EUROPEAN LAW

- **The sudden termination of established business relationships considered to be a tortious act at the stage of international jurisdiction: the Commercial Chamber persists, like its difference of opinion with the First Chamber**

The Commercial Chamber of the French Supreme Court continues to consider that the action for compensation on the ground of a sudden termination of established business relationships, initiated under Article L. 442-6, I, 5° of the French Commercial Code, has a tortious nature. It strongly recalled this principle in an unpublished decision dated 13 December 2011 (*Pourvoi* no. 11-12.024).

In this case, the distributor in France of products of a Swiss company had summoned the latter in France on the ground of the sudden termination of their business relationships. The jurisdiction of the French courts could here result from Article 5.3 of the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (the "Lugano Convention"), pursuant to which (as is the case pursuant to the EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the "Brussels I Regulation"), the defendant can be sued, in matters relating to tort, before the "*courts for the place where the harmful event occurred*", in this case, the registered office of the French distributor.

Requested to rule on an objection to a decision on jurisdiction (*contredit*), the Paris Court of Appeal had yet considered that the claim of the French company was based on the "*non-compliance with a freely assumed obligation of a party towards the other*" and, consequently, that it did not fall within the field of tort but had a contractual nature within the meaning of European case law. As a result, the Court of Appeal had thus not applied Article 5.3 but Article 5.1 of the Lugano Convention which creates (again like the Brussels I Regulation mentioned above), in matters relating to contracts, a ground of jurisdiction in favour of "*the courts for the place of performance of the obligation in question*", i.e. in the case at hand, Switzerland and not France.

This decision has been quashed by the Commercial Chamber of the French Supreme Court: the action is based on tort, which means that, pursuant to Article 5.3 of the abovementioned Lugano Convention, the French courts should be granted jurisdiction over the dispute. By doing so, the Commercial Chamber confirms its position, already expressed on several occasions these past years, but also its refusal to fall into line with the divergent position of the First Civil Chamber of the French Supreme Court.

Indeed, for the First Civil Chamber, an action for damages on the ground of the sudden termination of established business relationships is not a tortious action but a contractual one when the issue relates to determining whether the French courts have jurisdiction pursuant to European rules. As a consequence, the jurisdiction clause provided for between the parties to an international contract must apply (French Supreme Court, 1st Civil Chamber, 6 March 2007, Bull. Civ. I, no. 93).

Some commentators had asserted that the difference of position with the Commercial Chamber could possibly be explained by the domestic nature of the disputes brought before the latter, compared with the international nature of the actions brought before the First Civil Chamber. The facts of the abovementioned dispute prove that this is not the case. It is, therefore, urgent that they find a common solution, or even that a question be referred to the Court of Justice of the European Union (the "CJEU") for a preliminary ruling in this respect. Until then, the people involved in disputes, lawyers, civil courts and courts of appeal will unfortunately have to make do with contrary case law.

Christophe Garin

- **Interpretation of the notion of "harmful event" pursuant to the Lugano Convention**

As the French Supreme Court rarely hands down decisions relating to the international jurisdiction of courts in matters of unfair and anti-competitive practices, a decision handed down on 1st February 2012 deserves to be mentioned (*Pourvoi* no. 10-24.843). In this case, the issue arose of the definition of the place of the "*harmful event*" pursuant to Article 5, paragraph 3, of the Lugano Convention. According to the case law of the CJEU, mainly handed down on the basis of Article 5.3 of the Brussels I Regulation, this text enables the claimant to bring his/her case either before the courts of the place where the event giving rise to the damage occurred or the courts of the place where the damage occurred, provided that the damage is the direct consequence of the event giving rise to the damage and that the claimant is the immediate victim of the damage.

In the above case, a person who wished to become a sports agent had initiated an action for liability before the French courts against the International Federation of Association Football ("FIFA"), the headquarters of which are located in Switzerland. He alleged that FIFA's regulation gave rise to anti-competitive practices and unfair competition and that FIFA's refusal to authorise him to start an activity as sports agent pursuant to such rules had led him to suffer from a loss that had to be compensated by FIFA. Indeed, he could not supply the significant bank guarantee that was then required by FIFA's regulation.

In this case, even though this was not discussed, the place of the event giving rise to the damage could apparently only be located in Switzerland, place where the decision had been

made. The challenge was thus to determine if the damage could be connected to France as place of the loss. The French Supreme Court considers that the French courts have jurisdiction as the damage, which directly and immediately resulted from an event giving rise to a damage that occurred in Switzerland, had occurred in France insofar as the requested licence related to the exercise of an activity as sports agent in Nantes in France.

The French Supreme Court thus applies the criteria defined by European case law emphasising that it determined the place of the damage having directly resulted from the event giving rise to it which had occurred abroad. Even though in this case, it seems easy to separate the direct damage from the more distant consequences of the causal event, previous examples showed that it was not necessarily the case. Nonetheless, this solution should be more extensively applied by French courts, whether under European law (Articles 5.3 of the Brussels I Regulation and of the amended Lugano Convention, see *Entry into force of the new Lugano Convention*, by Christelle Coslin and Delphine Lapillonne, Paris International Litigation Bulletin no. 2, January 2012) or under French private international law (in this case, Article 46 of the French Code of Civil Procedure).

Christelle Coslin/Damien Bergerot

- **The CJEU always in favour of efficient and speedy *exequatur* procedures**

By a decision handed down on 13 October 2011, the CJEU recalled the importance of the free circulation of judgments within the European Union. In this case, the CJEU was requested to rule on the issue of knowing whether a decision already enforced in a Member State of the European Union could still be subject to an *exequatur* decision in another Member State on the ground of the Brussels I Regulation (*Prism Investments BV*, Case no. C-139/10).

In this respect, it ought to be recalled that pursuant to Article 45 of the Brussels I Regulation, an *exequatur* decision, the purpose of which is to acknowledge the enforceability of a judgment handed down in another Member State, can be repealed only for one of the grounds preventing the recognition of a decision. These grounds are laid down in Articles 34 and 35 of the same Regulation: the conflicting nature of the judgment in question with the public policy in the Member State in which recognition is sought; its conflicting nature with a prior judgment handed down between the same parties; where given in default of appearance, the absence of service of the writ of summons on the defendant; and, finally, the court of origin's failure to comply with protective rules of jurisdiction for weak parties and exclusive jurisdiction rules.

In the present case, the CJEU firstly ruled that the enforcement of the decision in question in the Member State of origin (Belgium) did not deprive it of its enforceable nature, which is a necessary condition to acknowledge its enforceability in the other Member States. Furthermore, the CJEU dismissed the argument according to which the enforcement of the judgment in the Member State of origin, whether implying a set-off or payment, should be taken into account in the *exequatur* procedure initiated in a second Member State (in this case, in the Netherlands). Indeed, the European Court recalls the strictly restrictive and exhaustive nature of the list of the grounds for the non-recognition of foreign decisions laid down in Articles 34 and 35 of the Brussels I Regulation.

Nevertheless, the CJEU concludes by emphasising that once the decision has been accepted by the courts of the Member State addressed, its enforcement occurs pursuant to the laws of this State. As a consequence, Enforcement Judges could later possibly examine a claim for set-off in this case.

The CJEU thus clearly recalls the limit established by the Brussels I Regulation to the means a party can use to try to limit to only one Member State the effects of a legal decision which has been handed down against it. Pursuant to the texts, it privileges the efficiency of the *exequatur* procedure even though the debate is only transferred before the national courts in charge of enforcing decisions. The CJEU's reasoning far from being purely trivial, shows, if this was necessary, that the circulation of decisions within the European Union must only rarely be hindered because of the principle of mutual trust between the Member States which implies both the automatic recognition and an easy and speedy enforcement of decisions in the other countries. The discussions on the recast of the Brussels I Regulation and a possible abolition of the *exequatur* procedure only confirm this trend (see, in this Bulletin, *The position of the Council of the European Union on the recast of the European Regulation "Brussels I": A new step forwards or backwards?*, by Christelle Coslin).

Christelle Coslin/Damien Bergerot

- **What is the impact of the legal basis of claims to determine their possible connection (*connexité*)?**

Intellectual property is one of the main areas of development of European case law in matters relating to international jurisdiction. One of the latest examples in this respect relates to disputes involving several defendants and to the application of Article 6.1 of the Brussels I Regulation. Indeed, this special rule of jurisdiction enables claimants to initiate proceedings against several defendants before the same court (the court of the place where one of the defendants is domiciled) provided that the claims are so closely connected that there is an interest to examine them together and to rule on them at the same time in order to avoid incompatible judgments in the

European Union. According to prior decisions of the CJEU, decisions are incompatible only if they provide for a different solution to identical legal and factual situations.

In this case, a photographer blamed five German and Austrian newspaper publishers for having reproduced, without her prior consent, photographs that she had taken and had initiated a single action before the Austrian courts (CJEU, 1st December 2011, *Eva-Maria Painer*, Case no. C-145/10). It ought to be noted that the issue at stake related to the reproduction of the same photographs in the different publications in Germany and/or in Austria or online. The Austrian court thus examined the possible consequences that could arise from the fact that the claims were based on different national laws depending on the defendants.

The CJEU finally ruled that Article 6.1 of the Brussels I Regulation applies to all cases where there are several defendants, even if the actions initiated against them are based on different national laws. Indeed, it holds that the fact that the actions have the same legal basis is only a possible criterion, which is not essential to determine the connection between two cases. This must all the more be the case when, in situations similar to the situation at stake relating to authors' rights, the national provisions merely transpose a European Directive, which implies that they are basically very similar. The national court must, therefore, determine whether, in each case, a risk of conflicting decisions justifies that a ruling be handed down on all the claims despite the latter being based on different legal provisions.

Christelle Coslin/Damien Bergerot