Upcoming international conference at the Academy of European Law: “How to handle international commercial cases – Hands-on experience and current trends”

The Academy of European Law (ERA) will host an international conference on recent experience and current trends in international commercial litigation, with a special focus on European private international law. The event will take place in Trier (Germany), on 8-9 October 2015. This conference will bring together top experts in international commercial litigation who will report on their experiences in this field including litigation strategy and tactics.

Key topics will be:

- Recent case law in the area of European civil procedure, private and business law, including Alternative Dispute Resolution (ADR) and arbitration,
- Best practice in applying commercial litigation and conflict of laws rules,
- Forthcoming changes after the entry into force of the new Hague Choice of Court Convention in June 2015, the recast of the Insolvency Regulation in summer 2015, the revision of the Small Claims Procedure 2015, and the Regulation establishing a European Account Preservation Order,
- A round table discussion about “Coherence, consolidation and codification: the road ahead for European private international law”.

The conference language will be English. The event is organized by Dr Angelika Fuchs, ERA, in cooperation with Professor Jan von Hein, University of Freiburg (Germany). The confirmed speakers are

- **Professor Camelia Toader**, Judge at the European Court of Justice of the EU (CJEU), Luxembourg
- **Professor Gilles Cuniberti**, University of Luxembourg
- **Raquel Ferreira Correia**, Counsellor, Lisbon
- **Sarah Garvey**, Counsel and Head of KnowHow in the Litigation Department, Allen & Overy LLP, London
- **Jens Haubold**, Partner, Thümmel, Schütze & Partner, Stuttgart
- **Professor Jan von Hein**, Director of the Institute for Foreign and International Private Law, Dept. III, University of Freiburg
- **Brian Hutchinson**, Arbitrator, Mediator, Barrister, GBH Dispute Resolution Consultancy; Senior Lecturer, University College Dublin
- **Marie Louise Kinsler**, Barrister, 2 Temple Gardens, London
- **Professor Xandra Kramer**, Erasmus University Rotterdam; Deputy Judge of the District Court of Rotterdam
- **Alexander Layton QC**, Barrister, Arbitrator, 20 Essex Street, London.

The full conference programme is available here. For further information and registration (including early bird rebates), please click here.

Recognition of Foreign Bankruptcy and the Requirement of Reciprocity (Swiss Federal Court)

The Swiss Federal Court recently issued a noteworthy judgment (scheduled for publication in the official reports) concerning the requirement of reciprocity with respect to the recognition of foreign bankruptcy decrees. The judgment (in German) is available here.

Marjolaine Jakob, the author of the following summary and comment, is a researcher at the University of Zurich, Faculty of Law.

Introduction

Under Swiss international bankruptcy law, the access of a bankruptcy administrator to a bankruptcy debtor's assets located in Switzerland requires a successful recognition of the foreign bankruptcy order by the competent Swiss court. The recognition of a foreign bankruptcy order and the effects of such recognition (including the opening of mandatory secondary insolvency proceedings over the assets located in Switzerland) are regulated by art. 166 et seq. SPILA (Swiss Private International Law Act). According to art. 166 para. 1 lit. c SPILA a foreign bankruptcy order shall be recognized provided that, amongst other prerequisites, reciprocity is granted by the state in which the order was rendered. In the decision of the Swiss Federal Supreme Court discussed hereinafter, it was disputed whether Dutch law grants reciprocity.

Summary of the facts of the case

The parent company C Ltd., Rotterdam (the Netherlands), filed a claim in the debt-restructuring moratorium over the company B Ltd., Zug (Switzerland). The respective claim was for the most part provisionally admitted by the trustees and for the remaining part contested.

By judgment of August 6, 2012 the district court of Rotterdam opened bankruptcy proceedings over C Ltd. and appointed A as bankruptcy administrator.

By judgment of February 18, 2013 the cantonal court of Zug approved a composition agreement entered into between B Ltd. and the creditors.

On September 13, 2013, the foreign bankruptcy administrator (A) filed a request for recognition of the Dutch bankruptcy order of August 6, 2012 with the cantonal court of Zug.

By judgment of October 8, 2013 the cantonal court of Zug rejected the request for recognition of the Dutch bankruptcy order by reasoning that the prerequisite of reciprocity (art. 166 para. 1 lit. c SPILA) is not granted by Dutch law. After rejection of the appeal by the High Court of the Canton Zug, A filed an appeal in civil matters to the Swiss Federal Supreme Court and requested annulment of the judgment of the High Court of the Canton of Zug, recognition of the Dutch insolvency order of August 6, 2012 and in consequence of the latter, the opening of secondary bankruptcy proceedings over C Ltd.'s assets located in Switzerland.

Considerations

The Swiss Federal Supreme Court refers to earlier case law, according to which the prerequisite of reciprocity is to be interpreted in a broad sense. Reciprocity is granted if the law of the state concerned recognizes the effects of Swiss bankruptcy proceedings on similar (but not necessarily on identical) grounds. In other words, it suffices if the foreign law recognizes a Swiss bankruptcy order under conditions not considerably stricter than those established by Swiss law regarding the recognition of a foreign bankruptcy order.

The decision furthermore refers to the European trend of abolishing the prerequisite of reciprocity, which is also reflected in Swiss legislation. Since September 1, 2011 the Swiss Financial Market Supervisory Authority (FINMA) *may* recognize under certain conditions foreign bankruptcy orders and insolvency measures pronounced against banks abroad without a mandatory opening of secondary bankruptcy proceedings in Switzerland (cf. art. 37g para. 2 Swiss Banking Act) and without the state in which the bankruptcy order was rendered granting reciprocity (cf. art. 10 para. 2 Regulation on Banking Insolvencies by the Swiss Financial Market Supervisory Authority). As a consequence thereof, the Swiss Federal Supreme Court acknowledges that the bar should not be set too high regarding the prerequisite of reciprocity where it still exists.

In the Netherlands, the opening of foreign bankruptcy proceedings cannot be formally recognized and no formal and comprehensive effects of seizure occur. Thus, according to Dutch law a foreign bankruptcy administrator has to "compete" with other creditors, since their rights over seized assets are to be respected. However, the foreign bankruptcy administrator has rights of action and enforcement rights on Dutch territory. Furthermore, he is able to directly access the bankruptcy debtor's assets located in the Netherlands. Consequently, the Dutch international bankruptcy law appears to be equal in qualitative terms, although technically differing fundamentally from Swiss international bankruptcy law. According to the decision of the Swiss Federal Supreme Court, with regard to the prerequisite of reciprocity, it is not decisive that the formal recognition of a foreign bankruptcy order and an overall liquidation of local assets are alien to Dutch international bankruptcy law. Instead, the quality of mutual assistance is decisive. Moreover, the Swiss Federal Supreme Court acknowledges that a foreign bankruptcy administrator is not in a worse position but presumably in numerous cases even in a better position in the Netherlands compared to the

position of a foreign bankruptcy administrator in Switzerland.

In consequence thereof, the Swiss Federal Supreme Court concludes that Dutch law grants reciprocity according to art. 166 para. 1 lit. c SPILA and provided that the remaining prerequisites are fulfilled, the Dutch bankruptcy order shall be recognized.

Comment

It has to be welcomed that the Swiss Federal Supreme Court has adopted a liberal interpretation based on a contemporary understanding of tendencies in international insolvency law and especially in Swiss international banking insolvency law. The former case law of the Swiss Federal Supreme Court was shaped by a highly restrictive interpretation of art. 166 et seq. SPILA insisting on a protective interpretation of Swiss international insolvency law. The present decision delivers the impression that the Swiss Federal Supreme Court finally considers international trends and – even more important – trends in Swiss law. However, it is incomprehensible and intolerable that Swiss international banking insolvency law contains a far more liberal regulation than Swiss international insolvency law; the latter being applicable much more frequently. This unsatisfactory legal situation is the result of the uncoordinated process of revising and adopting Swiss legislation. Hopefully, the Swiss Federal Supreme Court will continue to follow international trends and adopt a more generous approach also on other issues of Swiss international insolvency law, for example with regard to the power of the bankruptcy administrator in Switzerland.

De Miguel on Derecho Privado de Internet (5th edn)

The fifth edition of *Derecho privado de internet* (Thomson Reuters Civitas, 1150 pages), by Professor Pedro De Miguel Asensio (Universidad Complutense de Madrid) has just been published. This well-known treatise cover a wide range of areas of Internet regulation and the ordering of Internet activities with a

particular focus on Private Law and Conflict of Laws aspects.

As noted by Prof. Gerald Spindler in his review of the previous edition of this book in the *Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)*, 2012, pp. 88-90: *"De Miguel's book is indeed an encyclopedia of Internet law, with special regard to its implementation in Spain. The effort to undertake such a comparative legal work is huge, and it is the only way to cope with the global phenomenon of the Internet. The book is highly recommendable for everyone engaged in electronic commerce and Internet law as a rich source of information that spans all kinds of legal areas, thus making it indispensable for European lawyers in these fields".*

Further information on the new edition is available on the **publisher's website**.

The new European Insolvency Regulation

Antonio Leandro, the author of this post, teaches International Law at the University of Bari.

On 20 May 2015 the European Parliament approved the new European Insolvency Regulation (EIR) in the text adopted by the Council at first reading on 12 March (publication on the Official Journal is expected to follow soon). This marks the end of a revision process which started with the Commission proposal of 12 December 2012 (COM/2012/744 final).

The primary aim of the revision was to improve the operation of the EIR with a view to ensuring a smooth functioning of the internal market and its resilience in economic crises, having regard to national insolvency laws and to the case law of the ECJ on the "old" Insolvency Regulation, *i.e.* Regulation No 1346/2000 (the relevant ECJ judgments include: *Susanne Staubitz-Schreiber* [2006]; *Eurofood IFSC* [2006]; *Deko Marty Belgium* [2009]; *SCT Industri* [2009]; *German Graphics* [2009]; *MG Probud* [2010]; *Interedil* [2011]; *Zaza Retail* [2011]; *Rastelli Davide*

[2011]; *F-Tex SIA* [2012]; *ERSTE Bank Hungary* [2012]; *Ulf Kazimierz Radziejewski* [2012]; *Bank Handlowy* [2012]; *Grontimmo* [2013]; *Meliha Veli Mustafa* [2013]; *Ralph Schmid* [2014]; *Burgo Group* [2014]; *Nickel & Goeldner Spedition* [2014]; *H* [2014]).

In short, the revised text: (*a*) extends the EIR's scope to proceedings aimed at giving the debtor a "second chance"; (*b*) strengthens the current jurisdictional framework in terms of certainty and clarity; (*c*) improves the coordination among insolvency proceedings opened in respect of the same debtor and strikes a better balance between efficient insolvency administration and protection of local creditors; (*d*) reinforces the publicity of the proceedings by compelling Member States to provide for insolvency registers and by providing for the interconnection of national registers; (*e*) deals with the management of multiple insolvency proceedings relating to groups of companies.

The new EIR will enter into force following its publication in the Official Journal, but the bulk of its provisions will only apply in 2017.

A broader scope

Opening the EIR to collective rescue and restructuring proceedings, to proceedings which leave the debtor fully or partially in control of its assets and affairs and to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons as well as to interim proceedings, means that the appointment of a "liquidator" and the debtor's divestment are no more grounds of the EIR's applicability.

The difference between "all-creditors-including" and "not-all-creditors-including" proceedings has been implicitly upheld. However, Recital 14 clarifies that proceedings not including all the creditors should be proceedings aimed at rescuing the debtor, while those leading to a definitive cessation of the debtor's activities or to the liquidation of the debtor's assets should include all the creditors.

Annex A lists the proceedings at stake: national insolvency procedures not listed fall out of the scope of the Regulation. In doing so, Annex A provides – as the ECJ held in *Ulf Kazimierz Radziejewski* (§§ 23-24) and *Meliha Veli Mustafa* (§ 36) – a clear-cut confine of the EIR's scope.

Moreover, the extension to proceedings whose purpose is not liquidation has led to replacing the term “liquidator” with “insolvency practitioner”, so as to include a broader range of tasks in connection with the administration of the debtor’s affairs. Annex B lists the relevant insolvency practitioners based on national laws.

Hereinafter, we will refer to the insolvency practitioner appointed in the main proceedings as the “main insolvency practitioner” and to the one appointed in secondary proceedings as the “secondary insolvency practitioner”.

The innovations regarding jurisdiction

Some Recitals inspired by *Eurofood* and *Interedil* have been inserted in the new EIR to clarify the concept of “centre of main interests” (COMI).

It is now stated that the COMI of individuals is to be found – presumptively – in their “principal place of business”, if they are independent businessmen or professional providers, or in their habitual residence, in all other cases (Article 3(1)).

In order to avoid fraudulent or abusive forum shopping practices, these presumptions will only apply if the registered office/principal place of business/habitual residence have not been transferred to another Member State within a given period prior to the request for the opening of the insolvency proceedings.

The court requested to open the proceedings will rule on jurisdiction of its own motion, and specify in the judgment on which ground it retained jurisdiction (Article 4).

Vis attractiva over “ancillary” proceedings is now codified in Article 6. Moreover, should the “ancillary” action be related with another action based on civil and commercial law, then the insolvency practitioner is entitled to bring both claims in the court of the defendant’s domicile or, in the case of several defendants, in the court of the Member State where any of them is domiciled, provided that such court has jurisdiction under the Brussels I Regulation (recast).

Coordination of proceedings

The new EIR improves the coordination among insolvency proceedings opened against the same debtor, and attempts to strike a better balance between efficient insolvency administration and protection of local creditors.

In particular, it makes the opening of secondary proceedings conditional upon both the interests of local creditors and the objectives of the main proceedings, and accordingly, strengthens the main insolvency practitioner's role in this regard.

The court of the establishment will be enabled, on request of the main insolvency practitioner, to refuse or to postpone the opening of secondary proceedings whenever this is not necessary to protect the interest of local creditors.

When ruling on a request for opening brought by local creditors, the court of the establishment should give the main insolvency practitioner the opportunity to be heard before deciding (Article 38). The main insolvency practitioner will have the opportunity to apply for refusal or postponement of the opening of secondary proceedings, while the court of the establishment will be in a position to be aware of any rescue or reorganization options explored by the main insolvency practitioner, so as to properly assess the consequences of the opening.

Based on these and other elements, the court may refuse the opening or opt for proceedings not involving the winding-up of the debtor. This differs from the current regime, which allows for the alternative proceedings option only for territorial proceedings, *i.e.* prior to the opening of main proceedings.

In line with this new broadened role in evaluating the impact of secondary proceedings upon the centralized rescue or the estate administration, the main insolvency practitioner will be entitled to challenge the decision whereby secondary proceedings are opened.

As regards the protection of local creditors, in order to avoid the opening of secondary proceedings, the main insolvency practitioner may undertake within the main proceedings, in respect of assets located in the Member State of the establishment, 'that he will comply with the distribution and priority rights under national law that [they] would have if secondary proceedings were opened' (Article 36(1)). This undertaking should remove the local creditors' concern over seeing themselves deprived of interests and preferential rights based on the local *lex concursus* by the opening of the sole main proceedings and by the

applicability of the COMI's *lex concursus*. At the same time, it will avoid the opening of secondary proceedings that may adversely affect the outcome of the main insolvency proceedings, in particular where the latter are aimed at rescue and restructuring.

In this respect, the new EIR draws inspiration from the "synthetic secondary proceedings".

If secondary proceedings are opened or the request of opening is still pending, the new EIR extends the duty to cooperate both to the courts involved and between courts and insolvency practitioners (Articles 41-43).

Courts and insolvency practitioners are also required to take account of principles and guidelines adopted by European and international organizations active in the area of insolvency law, including the UNCITRAL guidelines (Recital 48). For instance, the courts may coordinate with each other to appoint the insolvency practitioners, while courts and insolvency practitioners may enter into protocols and agreements to facilitate cross-border cooperation and to coordinate the administration and supervision of the debtor's assets and affairs.

Publishing insolvency information

Member States are required to establish publicly accessible electronic registers that contain information on cross-border cases (Article 24). All national registers will be interconnected with each other through the European e-Justice portal (Article 25).

This mandatory regime is meant to safeguard the foreign creditors' right to lodge claims and prevent the opening of parallel proceedings. As for the foreign creditors – *i.e.* those having their habitual residence, domicile or registered office in a Member State other than the State of the proceedings, including the tax authorities and social security authorities of Member States: Article 2(12) –, their right to lodge claims will be facilitated by using a standard form to be established in an implementing act of the Commission.

Certain protective rules concerning the personal data have been inserted on account of the fact that, as noted above, the new Regulation will also apply to proceedings opened against persons who do not carry out an independent

business or professional activity: see Articles 78-83. Having these cases in mind, Recital 80 strikes a balance with the creditors' right to lodge the claims by calling Member States to ensure both that the relevant information is given to creditors by individual notice and that claims of creditors who have not received the information are not affected by the proceedings.

Groups of companies

The revision also addresses the management of multiple insolvency proceedings relating to groups of companies, introducing a specific Chapter (V). This strives to ensure the efficiency of the insolvency administration, whilst respecting each group member's separate legal personality.

In this regard, the new EIR draws inspiration from the UNCITRAL Model Law and related Legislative and Practice Guides.

Firstly, should more proceedings be opened in different Member States, the new EIR requires all the actors involved (insolvency practitioners and courts) to comply with the duties of cooperation and communication applicable when main and secondary insolvency proceedings are opened against the same debtor (Chapter V, Section 1).

An important innovation is that an insolvency practitioner is now allowed to request the opening of a "group coordination proceeding", which should further facilitate, in particular, the restructuring of groups (Chapter V, Section 2). The participation of the other insolvency practitioners (hence, the other proceedings) rests on a voluntary basis.

A "coordinator" will be appointed to propose and implement the coordination plan (Articles 71-72).

All the advantages of the "coordination proceedings" should be worth the costs. In other words, the costs of the coordination should be sustainable and adequate having regard to the purpose of each proceedings involved.

The introduction of groups-of-companies oriented rules will not prevent a court from opening insolvency proceedings for several companies in a single State if the court finds a common COMI therein (Recital 53).

What about the applicable law?

The revision only marginally addresses the issue of applicable law.

However, Article 11(2) and Article 13(2) of the new texts are noteworthy in this respect, in that they manage, as regards contracts relating to immovable property and contracts of employment, the effects of the insolvency stemming from the (local) *lex contractus* when the insolvency being handled abroad in the main proceedings.

Article 18 extends to pending arbitration proceedings the existing rule whereby the effects of insolvency proceedings on a pending lawsuit concerning assets or rights included in the debtor's insolvency estate must be governed by the law of the Member State where the lawsuit is pending (the law of the seat of the arbitration will apply).

Finally, all the rules whose functioning depends on the concept of "Member State in which assets are situated" will benefit from the broader and more detailed definition provided by Article 2(9), which refers, among other "assets", to registered shares in companies, financial instruments, cash held in credit institutions accounts and copyrights.

Dicke on Capital Market related Transactions with Consumers under the Rome I Regulation

Andrea Isabell Dicke, attorney at law in Berlin, has authored a book on capital market related financial transactions with consumers under the Rome I Regulation (*"Kapitalmarktgeschäfte mit Verbrauchern unter der Rom I-VO"*) Published by Mohr Siebeck the book provides a detailed and thorough analysis of Article 6(4) lit. d) and e) of the Rome I Regulation (in German). Further information is available on the publisher's website. The official (English) abstract reads as follows:

> *Article 6(4) lit. d) and e) of the Rome I Regulation establish various capital market-related categories which are excluded from the general consumer protection under the special conflict of laws rule for consumer contracts in Article 6 of the Rome I Regulation. Andrea Isabell Dicke examines the scope of application and practical relevance of this exemption provision.*

Travaux du Comité Français de Droit International Privé

The release of the latest volume of the Travaux du Comité Français de DIP, 2013-2014, has just been announced. These are the contributions therein:

Olivier CACHARD

Les conventions uniformes régissant les transports internationaux et les règles de droit international privé de l'Union européenne : symbiose, indifférence ou rejet ?

Table ronde sur les innovations du règlement Bruxelles I refondu :

Etienne PATAUT

Le domaine spatial des règles de compétence
Pascal de VAREILLES-SOMMIERES
Les conflits de procédures
Françoise MONEGER
La reconnaissance et l'exécution des jugements étrangers

Fabienne JAULT-SESEKE
L'appréhension de la responsabilité des groupes de sociétés par le droit international privé : l'exemple du droit du travail et du droit de l'insolvabilité

Maxi SCHERER
Les effets des jugements étrangers relatifs aux sentences arbitrales

Guido CARDUCCI
Acquisition *a non domino*, prescription acquisitive, possession vaut titre, conflit mobile et circulation d'une *res extra commercium*

Pierre VERON
Le brevet européen à effet unitaire et la Juridiction unifiée du brevet (aspects de droit international privé)

Sylvain BOLLEE
La gestation pour autrui en droit international privé

Stefania BARIATTI
Critères de compétence européens et domaine de la compétence territoriale des juridictions nationales

For more information click here.

Conference on Extraterritorial

Application of EU Law 18-19 June (Vigo, Spain)

The Spanish Association of Professors of International Law and International Relations is hosting a conference on

The Extraterritorial Application of EU Law

in Vigo (Spain) the 18th and 19th of June 2015.

The conference is structured in 8 thematic panels entitled:

- EU, Values and Human Rights
- Extraterritorial Application of EU Law: Trade and Contracts
- The Fight against Corruption from an International Law Perspective
- The Extraterritorial Application of Intellectual Property Rights
- The Extraterritorial Application of Data Protection Legislation
- The Extraterritorial Application of EU Competition Law
- The Extraterritorial Application of Environmental Law
- Fishing Industries and the Changes in Maritime Areas

The entrance is free but prior registration is required by June, 17 via e-mail to: montserrat.abad@uc3m.es or laura.carballo@usc.es

Further information can be found here.

The conference is organized in the framework of the *Jean Monnet Project* EU Law between Universalism and Fragmentation: Exploring the Challenge of Promoting EU Values beyond its Border

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2nd Yale-Humboldt Consumer Law

Lecture and Kosmos-Dialogue

On June 1, 2015, the Yale – Humboldt Consumer Law Lecture will be held for the second time at Humboldt-University Berlin. In this annual lecture series, up to three scholars from Yale Law School and other leading US-Law Schools will be invited to spend two weeks in Berlin, at Humboldt Law School. During their stay, and as part of a variety of different events, the three visitors will interact with colleagues as well as doctoral candidates and students. The highlight of these series of events will be the Yale Humboldt Consumer Law Lecture, which will be open to all interested lawyers. The presentations will be followed by a discussion.

The event is aimed at encouraging the exchange between American and European lawyers in the field of Consumer Law, understood as an interdisciplinary field that affects many branches of law. Special emphasis will therefore be put on aspects and questions which have as yet received little or no attention in the European discourse.

The programm reads as follows:

- 2.00 p.m.
  Welcome
  Professor Dr. Susanne Augenhofer, Humboldt University, and *Professor Dr. Peter A. Frensch,* Vice President for Research of Humboldt University
- 2.15 p.m.
  Knowledge in Law and Economics and the Information Fiduciary
  Professor Richard Brooks, Columbia Law School
- 3.15 p.m.
  Coffee break
- 3.45 p.m.
  Does Disclosure Work? Some Realities and Challenges in Consumer Markets
  Professor Florencia Marotta-Wurgler, NYU School of Law
- 4.45 p.m.
  Break

- 5.00 p.m.
  The No Reading Problem in Consumer Contract Law
  Professor Alan Schwartz, Yale Law School

- 6.00 p.m.
  Panel Discussion

The event will be followed by a reception.

Further information is available here. Participation in the event is free of charge but binding
registration is required by online-registration.

Journal of Private International Law 10th Anniversary Conference: 3-5 September 2015

This conference, the next in a series that has featured Madrid (2013), Milan (2011), New York (2009), Birmingham (2007) and Aberdeen (2005), will be held in Cambridge, England at the University of Cambridge. As in the past, it features a diverse line-up of exciting speakers on interesting topics. All essential information can be found on the conference web site (http://www.pilconf15.law.cam.ac.uk/) which can be accessed here. In particular, the program and additional essential information can be obtained.

Accommodation is in Harvey Court, Gonville & Caius College, West Road. All rooms are ensuite and there are some doubles. It is very close to the Law Faculty. The conference dinner on Thursday evening is in Caius Old Hall. Both accommodation and dinner can be booked via the same link. The further information gives travel advice about coming to Cambridge.

The conference organizers are Richard Fentiman, Pippa Rogerson and Louise Merrett. The conference is supported by the Centre for Corporate and

Commercial Law (3CL).

Registration is now open and so you are encouraged to book.

The ECJ on choice-of-court agreements relating to contracts concluded electronically

Under the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (and, today, under the recast Brussels I*a* Regulation), choice-of-court agreements must comply with certain formal requirements. These are set out in Article 23(1) of the Brussels I Regulation (corresponding to Article 25(1) of the recast). The agreement may either be "in writing" or "evidenced in writing", or be "in a form which accords with practices which the parties have established between themselves" or, in international trade, in a form which accords with a usage of which the parties are or ought to have been aware.

Article 23(2) of the Brussels I Regulation (Article 25(2) of the recast) adds that "[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'".

In a judgment of 21 May 2015 (Case C-322/14, *Jaouad El Majdoub* v *CarsOnTheWeb*) the ECJ clarified the meaning of the latter provision.

The Court had been seised of a request for a preliminary ruling in the framework of a dispute regarding a contract for the sale of a car concluded by "click-wrapping" between parties none of which was a consumer.

In electronic contracts, click-wrapping occurs where the webpage containing the general terms and conditions of the seller does not open automatically upon registration or in the process leading to the individual transaction. Rather, to view

such general terms and conditions, the purchaser must click on a box bearing an indication such as to “click here to open the general conditions of sale in a new window” .

In the case at hand, the general conditions of the seller included a forum-selection clause providing for the jurisdiction of a court in Leuven. The purchaser, however, contended that the click-wrapping method of accepting such general terms did not fulfil the requirements laid down in Article 23(2) of the Brussels I Regulation. Consequently, the jurisdiction clause cannot, in his view, be invoked against him.

In its judgment, the ECJ held that the method of accepting the general terms and conditions of a contract by “click-wrapping” constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of Article 23(2) of the Brussels I Regulation, “where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract”.

The reasoning of the Court may be summarised as follows.

The formal requirements in Article 23 of the Brussels I Regulation “must be strictly interpreted”, since a valid agreement excludes both the general jurisdiction of the courts of the State in which the defendant is domiciled and the special jurisdiction provided for in Articles 5 to 7 of that Regulation (Articles 7 to 9 of the recast).

The scope of Article 23 is limited to cases in which the parties have “agreed” on a court. It is that consensus between the parties which justifies the primacy granted, in the name of the principle of autonomy, to the choice of a court other than that which may have had jurisdiction under the Regulation.

Thus, as the Court itself already observed with reference to the predecessor of the Brussels I Regulation, *i.e.* the Brussels Convention of 27 September 1968, the rule in question, by making the validity of a jurisdiction clause subject to the existence of an “agreement” between the parties, “imposes on the court before which the matter is brought the duty of examining … whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated”.

Under Article 23(2) of the Brussels I Regulation, the validity of a forum-selection

agreement involving communication by electronic means depends, *inter alia*, on the possibility of providing a durable record of the agreement of the parties.

Literally, this provision requires there to be the "possibility" of providing such a durable record, "regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after he clicks the box indicating that he accepts those conditions".

Furthermore, the Explanatory Report of the Lugano Convention of 30 October 2007, by Professor Fausto Pocar, suggests that the test of whether the formal requirement in that provision is met is "whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way", and that that is the case "even if no such durable record has actually been made", meaning that "the record is not required as a condition of the formal validity or existence of the clause".

As a matter of fact, the purpose of Article 23(2) is "to treat certain forms of electronic communications in the same way as written communications in order to simplify the conclusion of contracts by electronic means, since the information concerned is also communicated if it is accessible on screen". For electronic communication to offer the same guarantees, in particular as regards evidence, "it is sufficient that it is 'possible' to save and print the information before the conclusion of the contract".

The Court noted that, in *Content Services*, a judgment of 2012, it held that "a business practice consisting of making information accessible only via a hyperlink on a website does not meet the requirements" set out by Article 5(1) of Directive 97/7/EC on the protection of consumers in respect of distance contracts, pursuant to which the consumer must receive "written confirmation" of certain information to be provided prior to the conclusion of the contract, or "confirmation in another durable medium available and accessible to him".

However, the Court explained, that interpretation cannot be applied to Article 23(2) of the Brussels I Regulation, "since both the wording of Article 5(1) of Directive 97/7 … and the objective of that provision, which is specifically consumer protection, differ from those of Article 23(2)".