students associations of the masters' degree in International Private Law and International Business Law, International (Droit International Privé et Droit du Commerce International), in International Relations and Trade Law (Droit des Relations Economiques Internationales) and of the Institut des Hautes Etudes Internationales of the University Panthéon-Assas, in collaboration with two research centers, namely the Centre de Recherche de Droit International (CRDI) and l'Institut des Hautes Etudes Internationales (IHEI).

Matinée : Droit des Investissements (9h45-12h30)

– Développement des procédures parallèles et facteurs de désordres procéduraux en arbitrage d'investissement: Walid BEN HAMIDA (Université d'Evry Val-Essonne)

– La contrariété de décisions en arbitrage d'investissement, risques et conséquences: Fernando MANTILLA SERRANO (Shearman & Sterling LLP Paris)

– Retour sur la pertinence de la distinction « contract claims » et « treaty claims » : Ibrahim FADLALLAH (Université Paris-Ouest Nanterre la Défense)

– Procédures Parallèles : aspects procéduraux et solutions institutionnelles : Eloïse OBADIA (Derains & Gharavi Washington D.C.)

– La concurrence des instances arbitrales : que disent les principes du contentieux international ? Yves NOUVEL (Université Panthéon-Assas)

Après-midi : Arbitrage Commercial International

– Propos introductifs : M. Philippe LEBOULANGER (Leboulanger & Associés)

– La prévention des contrariétés de décisions arbitrale et étatique : Claire DEBOURG (Université Paris-Ouest Nanterre la Défense)

– De l'utilisation des « anti-suit injunctions » par le juge et l'arbitre : Jacob

GRIERSON (McDermott Will & Emery Londres et Paris)

– L'exclusion de l'arbitrage dans le Règlement Bruxelles I refondu : Laurence USUNIER (Université Paris XIII Nord)

– Les contrariétés de décisions dans le contrôle des sentences arbitrales : Sylvain BOLLEE (Université Paris 1)

– Une illustration récente : l'affaire Planor Afrique : Alexandre REYNAUD (Betto Seraglini)

– Les procédures parallèles dans le règlement d'arbitrage et de médiation de la Chambre de Commerce Internationale : Thomas GRANIER (Cour internationale d'arbitrage de la CCI)

– Un remède, la concentration du contentieux devant l'arbitre (extension et transmission de la convention d'arbitrage) : Jean-Pierre ANCEL (Président de chambre honoraire à la Cour de cassation)

– Propos conclusifs : Daniel COHEN (Université Panthéon-Assas)

Venue : ICC, 33/43, Avenue du Président Wilson, 75116 Paris

Admission is free. Registration is possible by sending an email at : elise.grandgeorge@u-paris2.fr , message in which you should indicate your presence for the morning, the afternoon or the day and your name and phone number.

Weidemaier on Sovereign

Immunity and Sovereign Debt

Mark Weidemaier (University of North Carolina) has published Sovereign Immunity and Sovereign Debt in the latest issue of the *University of Illinois Law Review*.

> *The law of foreign sovereign immunity changed dramatically over the course of the 20th century. The United States abandoned the doctrine of absolute immunity and opened its courts to lawsuits by private claimants against foreign governments. It also pursued a range of other policies designed to shift such disputes into litigation or arbitration (and thus relieve political actors of pressure to intervene on behalf of disappointed creditors). This Article uses a unique data set of sovereign bonds to explore how international financial contracts responded to these legal and policy initiatives.*
>
> *The Article makes three novel empirical and analytical contributions. The first two relate to the law of sovereign immunity and to the role of legal enforcement in the sovereign debt markets. First, although the decision to abandon the absolute immunity rule was a major legal and policy shift, this article demonstrates that investors dismissed their new enforcement rights as irrelevant to the prospect of repayment. Second, the ongoing Eurozone debt crisis has prompted fears that private investors will use litigation to prevent debt restructurings necessary to revive European economies. This Article shows that such fears may be overblown and, in the process, informs the broader empirical and theoretical debate about the role of legal enforcement in the sovereign debt markets.*
>
> *Finally, the Article exposes a gap in contract theory as it pertains to boilerplate contracts such as sovereign bonds. Boilerplate presents a puzzle of intense interest to contracts scholars. It is drafted to serve the interests of sophisticated, well-resourced players, yet it often remains static in the face of new risks. To explain this inertia, contract theory posits that major shifts in boilerplate financial contracts require a financial crisis or other exogenous shock that substantially alters investors' risk perceptions. This Article, however, demonstrates that the Foreign Sovereign Immunities Act of 1976 prompted a major shift in contracting practices despite investors' continued indifference to legal enforcement and argues that contract theory must recognize that a wider range of forces may prompt boilerplate to change.*

Liber Amicorum Bernard Audit

A Liber Amicorum to French leading PIL scholar Bernard Audit (Mélanges en l'honneur du Professeur Bernard Audit) will be published in the coming months. It will include the following contributions:

Bertrand ANCEL (Université Paris II)
Exequatur et prescription

Louis d'AVOUT (Université Paris II)
La lex personalis *entre nationalité, domicile et résidence habituelle*

Tristan AZZI (Université Paris Descartes)
La Cour de justice et le droit international privé ou l'art de dire parfois tout et son contraire

Jean-Sylvestre BERGé (Université Lyon 3)
Droit international privé et approche contextualisée des cas de pluralisme juridique mondial

George A. BERMANN (Columbia Law School)
The European Law Institute : a Transatlantic Perspective

Nicolas BINCTIN (Université de Poitiers)
Les apports de la propriété intellectuelle à l'analyse d'un ordre public « transnational » ou « réellement international »

Sylvain BOLLÉE (Université Paris I)
La responsabilité extracontractuelle du cocontractant en droit international privé

Béatrice BOURDELOIS (Université du Havre)
Relations familiales internationales et professio juris

Dominique BUREAU (Université Paris II)
Le mariage international pour tous à l'aune de la diversité

Olivier CACHARD (Université de Nancy)
Regards transatlantiques sur le forum non conveniens : *la jurisprudence en matière aérienne et nautique*

Muriel CHAGNY (Université de Versailles St-Quentin en Yvelines) et Valérie PIRONON (Université de Nantes)
Les recours collectifs en droit du marché

Daniel COHEN (Université Paris II)
Sur l'émanation d'État

Gilles CUNIBERTI (Université du Luxembourg)
La faible attractivité internationale du droit français des contrats

Bénédicte FAUVARQUE-COSSON (Université Paris II)
Le droit international privé des contrats en marche vers l'universalité ?

Diego P. FERNANDEZ-ARROYO (Sciences Po)
La tendance à la limitation de la compétence judiciaire à l'épreuve du droit d'accès à la justice

Estelle FOHRER-DEDEURWARDER (Université Paris II)
Le principe prior tempore dans la résolution des conflits de procédures en droit commun (après l'abandon de l'exclusivisme des privilèges de juridiction)

Jacques FOYER (Université Paris II)
Lois de police et principe de souveraineté

Hugues FULCHIRON (Université Lyon 3)
La reconnaissance au service de la libre circulation des personnes et de leur statut familial dans l'espace européen

Hélène GAUDEMET-TALLON (Université Paris II)
De l'abus de droit en droit international privé

Pierre-Yves GAUTIER (Université Paris II)
Convaincre l'arbitre

Bernard HAFTEL (Université d'Orleans)
Pour en finir avec le cercle vicieux du principe d'autonomie (ou presque)

Jeremy HEYMANN (Université Paris I)
De la mobilité des sociétés dans l'Union. Réflexions sur le droit d'établissement

Laurence IDOT (Université Paris II)
Réflexions sur les limites du modèle américain en droit de la concurrence… L'exemple du private enforcement

Charles JARROSSON (Université Paris II)
Le compromis, convention d'arbitrage d'avenir ?

Catherine KESSEDJIAN (Université Paris II)
Quel juge est compétent pour décider de la validité et de l'applicabilité d'une convention d'arbitrage ?

Georges KHAIRALLAH (Université Paris II)
Le statut personnel à la recherche de son rattachement. Propos autour de la loi du 17 mai 2013 sur le mariage de couples de même sexe

Malik LAAZOUZI (Université Lyon 3)
La limitation internationale indirecte de for. Réflexions à propos du contrat d'assurance

Paul LAGARDE (Université Paris I)
La fraude en matière de nationalité

Pierre MAYER (Université Paris I)
Le poids des témoignages dans l'arbitrage international

Horatia MUIR WATT (Sciences Po)
L'émergence du réseau et le droit international privé

Marie-Laure NIBOYET (Université Paris Ouest Nanterre la Défense)
Les remèdes à la fragmentation des instruments européens de droit international privé (à la lumière de la porosité des catégories « alimony » et « matrimonial property » en droit anglais)

Cyril NOURISSAT (Université Lyon 3)
L'avenir des clauses attributives de juridiction d'après le règlement « Bruxelles I bis »

William W. PARK (Boston University)
The Deontology of Arbitration's Discontents : Between the Pernicious and the Precarious

Louis PERREAU-SAUSSINE (Université Paris-Dauphine)
Le conflit entre clause compromissoire et clause attributive de juridiction

Gérard PLUYETTE (Cour de cassation)
Actualités du droit de l'arbitrage : l'obligation de révélation des arbitres et le contrôle de l'ordre public de fond par la Cour de cassation

Anne SINAY-CYTERMANN (Université Paris Descartes)
Les tendances actuelles de l'ordre public international

Édouard TREPPOZ (Université Lyon 3)
L'extraterritorialité des injonctions portant sur internet

Laurence USUNIER (Université Paris 13)
Droit d'agir en justice et actions de groupe transnationales

Thierry VIGNAL, (Université de Cergy-Pontoise)
Sur quelques paradoxes contemporains de la territorialité

The book can be ordered in advance by filling this form. Early buyers will be mentionned as such in the book.

Audit on Sovereign Bonds and National Relativism

Mathias Audit (University Paris Ouest Nanterre la Defense) has posted Sovereign Bonds and National Relativism: Can New York Law Contracts Safely Cross the Atlantic? on SSRN.

> *Based on an overview of European cases related to the NML vs Argentina litigation saga, this article aims to show that the crossing of the Atlantic is*

perilous travel for sovereign bonds contracts terms. Normally, the choice of New York as providing governing law and as the competent court would ensure a certain degree of uniformity of interpretation and application of those contracts terms. However, it appears that some European countries' rules might interfere with this goal of uniformity, particularly in the context of two clauses: the waiver of immunity from attachment and execution and the pari passu clause.

The paper is forthcoming in *The Capital Markets Law Journal (2014)*

Not So Fast: Canadian Courts Cannot Sit Everywhere

In an earlier post I discussed three first-instance decisions of Canadian courts, one from each of Ontario, British Columbia and Quebec, holding that the court could, at its discretion, sit outside the province.

Two of those decisions were appealed and one appeal has now been decided. In *Endean v British Columbia*, 2014 BCCA 61 (available here) the Court of Appeal has reversed the lower court's decision in British Columbia and called into question the other two lower court decisions.

The court held (at para 82) that "British Columbia judges cannot conduct hearings that take place outside the province. Such a major law reform is for the legislature to determine." The court did note that "There is, however, no objection to a judge who is not personally present in the province conducting a hearing that takes place in a British Columbia courtroom by telephone, video conference or other communication medium".

The reasoning of the Court of Appeal echoes that in a comment written about the three first-instance decisions by Vaughan Black and Stephen G.A. Pitel entitled "Out of Bounds: Can a Court Sit Outside its Home Jurisdiction?" (currently available only through access to (2013) 41 Advocates' Quarterly 503).

We’re refurbishing – please excuse our dust

Many of you will have noticed that much of the functionality on the site has temporarily disappeared. This is intentional, or at least as intentional as it could be. I will not bore you with details of servers and software, backends and frameworks, but suffice to say when all of this was upgraded, it broke the design of the site. So, I am now working on a new design which does work, but this will take me a little time. Until then, you should still see all of the posts on here, receive of all the updates, and be able to comment as appropriate.

Conclusions & Recommendations of the Experts’ Group meeting on the Recognition and Enforcement of Foreign Protection Orders

The Hague Conference on Private International Law has announced that the Experts’ Group on the Recognition and Enforcement of Foreign Protection Orders met in The Hague on 12 and 13 February 2014 and issued Conclusions and Recommendations. A provisional version is available here.

The final versions of the Conclusions and Recommendations, in both English and

French, will be included in Preliminary Document No 4 for the attention of the 2014 meeting of the Council on General Affairs and Policy of the Hague Conference.

ECJ Rules on Geographical Scope of Customs Regulation

On 6 February 2014, the Court of Justice of the European Union delivered its judgment in Blomqvist v. Rolex (case C-98/13).

In January 2010, Mr Blomqvist, a resident of Denmark, ordered a watch described as a Rolex from a Chinese on-line shop. The order was placed and paid for through the English website of the seller. The seller sent the watch from Hong Kong by post. The parcel was inspected by the customs authorities on arrival in Denmark, who suspended the customs clearance of the watch. Rolex established that it was counterfeit, and requested that the buyer consent to destruction, as provided by Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights ('the customs regulation'). The buyer refused. Rolex went to court and won.

On appeal, the Danish court raised the question whether an intellectual property right had actually been infringed, as required for the implementation of the customs regulation, given that, for that regulation to apply, first, there must be a breach of copyright or of a trade mark right which is protected in Denmark and, second, the alleged breach must take place in the same Member State.

The ECJ ruled:

> *26 In those circumstances the questions referred must be understood as meaning that the referring court seeks to know whether it follows from the customs regulation that, in order for the holder of an intellectual property right over goods sold to a person residing in the territory of a Member State through*

an online sales website in a non-member country to enjoy the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State, that sale must be considered, in that Member State, as a form of distribution to the public or as constituting use in the course of trade. The referring court also raises the question whether, prior to the sale, the goods must have been the subject of an offer for sale or advertising targeting consumers in the same State.



27 In that regard, it must be borne in mind, first, that the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with that trade mark when that use is in the course of trade, is in relation to goods or services which are identical with, or similar to, those for which that trade mark is registered, and affects, or is liable to affect, the functions of the trade mark (Joined Cases C-236/08 to C-238/08 Google France and Google [2010] ECR I?2417, paragraph 49 and the case-law cited).

28 Second, under the copyright directive, an exclusive right is conferred on authors to authorise or prohibit any form of distribution to the public by sale or otherwise of the original of their works or copies thereof. Distribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. A trader in such circumstances bears responsibility for any act carried out by him or on his behalf giving rise to a 'distribution to the public' in a Member State where the goods distributed are protected by copyright (see, to that effect, Donner, paragraphs 26 and 27).

29 Accordingly, European Union law requires that the sale be considered, in the territory of a Member State, to be a form of distribution to the public within the meaning of the copyright directive, or use in the course of trade within the meaning of the trade mark directive and the Community trade mark regulation. Such distribution to the public must be considered proven where a contract of sale and dispatch has been concluded.

30 It is not disputed that, in the case in the main proceedings, Rolex is the holder in Denmark of the copyright and trade mark right which it claims and that the watch at issue in that case constitutes counterfeit goods and pirated

goods within the meaning of Article 2(1)(a) and (b) of the customs regulation. Nor is it disputed that Rolex would have been entitled to claim an infringement of its rights if those goods had been offered for sale by a trader established in that Member State, since, on the occasion of such a sale, made for commercial purposes, use would have been made, on distribution to the public, of its rights in the course of trade. It therefore remains to be ascertained, in order to reply to the questions referred, whether a holder of intellectual property rights, such as Rolex, may claim the same protection for its rights where, as in the case in the main proceedings, the goods at issue were sold from an online sales website in a non-member country on whose territory that protection is not applicable.

31 Admittedly, the mere fact that a website is accessible from the territory covered by the trade mark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory (L'Oréal and Others, paragraph 64).

32 However, the Court has held that the rights thus protected may be infringed where, even before their arrival in the territory covered by that protection, goods coming from non-member States are the subject of a commercial act directed at consumers in that territory, such as a sale, offer for sale or advertising (see, to that effect, Philips, paragraph 57 and the case-law cited).

33 Thus, goods coming from a non-member State which are imitations of goods protected in the European Union by a trade mark right or copies of goods protected in the European Union by copyright, a related right or a design can be classified as 'counterfeit goods' or 'pirated goods' where it is proven that they are intended to be put on sale in the European Union, such proof being provided, inter alia, where it turns out that the goods have been sold to a customer in the European Union or offered for sale or advertised to consumers in the European Union (see, to that effect, Philips, paragraph 78).

34 It is common ground that, in the case in the main proceedings, the goods at issue were the subject of a sale to a customer in the European Union, such a situation not being therefore in any event comparable to that of goods on offer in an 'online marketplace', nor that of goods brought into the customs territory of the European Union under a suspensive procedure. Consequently, the mere fact that the sale was made from an online sales website in a non-member

country cannot have the effect of depriving the holder of an intellectual property right over the goods which were the subject of the sale of the protection afforded by the customs regulation, without it being necessary to verify whether such goods were, in addition, prior to that sale, the subject of an offer for sale or advertising targeting European Union consumers.

35 In the light of the foregoing, the answer to the questions referred is that the customs regulation must be interpreted as meaning that the holder of an intellectual property right over goods sold to a person residing in the territory of a Member State through an online sales website in a non-member country enjoys the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State merely by virtue of the acquisition of those goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that State.

Ruling:

Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights must be interpreted as meaning that the holder of an intellectual property right over goods sold to a person residing in the territory of a Member State through an online sales website in a non-member country enjoys the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State merely by virtue of the acquisition of those goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that State.

H/T: Bernd Justin Jutte