

ECJ Rules on the Enforcement of Fines under Brussels I

On October 18th, 2011, the Grand Chamber of the European Court of Justice held in *Realchemie Nederland BV v Bayer CropScience AG* (Case C 406/09) that the Brussels I Regulation applies to fines ordered to ensure compliance with judgments given in civil and commercial matters.

Facts

In 2005, German firm Bayer initiated proceedings in Germany against Dutch firm Realchemie for alleged patent infringement. On December 19, 2005, a German Court issued an interim order prohibiting Realchemie from importing into, possessing or marketing certain pesticides in Germany. The Order was issued on pain of a fine. The Court also ordered the Dutch defendant to provide details of its commercial transactions involving the pesticides and to transfer its stock into the custody of the courts.

In 2006, the German Court found that Realchemie had not complied with the order. On August 17, 2006, it thus ordered Realchemie to pay a fine of Euro 20,000 (*Ordnungsgeld*) pursuant to Article 890 of the German Code of civil procedure (ZPO), to be paid to the Court. In October 2006, the Court also ordered a periodic payment of Euro 15,000 (*Zwangsgeld*) pursuant to Article 888 of the German Code of civil procedure to encourage it to provide details of the commercial transactions concerning the pesticides in question. Each time, the Court ordered the Dutch defendant to pay the costs of the proceedings.

In 2007, Bayer sought to enforce the orders in the Netherlands.

Judgment

The Brussels I Regulation only applies to Civil and Commercial Matters. The obvious question was whether a fine ordered to ensure compliance of judgments falls within that category and can thus be enforced under the Regulation.

The Court reiterated that such issues of characterization were to be addressed by looking at the subject matter of the legal relationship between the parties rather

than the nature of the particular remedy. It thus held:

41 In the present case, even if, according to Paragraph 890 of the ZPO, the fine at issue in the main proceedings is punitive and the reasoning in the order imposing it explicitly mentions the penal nature of that fine, the fact remains that, in those proceedings, there is a dispute between two private persons, the object of which is the authorisation of enforcement in the Netherlands of six orders from the Landgericht Düsseldorf, by which the latter, hearing an application lodged by Bayer and based on an allegation of patent infringement, prohibited Realchimie from importing into, possessing and marketing certain pesticides in Germany. The action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute. In other words, the legal relationship between Bayer and Realchimie must be classified as 'a private law relationship' and is therefore covered by the concept of 'civil and commercial matters' within the meaning of Regulation No 44/2001.

The fact that the fine was to be paid to the German state was not regarded as decisive:

42 It is true, as is apparent from the order for reference, that the fine imposed on Realchimie pursuant to Paragraph 890 of the ZPO, by order of the Landgericht Düsseldorf must be paid, when it is enforced, not to a private party but to the German State, that the fine is not recovered by the private party or on its behalf but automatically, and that the actual recovery is made by the German judicial authorities. Those specific aspects of the German enforcement procedure cannot however be regarded as decisive as regards the nature of the right to enforcement. The nature of that right depends on the nature of the subjective right, pursuant to the infringement of which enforcement was ordered, that is, in the present case, Bayer's right to exclusively exploit the invention protected by its patent which is clearly covered by civil and commercial matters within the meaning of Article 1 of Regulation No 44/2001.

The Court therefore concluded:

1. The concept of 'civil and commercial matters' in Article 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 that that regulation applies to the recognition and enforcement of a decision of a court or tribunal that contains an order to pay a fine in order to ensure compliance with a judgment given in a civil and commercial matter.

The Court was also asked to characterize the costs of the proceedings to determine whether they were governed by Article 14 of the Directive on the enforcement of IP rights, which provides that they should be borne by the unsuccessful party. It held:

2. The costs relating to an exequatur procedure brought in a Member State, in the course of which the recognition and enforcement is sought of a judgment given in another Member State in proceedings seeking to enforce an intellectual property right, fall within Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

Many thanks to Maja Brkan for the tip-off.

Cachia on the Brussels I Recast

Paul Cachia, who practises and lectures in Malta, has published an article on the Brussels I Recast in the last issue of the ELSA Malta Law Review.

Nearly eight years after its entry into force, the European Commission published a Proposal for a recast of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Proposal identifies a number of shortcomings in the Regulation's operation and proposes a number of amendments to improve its operation with the ultimate objective of facilitating cross-border litigation and removing the remaining obstacles to the free movement of judgments. This paper examines the proposed amendments in the jurisdictional sphere, their objective, and the

manner in which they are supposed to change the existing rules. Particular emphasis is given to the proposed extension of the Regulation to jurisdiction over defendants not domiciled in a Member State which, if adopted, would have the effect of wiping out the national jurisdictional rules of the Member States in disputes falling within the domain of the Regulation. This paper also considers the Commission's proposed amendments to enhance the effectiveness of choice of court agreements together with the other proposed amendments in the jurisdictional sphere. If adopted by Parliament and Council, the new legislation would certainly lead to a more complete European codification of the rules on international jurisdiction in civil and commercial matters.

The article can be freely downloaded [here](#).

United States Supreme Court to Again Consider the Alien Tort Statute

Today, the United States Supreme Court granted certiorari in the case of *Kiobel v. Royal Dutch Petroleum* to consider the following questions: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute, 28 U.S.C. § 1350, is a merits question or instead an issue of subject matter jurisdiction; and (2) whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations. In addition to *Kiobel*, the Court also granted cert. in *Mahamad v. Rajoub* to consider whether whether the Torture Victim Protection Act of 1991 permits actions against defendants that are not natural persons.

In *Kiobel*, 12 Nigerian nationals claimed human rights violations by oil companies, alleging that the oil companies enlisted the Nigerian government to use its armed forces to suppress resistance to oil exploration in the Niger Delta. In *Mohamad*,

the family of a U.S. citizen claimed torture by officers of the Palestinian Authority and the Palestine Liberation Organization. The cases present the question whether the ATS and the TVPA apply to entities other than natural persons—corporations in *Kiobel* and other organizations in *Mohamad*.

What makes the *Kiobel* grant interesting, besides it being only the second time the US Supreme Court will hear an ATS case, is that the Court granted the case without soliciting the views of the United States. Given that cases raised under the ATS implicate in many cases foreign policy concerns of the Executive Branch, the considered views of the Executive would have advanced the Court's consideration of the case, even at the cert. stage. Whether the Solicitor General will file a brief *amius curiae* and request oral argument time will tell one a great deal about how the Obama Administration responds to the tensions created in ATS cases—at best, the ATS seeks to support human rights throughout the world and, at worst, imposes United States legal views on acts or omissions occurring within the sovereign territory of another country.

For international law scholars, the current Supreme Court term just became a great deal more interesting!

ECJ Rules on Set-Off and Exequatur

On October 13th, 2011, the European Court of Justice held in *Prism Investments BV v. Jaap Anne van der Meer* (Case C-139/10) that enforcing courts may not deny exequatur to foreign judgments on the ground that they were already paid by way of set-off.

Facts

In a nutshell, a Dutch company, Arilco Holland, had transferred monies (Euro 1 million) to a Dutch investment company, Prism Investment BV. Several companies of the Arilco group had originally received the monies from a Finish bank. When

they were sued in Belgium to reimburse the monies, Arilco asked in turn Prism Investment to return the million it had received.

In 2006, the Court of appeal of Brussels ordered Prism to pay Arilco Holland the said million. In August 2007, Arilco Holland was declared insolvent. In September 2007, the trustee sought and obtained that the Belgian judgment be declared enforceable in Holland. Prism appealed the declaration of enforceability on the ground that it had already paid the judgment by way of set-off in Belgium.

The ECJ's Decision

The ECJ held that declarations of enforceability may only be challenged on the grounds provided by the Brussels I Regulation.

Article 45 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 precluding the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking a declaration of enforceability of a judgment on a ground other than those set out in Articles 34 and 35 thereof, such as compliance with that judgment in the Member State of origin.

Payment of the judgment in the state of origin is not one of those grounds:

34 In the present case, it is apparent from the order for reference that the ground for revocation of the declaration of enforceability relied upon by the appellant in the main proceedings and relating to compliance with the judgment in the Member State of origin – that is to say, Belgium – is not one of those grounds which the court or tribunal of the Member State in which enforcement is sought – in the present case, the Kingdom of the Netherlands – has jurisdiction to review. The fact that that ground was not raised before the Belgian court is irrelevant in that regard.

Although this does not seem to have been central to the decision, the court found interesting to underscore that the set-off was actually disputed:

35 Furthermore, as the Advocate General has noted in point 47 of her Opinion, the argument of the appellant in the main proceedings against the declaration

of enforceability is derived from the alleged satisfaction of the claim at issue by means of a financial settlement. However, in his written observations, Mr van der Meer, acting in his capacity as receiver in the liquidation of Arilco Holland, challenges that financial settlement in detail. The answer to the question whether or not the requirements of that financial settlement were fulfilled will therefore be neither straightforward nor swift and could require an extensive examination of the facts regarding the claim in relation to which that financial settlement may have been reached and would thus be difficult to reconcile with the objectives pursued by Regulation No 44/2001.

It was thus for the courts of the enforcing state to rule, at a later stage, on the issue:

40 Such a ground may, by contrast, be brought before the court or tribunal responsible for enforcement in the Member State in which enforcement is sought. In accordance with settled case-law, once that judgment is incorporated into the legal order of the Member State in which enforcement is sought, national legislation of that Member State relating to enforcement applies in the same way as to judgments delivered by national courts (see Case 148/84 Deutsche Genossenschaftsbank [1985] ECR 1981, paragraph 18; Case 119/84 Capelloni and Aquilini [1985] ECR 3147, paragraph 16; and Hoffmann, paragraph 27).

Clearer Patrimonial Regimes for International Couples: Joint Conference of the European

Commission and CNUE

On Monday 17 October 2011 **the Council of the Notariats of the European Union (CNUE)** is organising, **jointly with the EU Commission**, a conference in Brussels on the proposals for two regulations on property rights of “international” married couples and registered partnerships: **“Clearer Patrimonial Regimes for International Couples”**. A dedicated section of the CNUE website has been set up for the event, for further information and registration (there are still some places left to attend the conference). Here’s the programme (interpretation will be available in English, French, German, Italian, Polish, Romanian and Spanish):

9.30 - 9.40 Opening: *Rudolf Kaindl*, CNUE President

9.40 - 10.20 Keynote speeches:

- *Viviane Reding*, Vice-President of the European Commission
- *Frank Molitor*, President of the Luxembourg Chamber of Notaries

10.20 - 10.40 Proposals for Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and regarding the property consequences of registered partnerships: *Salla Saastamoinen*, Head of Unit, DG Justice, European Commission

11.00 - 12.40 Panel discussion: Session 1 - The applicable law

Moderator: *Prof. Katharina Boele-Woelki*, University of Utrecht

Speakers:

- *Prof. Paul Lagarde*, University of Paris I “Panthéon Sorbonne”
- *Prof. Brigitta Lurger*, University of Graz
- *Prof. Barbara Reinhartz*, University of Amsterdam
- *Franco Salerno Cardillo*, Civil Law Notary in Palermo
- *Alexandra Thein*, Member of the European Parliament
- *Richard Frimston*, STEP, Solicitor and Notary Public in London

14.00 - 15-15 Panel discussion: Session 2 - The competent court

Moderator: *Sjef van Erp*, Maastricht University, Deputy-Justice, Court of Appeal,

's-Hertogenbosch

Speakers:

- *Ulf Bergquist*, Lawyer in Stockholm
- *Prof. Patrick Wautelet*, University of Liège
- *Katarzyna Lis*, Judge, Polish Ministry of Justice

15.15 - 16.30 Panel discussion: Session 3 - Recognition and enforcement in cross-border cases

Moderator: *Pedro Carrión García de Parada*, Chair of the CNUE's Family Law Working Group

Speakers:

- *Matthias Neumayr*, Judge at the Austrian Supreme Court
- *Prof. Philippe De Page*, Université Libre de Bruxelles
- *Prof. Dieter Martiny*, European University Viadrina
- *Edmond Jacoby*, Civil Law Notary in Forbach

16.30 - 17.00 Information session - More information and services for European citizens

- The patrimonial property regimes website project, *Harald Steinwendter*, University of Graz
- The European Directory of Notaries, *Thomas Diehn*, Federal Council of the German Notariat

17.00 - 17.30 Closing speech: *Paraskevi Michou*, Director, DG Justice, European Commission.

Weber on Creditor Protection in International Civil Procedure

Johannes Weber, a research fellow at the Max Planck Institute for Comparative and International Law in Hamburg, has written a book on “Gesellschaftsrecht und Gläubigerschutz im Internationalen Zivilverfahrensrecht. Die Internationale Zuständigkeit bei Klagen gegen Gesellschafter und Gesellschaftsorgane vor und in der Insolvenz” [Corporate Law and Creditor Protection in International Civil Procedure. The International Jurisdiction for Actions against Shareholders and Directors before and during Insolvency]. Here is an English abstract:

Creditor protection in respect of limited liability corporations is a topic assuming an increasingly central role in corporate law and private international law. Whereas the scholarly discussion has primarily focused on substantive law issues and the appropriate connecting factors from a private international law perspective, the question of international civil procedure has thus far received relatively little attention. In his work “Gesellschaftsrecht und Gläubigerschutz im Internationalen Zivilverfahrensrecht” (Corporate Law and Creditor Protection in International Civil Procedure), Dr. Johannes Weber, research fellow at the Max Planck Institute for Comparative and International Private Law, addresses the question of which court may claim international jurisdiction when it comes to the enforcement of creditor protection in respect of corporations. Analyzing the question in the context of EU international civil procedure, Weber’s analysis offers in particular a comparison of German and English substantive law. Revealing a number of significant substantive contrasts between the two distinct legal traditions, the inquiry is also of considerable relevance in light of the number of business entities incorporated under British law. Each chapter of the work concludes with a discussion on the perspectives for future legal reform.

More information is available on the publisher’s website.

French Conference on Arbitration and EU Law

A conference on Arbitration and European Union Law (*Arbitrage et droit de l'Union européenne*) will be held in Paris on November 4th, 2011.

8h30 – Accueil et inscription des participants

9h00 – Allocution introductive

M Philippe LEBOULANGER

Président du Comité français de l'arbitrage

Avocat au Barreau de Paris

*PREMIERE PARTIE – L'EXCLUSION DE L'ARBITRAGE DU DOMAINE DU
REGLEMENT BRUXELLES 1 ET SON EVENTUELLE SUPPRESSION*

9H10

Président de séance

M Gérard PLUYETTE

Conseiller Doyen à la première Chambre civile de la Cour de cassation

Les questions liées à l'appréciation et aux effets de la convention d'arbitrage

M Sylvain BOLLEE

Professeur à l'Ecole de droit de la Sorbonne (Paris I)

*Les questions liées au déroulement de la procédure arbitrale et à l'efficacité de
la sentence*

M Cyril NOURISSAT

Recteur de l'Université de Bourgogne

Table ronde et discussion générale

Mme Sandrine CLAVEL

Professeur à l'Université Versailles Saint Quentin,

M Laurent JAEGER

Avocat au Barreau de Paris, Associé, Orrick

Philippe PINSOLLE

Avocat au Barreau de Paris, Associé Shearman & Sterling

François-Xavier TRAIN
Professeur à l'Université Paris-Ouest.

11h15 : Pause-café

DEUXIEME PARTIE - ARBITRAGE ET DROIT MATERIEL EUROPEEN
11H45

Président de séance :
M Guy CANIVET
Président honoraire de la Cour de cassation
Membre à la Cour de cassation

L'application du droit européen de la concurrence par l'arbitre
M Olivier CAPRASSE
Doyen de la Faculté de droit de Liège
Professeur à l'Université de Bruxelles
Avocat au Barreau de Bruxelles, Cabinet Hanotiau & Van Den Berg

Le contrôle judiciaire sur le respect du droit européen de la concurrence par l'arbitre
M Matthieu DE BOISSESON
Avocat au Barreau de Paris, Associé, Darrois Villey Maillot Brochier

12h45 - Déjeuner

DEUXIEME PARTIE (SUITE) - ARBITRAGE ET DROIT MATERIEL EUROPEEN
(suite)
14H15

Arbitrage et droit européen de la consommation
M Christophe SERAGLINI,
Professeur à l'Université Jean Monnet (Paris XI)

Table ronde et discussion générale
M Santiago MARTINEZ LAGE
Avocat au Barreau de Madrid, Associé Howrey LLP
M Pierre MAYER
Professeur à l'Ecole de droit de la Sorbonne (Paris I)
Avocat au Barreau de Paris, Associé, Dechert LLP

M Jean-Baptiste RACINE

Professeur à l'Université de Nice-Sophia Antipolis

M Luca RADICATI DI BROZOLO

Professeur à l'Université Catholique de Milan

Avocat associé, Bonelli Erede Pappalardo

15h45 : Pause

*TROISIEME PARTIE - L'ARBITRAGE ET LE CONTROLE DES ENGAGEMENTS
EN DROIT DE LA CONCURRENCE (PRATIQUES ANTICONCURRENTIELLES
ET CONTROLE DES CONCENTRATIONS)*

16H00

Président de séance :

Mme Catherine KESSEDJIAN

Professeur à l'Université Panthéon- Assas (Paris II)

Membre du Collège européen de Paris

Description du système, objectifs et bilan

Mme Ana GARCIA CASTILLO

Direction Générale de la Concurrence

Membre de la Commission européenne

Analyse du système

Mme Laurence IDOT

Professeur à l'Université Panthéon-Assas (Paris II)

Membre du Collège européen de Paris

Discussion générale

*QUATRIEME PARTIE - LE ROLE DE LA COMMISSION DE L'UNION
EUROPEENNE DANS LA NEGOCIATION DES TRAITES COMPORTANT DES
CLAUSES RELATIVES A L'ARBITRAGE*

17H00

Président de séance :

Mme Catherine KESSEDJIAN

Professeur à l'Université Panthéon- Assas (Paris II)

Membre du Collège européen de Paris

Exposé

M Eric LOQUIN

Professeur à l'Université de Bourgogne

Doyen honoraire de la Faculté de droit

Directeur du CREDIMI

Sébastien MANCIAUX

Maître de Conférences à l'Université de Bourgogne

Discussion générale

18h00 - Clôture du colloque

The conference will be held at the *Maison du Barreau* on the *Ile de la Cite*.
Speeches will be delivered in French without translation.

More information is available [here](#).

New EU Rules on Consumer Rights to Enter into Force

Thanks to Marta Otero for the tip-off

Source: Europa Press Releases

The new EU Consumer Rights Directive was formally adopted by Member States last Monday in the EU's Council of Ministers . The new legislation will strengthen consumers' rights in all 27 EU countries, particularly when shopping online. After publication in the EU's Official Journal, governments will have two years to implement the rules at national level. Today's approval follows an overwhelming vote to back the rules by the European Parliament on 23 June 2011 (MEMO/11/450). The European Commission put forward the proposal in October 2008 (IP/08/1474). The final agreement between Parliament and Council on the Consumer Rights Directive was brokered by EU Justice Commissioner Viviane

Reding in June this year.

Top 10 benefits for consumers in the new Directive:

1) The proposal will eliminate hidden charges and costs on the Internet

Consumers will be protected against “cost traps” on the Internet. This happens when fraudsters try to trick people into paying for ‘free’ services, such as horoscopes or recipes. From now on, consumers must explicitly confirm that they understand that they have to pay a price.

2) Increased price transparency

Traders have to disclose the total cost of the product or service, as well as any extra fees. Online shoppers will not have to pay charges or other costs if they were not properly informed before they place an order.

3) Banning pre-ticked boxes on websites

When shopping online – for instance buying a plane ticket – you may be offered additional options during the purchase process, such as travel insurance or car rental. These additional services may be offered through so-called ‘pre-ticked’ boxes. Consumers are currently often forced to untick those boxes if they do not want these extra services. With the new Directive, pre-ticked boxes will be banned across the European Union.

4) 14 Days to change your mind on a purchase

The period under which consumers can withdraw from a sales contract is extended to 14 calendar days (compared to seven days legally prescribed by EU law today). This means that consumers can return the goods for whatever reason if they change their minds.

- Extra protection for lack of information: When a seller hasn’t clearly informed the customer about the withdrawal right, the return period will be extended to a year.
- Consumers will also be protected and enjoy a right of withdrawal for solicited visits, such as when a trader called beforehand and pressed the consumer to agree to a visit. In addition, a distinction no longer needs to be made between solicited and unsolicited visits; circumvention of the

rules will thus be prevented.

- The right of withdrawal is extended to online auctions, such as eBay – though goods bought in auctions can only be returned when bought from a professional seller.
- The withdrawal period will start from the moment the consumer receives the goods, rather than at the time of conclusion of the contract, which is currently the case. The rules will apply to internet, phone and mail order sales, as well as to sales outside shops, for example on the consumer's doorstep, in the street, at a Tupperware party or during an excursion organised by the trader.

5) Better refund rights

Traders must refund consumers for the product within 14 days of the withdrawal. This includes the costs of delivery. In general, the trader will bear the risk for any damage to goods during transportation, until the consumer takes possession of the goods.

6) Introduction of an EU-wide model withdrawal form

Consumers will be provided with a model withdrawal form which they can (but are not obliged to) use if they change their mind and wish to withdraw from a contract concluded at a distance or at the doorstep. This will make it easier and faster to withdraw, wherever you have concluded a contract in the EU.

7) Eliminating surcharges for the use of credit cards and hotlines

Traders will not be able to charge consumers more for paying by credit card (or other means of payment) than what it actually costs the trader to offer such means of payment. Traders who operate telephone hotlines allowing the consumer to contact them in relation to the contract will not be able charge more than the basic telephone rate for the telephone calls.

8) Clearer information on who pays for returning goods

If traders want the consumer to bear the cost of returning goods after they change their mind, they have to clearly inform consumers about that beforehand, otherwise they have to pay for the return themselves. Traders must clearly give at least an estimate of the maximum costs of returning bulky goods bought by

internet or mail order, such as a sofa, before the purchase, so consumers can make an informed choice before deciding from whom to buy.

9) Better consumer protection in relation to digital products

Information on digital content will also have to be clearer, including about its compatibility with hardware and software and the application of any technical protection measures, for example limiting the right for the consumers to make copies of the content. Consumers will have a right to withdraw from purchases of digital content, such as music or video downloads, but only up until the moment the actual downloading process begins.

10) Common rules for businesses will make it easier for them to trade all over Europe.

These include:

- A single set of core rules for distance contracts (sales by phone, post or internet) and off-premises contracts (sales away from a company's premises, such as in the street or the doorstep) in the European Union, creating a level playing field and reducing transaction costs for cross-border traders, especially for sales by internet.
 - Standard forms will make life easier for businesses: a form to comply with the information requirements on the right of withdrawal;
 - Specific rules will apply to small businesses and craftsmen, such as a plumber. There will be no right of withdrawal for urgent repairs and maintenance work. Member States may also decide to exempt traders who are requested by consumers to carry out repair and maintenance work in their home of a value below €200 from some of the information requirements.
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Masri Settles

The extraordinarily long-running litigation in *Masri v Consolidated Contractors* is over – the parties have settled. Brick Court (which represented the ‘successful’ claimant) has a useful summary of the various judgments of the English courts in *Masri* over the last five years.

[Thanks to Tom Cleaver for the tip-off.]

EU’s Proposed Sales Law Hits the Shelves

The Commission has, today, published its Proposal for a Regulation on a Common European Sales Law, as a consequence of its 2010 consultation on contract law in the EU and the work of the Commission’s (not uncontroversial) expert group. As expected, the proposed Common European Sales Law (CESL) takes the form of an optional instrument, which would apply only through the agreement of the parties to a contract falling within the scope of the instrument (which has contracts for the sales of goods at its core).

The Proposal marks the start of what seems likely to be a lively debate within and outside the institutions of the European Union. As a first reaction (and admittedly without having had sufficient time to explore the detail of the Proposal, which runs to 115 pages), it is suggested that two introductory points may be of particular interest to followers of this site.

First, the sole proposed legal basis of the measure is the internal market harmonisation power in TFEU, Art. 114. No reliance is placed on the civil justice power in TFEU, Art. 81.

Secondly, it is proposed that the Regulation should operate alongside (and not in lieu of) the choice of law regime established by the Rome I Regulation. According

to Recital (10):

The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.

Recital (12) emphasises that, since the CESL contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area where the parties have chosen to use the CESL. Consequently, Art. 6(2) of the Rome I Regulation, which guarantees to the consumer the protection of non-derogable provisions of the law of his country of habitual residence, is said to have “no practical importance for the issues covered by the Common European Sales Law”. Recitals (27) and (28) emphasise that the national law applicable under the Rome I and Rome II Regulations (or other rules of private international law) will apply in any event to matters falling outside the CESL.

The exclusive character of the CESL, when chosen by the parties, is affirmed by the first sentence of Article 11 of the Regulation, which provides that, where the parties have validly agreed to use the CESL for a contract (see Art. 8), only the European Sales Law shall govern the matters addressed in its rules. The second sentence of Art. 11 addresses pre-contractual duties.

This seems all very well when the law applicable to the contract under Arts. 3, 4 or 6 the Rome I Regulation (as applicable) is the law of a Member State, but what if it is the law of a non-Member State? Can Art. 10 be taken at face value in preserving the integrity of the Rome I and Rome II Regulations, or must the CESL be understood as being superimposed on the law applicable under the Rome I Regulation and (if so) on what basis? Recital (14) touches on this issue. It states

that the CESL should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. It continues by suggesting that:

Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.

It appears, therefore, that the proposed Regulation may contemplate that the choice of the CESL would involve an implicit choice under the Rome I Regulation of a law other than that of the third country consumer's country of habitual residence. The question is "Which law?", as Art. 3(1) of the Rome I Regulation requires that the law chosen be the law of a country, and not a choice of non-national law such as the CESL? In a contract between a seller habitually resident in an EU Member State and a consumer habitually resident in a non-Member State, one might argue that the choice of the law of the seller's State (including the CESL, as applicable in that State under the proposed CESL Regulation) may be demonstrated with sufficient clarity by the terms of the contract (Art. 3(1))? What, however, if the contract also (perversely) contains a choice of a third country's law? Does Art. 11 of the proposed Regulation then confer on the CESL rules the status of (party chosen) overriding mandatory provisions under Art. 9(2) of the Rome I Regulation, so as to trump the expressly chosen law, or does the CESL take effect as if incorporated by reference into the contract insofar as this is possible under the chosen law? Finally, even if a choice of a particular Member State's law can be clearly demonstrated, so as to give effect to the CESL, can the third country consumer still rely on more favourable protection under the law of his habitual residence, in line with Art. 6(2) of the Rome I Regulation (and in apparent contradiction of Recital (12))? These questions are likely to see more air time in the forthcoming legislative process. The point made here is that the proposed CESL and the Rome I Regulation do not, as Recital (10) and other parts of the Proposal appear to suggest, pass like ships in the night.