

# Paris International Litigation Bulletin no. 4

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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

## Recent developments

### FRENCH LAW

- **Referring to French law in an international contract of sale amounts to choosing the application of the Vienna Convention**

Since the entry into force of the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980 (the "CISG"), nearly 25 years ago, the French Supreme Court had never had the opportunity to answer the following question, which is relatively simple but which could have several consequences: when the parties to an international contract of sale referred to French law as the law applicable to their relationships, should French domestic law on sales or the provisions of the CISG apply? The question is obviously essential given the significant differences between the provisions of French domestic law and the provisions of the CISG (to mention only one example, the obligation to mitigate one's loss, i.e. the obligation imposed on the victim of a loss to reduce the consequences as much as possible, is provided for in the CISG but does not exist under French law).

In the case in question, a French company and a Colombian company had concluded a contract of sale in which they had provided that their relationships would be governed by the "*Laws of France*", without any further details. In the scope of an action initiated by the French seller for the payment of the balance of the price of the equipment sold, the Aix-en-Provence Court of Appeal had ruled that, pursuant to this provision, included in the contract "*with knowledge of the international nature of the sale*", the parties had subjected their contract of sale to French domestic rules and thus excluded the application of the CISG (it being specified that Article 6 of the CISG enables the parties to exclude its application). The French Supreme Court quashed this decision on the ground that the parties had not intended to subject their relationships to French domestic law, but to French substantive law, i.e. the CISG regarding international sales (French Supreme Court, Commercial Chamber, 13 September 2011, *Pourvoi* no. 09-70.305).

The French Supreme Court's position is not surprising. It is, in fact, in line with the solution found by the courts of other Contracting States to the CISG. In any case, it has the merit of settling this tricky question and of providing a clear set solution: the fact of choosing French law, in a general manner, to govern an international sale, amounts, for the parties, to subjecting such sale to the provisions of the CISG.

From a legal standpoint, the solution cannot be criticised as the CISG "makes" the French law governing international sales. Regarding the search for the parties' intention, the solution is probably less obvious as it is very unlikely, in most cases when the contracts are concluded without the presence of lawyers, that the parties really intended to choose the

application of the CISG by solely referring, in their contract, to French law, without any further details.

In any case, the question is now answered and all lawyers, whether specialised in contract law or in dispute resolution, will know what to expect. The parties will naturally always be able, in compliance with the CISG, to exclude its application and subject their relationships to French domestic law governing sales, i.e. mainly to the French Civil Code. However, it will more than ever be necessary to expressly indicate it in the contract so as to avoid the application to their relationships of provisions that are very different to what had been anticipated.

**Christophe Garin**

## 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, 1<sup>st</sup> 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 1<sup>st</sup> 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, 1<sup>st</sup> 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**

## PROCEDURE

- **An objection to the international jurisdiction of the French courts is a procedural plea**

In international disputes, litigants often challenge the jurisdiction of French courts. Their objective is to have the case referred to another court abroad, thus giving them more time and, eventually, to obtain a procedural advantage (defendants often prefer to be tried by the court of their domicile or place of establishment) or a substantial advantage (should the law applicable to this action before a foreign court be different).

The characterisation of this plea as a procedural plea has given rise to numerous questions in the past. Indeed, litigants have attempted to avoid the strict rules governing procedural pleas, which must in particular be raised before addressing the merits of the case. The French Supreme Court had already dismissed these attempts by stating that, even in a European context, the rules governing pleas of lack of international jurisdiction depended on the law of the forum and that pleas raised late were inadmissible by relying on the provisions applicable to procedural pleas (French Supreme Court, 1<sup>st</sup> Civil Chamber, 9 July 1991, Bull. Civ. I, no. 231).

Nevertheless, the French Supreme Court also held that the plea of lack of international jurisdiction is not identical to a plea of lack of territorial jurisdiction (between French domestic courts). It is true that such a challenge "*does not aim at sharing jurisdiction between the national courts but aims at depriving [the French courts] of the power to settle the dispute to the benefit of the court of a foreign State*" (French Supreme Court, 1<sup>st</sup> Civil Chamber, 7 May 2010, Bull. Civ. I, no. 106). This is the reason why it is possible to lodge a so-called immediate appeal before the French Supreme Court (*pourvoi immédiat*) against the appellate decision having ruled on a plea of lack of international jurisdiction without waiting for a decision on the merits. The Supreme Court thus applied to such pleas rules that differ, in this respect, from the rules concerning the pleas of lack of territorial jurisdiction (to the benefit of a court located elsewhere in France).

A Swiss company has recently attempted to take advantage of the reasoning of the French Supreme Court in this decision. It is only before the Court of Appeal that this company had, unsuccessfully, challenged the jurisdiction of the French courts. To attempt to render such a challenge admissible, it then argued, in the scope of its appeal before the French Supreme Court, that the objection to the international jurisdiction of the French courts could not be considered to be a procedural plea as it aims at challenging the French courts' power to rule on the claim, which would relate, according to the Swiss company, to the very right of the French courts to rule and not to their jurisdiction. The French Supreme Court dismissed this reasoning and recalled that any objection to

the international jurisdiction of the French courts is a procedural plea (French Supreme Court, 1<sup>st</sup> Civil Chamber, 23 May 2012, Bulletin to be published, *Pourvoi* no. 10-26.188).

With this decision, handed down by the plenary bench of the First Civil Chamber, the French Supreme Court is thus attempting to remove all ambiguities concerning the rules governing pleas of lack of international jurisdiction. It is *in limine litis*, before any other ground, that litigants will be allowed to raise an objection to the jurisdiction of French courts.

**Christelle Coslin/Damien Bergerot**

## Update on recent developments

### FRENCH PROCEEDINGS

- **The place of citizens in criminal justice: an experiment limited to two courts**

Since the entry into force on 1<sup>st</sup> January 2012 of Law no. 2011-939 of 10 August 2011 on the participation of citizens in the functioning of criminal justice and the judgment of minors, two citizen assessors sit with three professional judges in special benches of the Criminal Court (citizen bench of the Criminal Court) and of the Appellate Criminal Chamber (see *Towards a broader place for citizens in criminal justice?*, by Christine Gateau, Paris International Litigation Bulletin no. 3, May 2012). This measure has only come into force on an experimental basis and for the time being only concerns the districts of the Courts of Appeal of Dijon and Toulouse (Order of 12 October 2011). As from 1<sup>st</sup> January 2013, the districts of the Courts of Appeal of Angers, Bordeaux, Colmar, Douai, Fort-de-France, Lyon, Montpellier and Orléans were also meant to be concerned (Order of 16 February 2012).

However, as there has been no report on the outcome of the experiment that started at the beginning of the year, the new French Minister of Justice, Christiane Taubira, has decided not to extend the experiment to the other eight districts (Order of 13 June 2012). Only the experiments in the districts of the Courts of Appeal of Dijon and Toulouse will continue. The French Minister of Justice wishes to conduct a thorough study relating to the duration of the hearings, the cost of the experiment, the training of the assessors and the number of judges and civil servants who would be necessary to generalise the system before making a decision.

During her hearing before the Law Commission of the French *Assemblée Nationale* on 5 July 2012, Christiane Taubira also expressed her intention to implement a broader analysis relating, notably, to the creation of a first-instance tribunal that would be made of the different first-instance courts and to a generalisation of non-professional assessors, including in civil proceedings.

Even though the participation of citizens in criminal justice is for the time being limited and delayed, Christiane Taubira's declarations suggest that this pause will only be temporary and that the functioning of the French legal system could be significantly modified by the current administration.

**Christine Gateau**



## "Money, politics, power: corruption risks in Europe": The new report published by Transparency International on 6 June 2012

According to the report published on 6 June 2012 by Transparency International on the risks of corruption in Europe, France would appear to be lagging behind its European neighbours.

The report, funded with the support of the European Commission's Home Affairs Directorate General in the scope of the Programme entitled "Prevention of and Fight against Crime", is the first complete study focusing on the ability of European countries to fight against corruption. The report sets forth the results of the assessment of the integrity systems of 25 European countries carried out in 2011 by the Organisation. For this purpose, more than 300 national institutions have been analysed. Each institution and each sector have been examined in light of what they offer in terms of resources and institutions, of their internal governance and their ability to perform their role within the concerned State's system relating to the fight against corruption.

While the report emphasises the major trends that are noticed throughout Europe in this respect, it also issues recommendations in view of specific reforms. According to the Organisation, understanding common trends is essential in order to develop better integrity policies. The report thus issues recommendations for the attention of the European countries, the European Union bodies, political parties, the private sector and the civil society.

### Europe

According to the report, 75% of the European Parliaments offer integrity mechanisms that are either improperly applied or insufficient, which confirms the feeling of 74% of the European citizens who believe that corruption is a growing problem in their country. The institutions referred to as the most problematic in terms of integrity are political parties, businesses, the civil service and the private sector. Financial institutions and courts, election review committees and mediators promote integrity.

The close relationships between the private sector and politicians are particularly mentioned in the vast majority of European countries, even in those considered as the most virtuous. The main substantial weaknesses identified at the European level are as follows:

- the gaps in regulations concerning the funding of political parties (for instance, a significant number of examined countries do not limit the amount of donations given to political parties and some countries (like Switzerland or Sweden) do not have any regulations in this respect);
- the lack of transparency of lobbying activities;
- the lack of guarantee regarding the Members of Parliaments' integrity;

- the insufficient access to information for the public;
- the increased risks in terms of public procurements; and
- the absence of effective protection for whistle-blowers.

As a consequence, the report suggests improvements aiming at regulating lobbying activities, establishing limits for political donations, prohibiting anonymous donations and the mentioning of reservations in the declarations of interests of Members of Parliaments, adopting codes of conduct for the latter or improving the protection of whistle-blowers. The Organisation particularly encourages the European bodies to take initiatives in this respect.

### France

Compared with many of its European neighbours, which are particularly well positioned, like the Scandinavian countries, Germany or Switzerland, France thus appears to be lagging behind in the fight against corruption.

In December 2011, the Organisation had already issued recommendations aiming at the improvement of the policies regarding the fight against corruption in France (see *Situation of the fight against corruption in France*, by Thomas Rouhette and Pauline Blondet, Paris International Litigation Bulletin no. 3, May 2012). These recommendations notably included the prevention of conflicts of interests in the public sector, the creation of an audit of the Assemblies' financial situations, the reform of the status of the Department of the Public Prosecutor and the strengthening of the impartiality of the military classification procedure.

According to this last report, the Parliament and the Executive power are the weakest sectors of the French integrity system. For instance, French parliamentarians are the only ones (with their Slovenian colleagues) who do not make their declarations of assets and interests public. Furthermore, even though a register of lobbyists is available at the French *Assemblée Nationale*, registration only occurs on a voluntary basis, which limits its efficiency (127 lobbyists were registered in March 2011 on the official registers of the French *Assemblée Nationale*, while the report mentions 9,300 meetings between July 2007 and July 2010 between ministries and lobbyists, concerning around 5,000 organisations represented by more than 16,000 persons).

However, the French public services have received a good grade. The bodies considered as the most honest in France are financial institutions like the French *Cour des Comptes* (national Court controlling the country's financial situation) and the *Chambres Régionales des Comptes* (local financial courts). The election review Committees also seem to meet the integrity criteria of the Organisation.

The latter has thus pleaded in favour of the improvement of the transparency of lobbying activities, of the parliamentary integrity mechanisms, of access to information, of the transparency of public procurements and of the protection of whistle-blowers.

### Conclusion

Finally, the Organisation has insinuated that it expects the new French Government to implement the undertakings publicly taken by François Hollande during the presidential campaign, notably concerning the ban of the plurality of offices for Members of Parliaments, the extension of the period of ineligibility to 10 years for the elected representatives convicted of corruption and the publication of the declarations of interests of the Members of Parliaments.

Moreover, it ought to be noted that a criminal sentence for corruption of foreign public officials, which is an extremely rare event in France, has just been handed down against a big French company. By judgment of 5 September 2012, the Paris Criminal Court thus ordered a company in the aviation and defence industry, as legal entity, to pay a fine of 500,000 Euros as a consequence of the corruption of members of the Government of Nigeria to win a public procurement contract of approximately 170 million Euros. This judgment has been appealed. The two executives of the company, also prosecuted for the same facts, have been discharged.



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## Towards the introduction of the notion of environmental loss in the French Civil Code?

The *Erika* oil spill case has recently taken an unexpected turn following the filing by the Advocate General before the French Supreme Court of an Opinion recommending the quashing, without referral, of the decision of the Paris Court of Appeal of 30 March 2010. At the same time, a bill aiming at introducing the notion of environmental loss in the French Civil Code was filed with the French Senate on 23 May 2012.

During the hearing of the French Supreme Court on 4 April 2012, the Advocate General expressed the view that French Courts do not have jurisdiction to rule on the consequences of the sinking of the *Erika* oil tanker, which occurred in an exclusive economic zone. On this sole basis, the Advocate General requested a quashing without referral of the Paris Court of Appeal's decision. He also expressed doubts about the grounds on which the Paris Court of Appeal had awarded compensation for environmental loss.

Only two months after this hearing, Bruno Retailleau, Senator, filed a bill for the notion of environmental loss to be included in the French Civil Code in an Article 1382-1 drafted as follows: "A person whose actions cause damage to the environment shall remedy such damage. Damage to the environment shall first be remedied in kind".

### Legal developments in terms of environmental loss

It cannot be denied that the new environmental stakes have given rise to legal developments that aim at preventing and punishing damage to the environment. This has, for instance, shown itself in the 2004 Environmental Charter which has constitutional value, which notably enabled the Constitutional Council, in a decision of 8 April 2011, to consider that "everyone is bound by an obligation to be vigilant with regards to damage to the environment that may be caused by one's activity" (Decision no. 2011-116, in the scope of a request for a priority ruling on an issue of constitutionality, point 5).

Law no. 2008-757 of 1<sup>st</sup> August 2008 relating to environmental liability and to various adaptive provisions regarding European Law on the environment, which transposed European Directive no. 2004/35/EC of 21 April 2004 on environmental liability with regards to the prevention and remedying of environmental damage, also established the inclusion of a scheme governing environmental liability, which is now detailed in Articles L. 160-1 and following of the French Environmental Code. This scheme has also been strengthened by French case law in favour of the principle of compensating damages to the environment. In this respect, the Paris Court of Appeal acknowledged, in the scope of the *Erika* case, the existence of an "environmental loss resulting from damage to non-marketable environmental assets, to be compensated by the payment of an amount equal to the loss" (Paris Court of Appeal, 30 March 2010, Docket no. 08/02278).

### How to remedy such loss?

There is, to date, a contradiction between the existing case law, which provides that the environmental loss is "to be compensated by the payment of an amount equal to the loss"

and the recently filed bill, which provides that damage to the environment "shall first be remedied in kind".

As a consequence, should the bill be adopted unchanged, monetary compensation would only be an alternative remedy that could be awarded by the courts only if it is established that remedy in kind is not possible. It is, therefore, likely that the principle of giving priority to remedies in kind will lead the responsible person to submit to the courts' approval the appropriate compensation measures, which would, in this case, be subject to a debate in the presence of all the stakeholders.

This is, in any case, the approach recommended by the *Club des Juristes* (French legal think tank) in its report entitled "How to better remedy damages to the environment" (January 2012, p. 30, <http://www.leclubdesjuristes.com/notre-expertise/a-la-une/rapport-sur-la-responsabilite-environnementale-la-question-de-droit-civil-du-xxieme-siecle>). Yet, the consequences could be significant for any businesses found guilty: in addition to the costs of the initial proceedings, they would also incur the costs of this second debate held in the presence of all the parties and exclusively relating to the remedy measures. Such a debate might also draw the attention of the media and damage the businesses' reputation.

### What next?

While the bill intends to meet the fundamental principles of French Law in terms of civil liability by giving priority to full compensation for the loss sustained, a repressive dimension still results from the current context regarding damages to the environment. Indeed, some, notably associations, require more repressive measures, like punitive damages, thus increasing the sanctions against businesses.

Lastly, the new French Minister of Justice, Christiane Taubira, confirmed, during her hearing before the Law Commission on 5 July 2012, that the notion of environmental loss would be introduced in French law. Furthermore, she also announced that the Government would rely on the existing bills to introduce, in French Law, class actions. The combination of these two legal developments could have disastrous consequences for businesses.



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## Recent clarifications concerning the jurisdiction of the courts over torts allegedly committed on the internet

The application of the law to websites sometimes gives rise to difficulties when one seeks to locate certain facts relating to these websites, which are, by definition, virtual. This issue, in particular the application of the rules governing the jurisdiction of the courts of the Member States pursuant to 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") continues to frequently give rise to new European case law.

For instance, a rather particular case where it was impossible to locate the physical address of the editor of the website in question enabled the Court of Justice of the European Union (the "CJEU") to provide significant clarifications on such a situation (CJEU, *Cornelius de Visser*, 15 March 2012, Case no. C-292/10). Apart from this decision, the CJEU ruled on several occasions these last months on the determination of the place of the harmful event when such an event has allegedly been committed on the Internet.

### Impossibility to locate the defendant, editor of a website

In re *Cornelius de Visser*, a person having posed in Germany for naked photographs sued the editor of a website who had unscrupulously posted them online. When she became aware of this publication to which she had never agreed, the alleged victim sought the liability of the editor of the website, who could not be found despite the efforts made to find him. The editor of the website, who was also the owner of the domain name, could no longer be found at the addresses declared a few years before. The claimant thus brought her action before a German court, which, noting the impossibility to find the editor of the website to inform him of the proceedings initiated against him, ordered the service of the writ of summons by way of a publication, i.e. the display of a notice of service on a board held by the Court in question, in compliance with German law.

The German Court, torn between the rights of the defence and the right to bring an effective action before the courts, raised several referral questions before the CJEU, in particular to determine whether it had to apply the Brussels I Regulation even though there was no proof that the defendant was domiciled in a Member State.

Relying on the absence of proof of a possible domicile in a third party State, the CJEU gives priority to the applicability of the Brussels I Regulation in such a situation with, however, one condition. Indeed, the Brussels I Regulation should apply to cases where the defendant is probably a citizen of the European Union but is located in an unknown place, provided that the court hearing the case does not have any conclusive clues leading it to conclude that the defendant would be domiciled in a country outside the European Union. Should there be such clues, the national court must apply its own law pursuant to the reference made in Article 4.1 of the Brussels I Regulation.

The solution of this decision is thus based on the presumption that a European citizen having previously been located in different Member States is not domiciled in a third party State in the absence of any proof in this respect. By giving priority to the application of the uniform European rules, this solution protects, according to the CJEU, both the requirement of legal certainty and the objective of strengthening the legal protection of citizens of the European Union, "*by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued*".

The applicability of the Brussels I Regulation thus established, the issue was then to know whether the German Court could, in such a situation, hand down a judgment by default without breaching the other provisions of the Regulation. The CJEU had previously held that avoiding denials of justice represents an objective of general interest that may justify restrictions on the rights of the defence, lessened by the possibility for the defendant to then challenge the recognition of the judgment handed down by default against it pursuant to Article 34.2 of the Brussels I Regulation (CJEU, *Hypoteční banka*, 17 November 2011, Case no. C-327/10).

National courts are thus authorised to give a ruling against a defendant on which the writ of summons was served by way of a mere publication due to the impossibility to locate it. The CJEU concludes that a judgment may be handed down by default "*provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant*".

To protect the rights of the defence, however, the CJEU excludes the certification of a judgment by default as a European enforcement order within the meaning of EU Regulation no. 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims. Such a certification, removing all control in the Member State of enforcement, is "*inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence*". It can thus not be granted in a case where the absence of any challenge only results from the non-appearance of the defendant. In fact, this Regulation does not acknowledge the validity of the service of decisions when the address of the defendant is not known with certainty. As a consequence, it is only because of the limits that may eventually be set against the circulation in Europe of such a judgment that the CJEU agrees to let the national courts deal with this kind of disputes in the scope of judgments by default.

The search for balance between compliance with the rights of the defence and absence of a denial of justice is no longer an issue when determining whether the substantial European rules can apply. Thus, the provisions of Directive no. 2000/31/EC of 8 June 2000 on electronic commerce,

which require the identification of the Member State in which the editor of the website is established, cannot apply when the place of establishment of this service provider is unknown.

In this case, the German Court had also requested the CJEU's position on the interpretation of Article 5.3 of the Brussels I Regulation, which confers jurisdiction, in matters relating to tort, on the court of the place of the harmful event. However, as the CJEU had not long before handed down a decision concerning the application of this provision in the event of an alleged infringement of personality rights on the Internet, the referral question was removed as it had become groundless.

#### The possible locations of the harmful event

Indeed, in *re eDate Advertising* (CJEU, 25 October 2011, Cases no. C-509/09 and C-161/10), the CJEU transposed and adapted the now well-known *Fiona Shevill* case law to situations where personality rights have been infringed via the Internet. Thus, the person alleging a damage can request compensation for his/her entire loss either before the court of the place of establishment of the transmitter of the content in question, or before the courts of the Member State of the place where he/she has the centre of his/her interests (this concept mainly refers to the habitual residence of the alleged victim or the place where he/she has his/her professional activity). The alleged victim can also initiate an action before the courts of each Member State where content posted online is or was accessible. However, in this latter case, the courts will only have jurisdiction over the loss caused in their country.

The CJEU adopts a different approach in matters relating to the infringement of intellectual property rights. In cases where infringement of intellectual property rights is alleged, the CJEU gives priority to the criterion of orientation of the website on which the cyber-tort would allegedly have been committed over the criterion of mere accessibility, deemed insufficient to apply European law (CJEU, *L'Oréal*, 12 July 2011, Case no. C-324/09). Similarly, the CJEU previously refused to acknowledge as general ground of jurisdiction, under Article 5.3 of the Brussels I Regulation and the concept of place of the harmful event, the place where the assets of the claimant are concentrated (CJEU, *Kronhofer*, 10 June 2004, Case no. C-168/02).

Furthermore, the CJEU has provided further clarifications in the scope of a dispute relating to the reservation of sponsored links on the Google search engine. To be more precise, the owner of a trademark alleged that its competitor had illicitly used its trademark registered in Austria by reserving an identical keyword to the protected sign, which led, when the keyword was entered on the German website [www.google.de](http://www.google.de), to the appearance of an advert for this competitor (CJEU, *Wintersteiger*, 19 April 2012, Case no. C-523/10).

The CJEU firstly underlined that the factors concerning foreseeability that had led to the above solution in matters of infringement of personality rights could not be transposed in matters relating to the alleged infringement of intellectual property rights due to the limited territorial scope of such rights. The European Court added that the courts of the Member State in which the trademark is registered, considered to be the place of materialisation of the loss, can have jurisdiction over the entire alleged loss. The CJEU then considered that the causal event only results from the behaviour of the advertiser using the referencing service (and not the search engine which does not itself use the trademark in the scope of the display of the advert, as specified by the CJEU in its *Google France and Google Inc.* decision, 23 March 2010, Cases no. C-236/08 to C-238/08). Thus, the CJEU also confers jurisdiction on the courts of the place of establishment of the operator.

In this respect, one can note the wish of the CJEU to limit the impact of these solutions by insisting on the fact that they only apply to situations that are similar to the one that gave rise to the litigious case (i.e. the use of a keyword that is identical to a trademark as sponsored link on a search engine operating under an extension referring to a Member State other than the one where the trademark is registered). To date, it thus seems difficult to reconcile all the recent case law of the CJEU to establish guidelines that could apply beyond the situations that have already been examined. Nevertheless, additional clarifications can be expected, the CJEU being regularly requested to rule on referral questions relating to the application of Article 5.3 in matters relating to cyber-torts.

Lastly, the French Supreme Court requested an interpretation of the CJEU as it faced a new situation compared with the previous European decisions. The situation relates to the case where a work is allegedly illicitly reproduced on a material medium (for instance, a CD) that is offered for sale online, in contrast with the more typical case where the allegedly protected content (the piece of music) is reproduced or broadcasted on a website without any authorisation to do so. The issue thus relates to the determination of the appropriate interpretation of Article 5.3 of the Brussels I Regulation when a CD containing an illegal copy of a piece of music is offered for sale online. In this case, the litigious CDs had been burned in Austria but offered for sale by British companies and allegedly infringed the rights of a French singer-songwriter.

The French Supreme Court thus questioned the CJEU to know whether, in matters relating to the alleged infringement of authors' rights via content posted online, (i) the allegedly injured party can act before the courts of each Member State where the content is or was accessible to obtain compensation for the loss caused in this country, or (ii) whether it is also necessary to establish a particular connection with this State, such as the orientation of the content towards the public of this country. The French

Supreme Court also wishes to know whether the answer to this question is identical when the alleged infringement results from the offer online of a material medium reproducing content or when it results from the posting online of the very dematerialised content (French Supreme Court, 1<sup>st</sup> Civil Chamber, 5 April 2012, *Pourvoi* no. 10-15.890).

The rules of jurisdiction laid down on a case-by-case basis by the CJEU do thus not apply to all the situations that can arise in matters relating to cyber-torts. The national courts frequently seek to obtain confirmation of the transposable nature of the interpretations already provided in each new case. On the other hand, people involved in court proceedings can, without incurring too significant risks, anticipate a broad application of the European rules even if it seems difficult to establish the precise place of establishment of the operator of the website in Europe.



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## France and the concept of *amicus curiae*: What lies ahead?

The concept of *amicus curiae* first appeared in England during the 17<sup>th</sup> century and became, over the years, a common practice in common law countries and before certain international courts like the European Court of Human Rights. This concept, however, is not so common in France. Defined by Gérard Cornu in his legal dictionary *Vocabulaire juridique* as "the status of extraordinary consultant and voluntary informer pursuant to which the court invites a personality to attend the hearing in order to provide, in the presence of all interested parties, all the observations that may enlighten the court", it enables a third party to the proceedings to provide observations before the court hearing a case.

### France as *amicus curiae*

France, as well as French academics and organisations, have already acted as "friend of the court" in various proceedings.

For instance, France intervened in re *Robert Morrison, et al. v. National Australia Bank Ltd., et al.*, in which US courts had to rule on the application of a US Federal Law, the Securities Exchange Act, to claims raised by non-US citizens, concerning the purchase of shares of a non-US company on foreign stock markets. France, among numerous other intervening parties, filed an *amicus brief* on 26 February 2010 before the United States Court of Appeals for the Second Circuit to defend the position according to which US courts have to limit the application of US law in matters relating to securities fraud. Since then, the US Supreme Court refused to extraterritorially apply the Securities Exchange Act, thus excluding from its scope of application all actions with elements exclusively located outside the United States.

France's interest in intervening and declaring itself in favour of limiting the application of the Securities Exchange Act is clearly understandable. Indeed, French companies could be sued in the United States for similar facts while the connection with the US forum appears to be rather weak. This could notably have been the case in re *Rosenbaum Partners, et al. v. Vivendi Universal, S.A., et al.*, in which the United States District Court for the Southern District of New York relied, on 22 February 2011 and 27 January 2012, on the *Morrison* decision of 24 June 2010 to limit the definition of the persons allowed to be parties to the class action against Vivendi (see *Judicial victory for Vivendi following Morrison case law*, by Christelle Coslin and Delphine Lapillonne, Paris International Litigation Bulletin, July 2011).

### The *amicus curiae* in France

The influence of this British concept in France is not limited to a few interventions before foreign courts. Indeed, French courts have already used it and it is slowly becoming part of the French procedural system.

The Paris Court of Appeal resorted to the concept of *amicus curiae* for the first time in 1988. When requested to rule on an

issue relating to the application of rules governing the profession of lawyer, the Court asked the President of the Paris Bar, "as *amicus curiae*", to "provide, in the presence of all interested parties, all the observations that may enlighten the court in its process of solving the dispute" (Paris Court of Appeal, 21 June and 6 July 1988, Gaz. Pal. 1988, 2, 700, Note Laurin). On this occasion, the Court provided a negative definition of the role of *amicus curiae* by specifying that the *amicus curiae* is neither a witness nor an expert and is not subject to the rules of the French Code of Civil Procedure relating to objections to members of the court (*récusation*).

Even though the definition of the Paris Court of Appeal remains incomplete, it enables to slightly understand the concept of *amicus curiae* under French law, which is not subject to any specific rules. Indeed, the "friend of the court" must be distinguished from the witness, who certifies the existence of facts, and from the expert, who provides a technical opinion to the court, as his/her role is not to enlighten the court on a factual issue specific to the dispute at stake. Indeed, the *amicus curiae* gives his/her opinion and shares his/her knowledge with the court on a general topic that may impact several disputes and that often relates to a subject giving rise to debates within the society. Lastly, the *amicus curiae* must not be mistaken for a party to the trial, notably a voluntary or forced intervenor, as, within the meaning of the French Code of Civil Procedure, he/she does not have any interest in acting.

French civil courts then used the services of certain personalities as *amici curiae* in fields as diverse as surrogate mother agreements (French Supreme Court, Plenary Assembly, 31 May 1991, *Pourvoi* no. 90-20.105), the compensation granted to an HIV patient by the French Compensation Fund for transfused and haemophilic patients infected with HIV (Paris Court of Appeal, 27 November 1992, D. 1993, p. 172), the non-extension of the accusation of manslaughter to the embryo or the foetus (French Supreme Court, Plenary Assembly, 29 June 2001, *Pourvoi* no. 99-85.973) and the characterisation of investment contracts or insurance savings agreements combining mechanisms falling within the scope of life insurance and investment savings (French Supreme Court, Mixed Chamber, 23 November 2004, *Pourvois* no. 02-17.507, 03-13.673, 02-11.352 and 01-13.592).

The concept of *amicus curiae* also recently made its appearance in administrative proceedings following Decree no. 2010-164 of 22 February 2010. This Decree created, in Article R. 625-3 of the French Code of Administrative Justice, the possibility for the bench in charge of the investigation to invite any person, whose skills or knowledge may usefully enlighten it regarding the solution of the dispute, to provide general observations on the issues which it chooses. This legal instrument also enables any person to be invited to present oral observations to the bench in charge of the

investigation or the bench in charge of deciding the case, provided that the parties have been duly convened.

Similarly, pursuant to Article L. 621-20 of the French Monetary and Financial Code, all civil, criminal and administrative courts are entitled to invite the President of the French Financial Markets Authority (*Autorité des Marchés Financiers*) or the latter's representative to file submissions and to orally present them during the hearing.

Furthermore, European law also provides for the possibility for certain institutions to voluntarily intervene in proceedings relating to the areas concerning them. EC Regulation no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community created a procedure enabling various institutions to intervene on their own initiative before the courts of the Member States. Thus, Article 15-3 of the Regulation provides that the competition authorities of the Member States may submit written observations to the courts of their Member State on issues relating to the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly Articles 81 and 82 of the Treaty establishing the European Community).

Similarly, the European Commission can, in such disputes, submit written or oral observations when it obtains the consent of the national court in question. It is on this basis that the European Commission intervened before the Paris Court of the Appeal in *re Pierre Fabre*, in which it was notably requested to rule on the possibility for suppliers to prohibit the online sale of their products by the authorised distributors in the scope of selective distribution networks (Paris Court of Appeal, 29 October 2009, Docket no. 2008/23812). Nevertheless, after having underlined the non-binding nature of the observations of the European Commission as *amicus curiae*, the appellate judges preferred to bring a referral question before the Court of Justice of the European Union concerning the interpretation of European law. This case thus recalls that the *amicus curiae* is simply meant to enlighten the court and that the latter's opinion is not binding on it.

#### **Towards a more frequent use of the concept of *amicus curiae* in France?**

Despite these developments, the *amicus curiae* does not have the same importance in France as in Anglo-Saxon countries. Indeed, in most cases, apart from the possibilities arising from European law, the court must request the opinion of the *amicus curiae* and the latter cannot decide to get involved on its own initiative. Yet, the French courts do not often resort to it. Its use thus remains, for the time being, theoretical or very limited in practice, in particular in civil and commercial matters where there are only a few examples.

And yet, the intervention of an *amicus curiae* generally has the advantage of drawing the attention of the court to various general issues resulting from the decision to be handed down which exceed the mere scope of the dispute opposing the parties. The cases where these "special consultants" were used in France show that they can bring a significant social or economic perspective. Both abroad and before international courts, this practice is also one of the means used to take into account a variety of opinions like, for instance, the positions of foreign States on the possible effects of a decision in their own country or the taking into account of a broader interest within the European Union.

Nevertheless, for the parties to a dispute, the influence of the *amicus curiae* that would adopt an unfavourable position compared with their own might be difficult to challenge depending on the personality acting as *amicus curiae*. This is all the more the case due to the fact that there are currently no specific procedural rules governing these interventions and ensuring the full compliance with the adversarial principle and the principle of equality of arms.



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## The position of the Council of the European Union on the recast of the Regulation "Brussels I": A new step forwards or backwards?

### Background

EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation") is the cornerstone of the European legislation on cross-border litigation and judicial cooperation in the European Union. This Regulation, which came into force 10 years ago, replaced the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

As previously reported (see *A step forward in the revision of the Brussels I Regulation: the European Commission's proposal*, by Christelle Coslin and Delphine Lapillonne, Paris International Litigation Bulletin, July 2011), the European Commission is contemplating bringing radical changes to the current version of the Regulation. These changes are shown in the Draft Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters published on 14 December 2010 (Document no. COM(2010) 748 final) (the "Draft Proposal"). The United Kingdom and Ireland have decided to take part in the adoption and application of the recast Regulation and the provisions of the latter, once adopted, should also be applicable to Denmark.

The European Economic and Social Committee submitted its opinion on the Draft Proposal on 5 May 2011, whereby it generally approved the Draft Regulation and its major orientations, with yet a few reservations on some of the proposed changes (Document no. 2011/C 218/14). The Rapporteur appointed by the European Parliament also published on 28 June 2011 a Draft Report on this proposal which suggested a few amendments (Document no. 2010/0383(COD)).

More recently, on 8 June 2012, the Council of the European Union (Justice and Home Affairs) adopted a general approach on the proposed recast of the Brussels I Regulation in the form of an amended version of the Draft Proposal prepared by the European Commission (the "General Approach"). The General Approach results from the guidelines previously agreed upon by the Council during its session in December 2011, as well as from further discussions which enabled the Presidency to present a compromise to the Council during the June session. This text is not complete yet as one article (establishing a new and specific ground of jurisdiction for cultural goods) as well as the recitals and annexes remain to be completed and proofread. However, the changes brought by the General Approach to the Draft Proposal are significant enough to deserve attention. Only the most important of these changes will be examined below.

### Further limitation of the material scope of the Brussels I Regulation

To achieve better coordination, the Draft Proposal included provisions on the interface between arbitration and court proceedings. The objective was to no longer completely exclude arbitration from the scope of application of the Brussels I Regulation. These provisions were subject to debates by legal scholars who feared that arbitration clauses could consequently become less efficient. The Council decided to remove the new rules and to maintain arbitration issues outside the scope of the Regulation.

In addition, the General Approach mentions a few additional exclusions relating to the liability of the State for acts and omissions committed in the exercise of State authority, to relationships having comparable effects to marriage and to wills and successions. The exclusion of maintenance obligations suggested by the European Commission is not challenged by the Council. These exclusions may be justified by the enactment of other instruments covering such matters (for example, the adoption of EU Regulation no. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession).

### Status quo regarding the territorial scope of the rules of jurisdiction

Currently, the territorial scope of most of the rules of jurisdiction provided for in the Brussels I Regulation, subject to certain noteworthy exceptions, is limited to cases where the defendant is domiciled in a Member State. However, one of the most ground-breaking amendments of the Draft Proposal consisted in eliminating such a limitation by extending all rules of jurisdiction to defendants domiciled in third countries.

The Council did not agree with this specific proposal. As a result, the General Approach contains a wording very close to the current provisions of the Brussels I Regulation. After the recast of this Regulation, only defendants domiciled in a Member State could thus be sued in another Member State based on the rules set out in the Regulation. In the presence of a defendant not domiciled in a Member State, the international rules of jurisdiction comprised in the domestic law of each Member State would be applicable as a matter of principle.

The Brussels I Regulation currently provides for several exceptions to this principle, which relate to rules establishing the exclusive jurisdiction of specific courts or rules regarding prorogation of jurisdiction, which are applicable even if the defendant is not located in a Member State. These exceptions are maintained and even broadened in the General Approach.

Firstly, the rule governing jurisdiction clauses would become applicable regardless of the domicile of all parties (whereas, currently, Article 23 of the Brussels I Regulation requires one of the parties, either the defendant or the claimant, to be domiciled in a Member State). In addition, the General Approach adds a new exception corresponding to specific rules in favour of consumers, which allows consumers to sue their contracting party in the Member State where they are domiciled even if the contracting party is not a European defendant. A similar approach is adopted for employment issues: employees would be entitled to bring proceedings against non-European employers in most cases in the courts of the place where they usually carry out their work.

These amendments, which are rather limited compared with the Draft Proposal, aim at fulfilling one of the main objectives set by the European Commission, i.e. reinforcing the protection of weak parties by ensuring that the protective rules of jurisdiction available for consumers and employees are applicable in a greater number of cases (i.e. against non-European defendants). It is worth noting that the same reasoning is not transposed to insurance matters (yet, non-European insurers could be sued before a court of a Member State with respect to the operation in such country of their local branches or establishments). This being said, such modifications are significant compared with the current state of law because they imply that, in cross-border litigation, the court(s) having jurisdiction over proceedings brought by consumers or employees would no longer be determined by applying the domestic law of one Member State but the recast Brussels I Regulation.

Moreover, Member States will be required, pursuant to the General Approach, to notify the European Commission of their national rules of jurisdiction which could not be applied to European defendants. One can anticipate that these notifications will mostly correspond to the grounds of jurisdiction already mentioned in Annex I to the Brussels I Regulation (this Annex together with all the other Annexes to the Brussels I Regulation have recently been consolidated by EU Regulation no. 156/2012 of 22 February 2012 following the receipt of new notifications from Member States by the European Commission). Indeed, the application of the Brussels I Regulation is still perceived as a protection offered to European defendants against the so-called exorbitant rules of jurisdiction that may be part of the domestic law of Member States. Typically, an example of an exorbitant rule of jurisdiction can be found in Articles 14 and 15 of the French Civil Code pursuant to which the French courts have jurisdiction over claims brought by or against a French citizen or company. Pursuant to the General Approach and the Brussels I Regulation, such rules would be available to persons domiciled in a Member State (whatever their nationality) only against non-European defendants.

### Adjustment to several rules of jurisdiction

Compared with the Draft Proposal, the General Approach includes a number of amendments which are the consequences of the Council's choice to generally limit the scope of rules of jurisdiction to European defendants (subject to the exceptions discussed above). Most notably, the Draft Proposal included two additional rules of jurisdiction designed to be applicable where no other rule of the Brussels I Regulation would confer jurisdiction on the courts of one of the Member States. The first rule, referred to as Subsidiary Jurisdiction, enabled to sue a non-European defendant at the place of his/her/its assets in the European Union. The second provision established a *forum necessitatis* ground of jurisdiction to be used on an exceptional basis. By definition, such rules could only have applied in disputes involving defendants domiciled outside the European Union since the courts of the Member State where the domicile of the defendant is located have, as a matter of principle, jurisdiction. As a result, both rules have been deleted from the General Approach as they have become irrelevant.

With respect to jurisdiction clauses, it is interesting to note that the Council validated the proposal of the European Commission to address the issue of the substantive validity of the clause in the Regulation. The General Approach goes further in this direction: it is not only specified that the substantive validity of the clause will be subject to the law of the Member State of the chosen court (including its rules of conflict of laws), but also that jurisdiction clauses should be considered as distinct and separate clauses from the remainder of the contract in which they are included and that their validity should not be questioned based only on the invalidity of the contract.

In addition, the General Approach extends the protection of jurisdiction clauses to ensure their efficiency, even though the rules proposed by the Commission are only slightly amended. At present, if the parties have designated by contract a particular court to resolve their dispute, *lis pendens* rules (generally applicable when the same dispute is brought before two different courts) prevail over jurisdiction clauses. This means that the chosen court may have to stay the proceedings until the decision of the court first seized accepting or declining its own jurisdiction. To ensure a better enforcement of choice-of-court agreements, pursuant to the General Approach, the court initially designated by the parties would now be given priority to decide on its own jurisdiction forcing other courts in the European Union to stay the proceedings pending before them and to decline their jurisdiction once the chosen court has acknowledged its jurisdiction.

The Draft Proposal also sought to improve the *lis pendens* rules by creating a six-month timeframe for the court first seised to rule on its jurisdiction. However, such limitation has been removed from the General Approach which only relies on the duty of cooperation of courts within the European Union by providing that, upon request, a court should indicate without delay the date when it was seised.

Specific rules relating to coordination in the event of proceedings pending in third States set forth in the Draft Proposal were accepted and completed by the Council. The courts of a Member State, if seised on certain grounds of jurisdiction of the Brussels I Regulation, would be allowed to stay the proceedings if an action relating to the same cause of action and involving the same parties or a related action is already pending in a third State subject to two conditions: (i) the judgment to be handed down in the third State could be recognised and/or enforced in the Member State concerned and (ii) a stay would appear necessary for the proper administration of justice. However, if the proceedings in the third State are discontinued, stayed or unlikely to be concluded within a reasonable period of time, the court may reinstate and continue the proceedings. Yet, once the non-European court has given a decision that may be recognised and/or enforced in the Member State of the court seised, the proceedings pending in the latter country should be dismissed.

### **Towards the limitation of recognition and enforcement proceedings**

The area in which the Draft Proposal has endured the most changes relates to the recognition and enforcement of judgments. Based on the principle of mutual trust between Member States, the Draft Proposal provided for the complete abolishment of *exequatur* procedures and an automatic system of circulation of judgments in civil and commercial matters. Pursuant to the General Approach, the objective remains the same as it is established, as a matter of principle, that a judgment given in a Member State should be recognised in other Member States without any specific procedure and, if enforceable in the Member State of origin, should be enforceable without any declaration of enforceability.

This system of circulation of judgments will be based on the issuance by the courts of origin, at the request of one party, of certificates following a standard form. This certificate will notably mention if the judgment is enforceable in the Member State of origin, and, if so, the conditions of such enforceability, if any, or any relevant indications regarding the recoverable costs of the proceedings or measures ordered. The certificate will have to be served on the person against whom enforcement is sought before enforcement measures can be initiated and the person concerned would be entitled to challenge the enforcement of the decision. Furthermore, any interested party would be allowed to apply for either a

decision refusing the recognition of the judgment or a decision acknowledging that there is no ground for refusal of recognition.

The grounds allowing the courts of the Member State addressed to refuse recognition or enforcement are strictly limited and along the same lines as those currently in force. They relate to (i) conflicts with the public policy of the Member State addressed, (ii) judgments given in default of appearance if the defendant was not adequately informed of the proceedings, (iii) the irreconcilable nature of the judgment with another decision between the same parties given in the Member State addressed or with a previous decision (of another Member State or third State) involving the same cause of action and between the same parties (provided it fulfils the conditions to be recognised), and finally (iv) non-compliance of the judgment with the rules of exclusive jurisdiction or the protecting rules of jurisdiction applicable in insurance, employment and consumer matters (provided the weak party was the defendant). Apart from the latter ground for refusal, the courts of the Member State addressed are prohibited from examining whether the court of origin had jurisdiction (even pursuant to the public policy clause).

Therefore, the Council did not follow the Draft Proposal insofar as it suggested creating specific safeguards to protect defendants' rights and to maintain *exequatur* proceedings in a few areas such as matters relating to defamation and collective redress mechanisms.

### **Conclusion**

The Draft Proposal of the European Commission was very innovative, especially with respect to three key topics which were the abolishment of *exequatur* proceedings, the interface between the Brussels I Regulation and arbitration and the general extension of rules of jurisdiction of the Regulation to non-European defendants. Yet, the Council of the European Union decided not to keep the two latter points in its General Approach. Indeed, the major point of the recast of the Brussels I Regulation is clearly the system of circulation of judgments across Europe, which should greatly facilitate the enforcement of judgments.

Should the adopted amended Regulation be along the same lines as the General Approach, its impact on cross-border litigation between the European Union and third States should remain more limited than what could be anticipated after examining the European Commission's Draft Proposal. The proposed general extension of the Regulation to non-European defendants will apparently not have any future. However, it will be interesting to see if the *lis pendens* rules aiming at a better coordination of proceedings pending in Europe with proceedings pending outside Europe will have any significant effect.

In any case, before making one's final opinion on the recast of the Brussels I Regulation, one should wait for a final and complete text including recitals as they play an increasing role in the construction of European law. Besides, the European Parliament is expected to review the General Approach in first reading in December 2012, which could give rise to further amendments.



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## Translator's Corner: *Jurisdiction*

Both translators and lawyers often find it difficult to translate in their own language the English term *jurisdiction*. This problem is clearly understandable as its definition refers to different, even though close, concepts. Here are some ideas to help you find the correct French equivalent.

To put it simply, the English term *jurisdiction* refers to power and authority and the limits and territory within which such power or authority may be exercised. As a consequence, depending on the context, *jurisdiction* can have specific meanings, which will be translated differently in French.

*Jurisdiction*, which comes from the Latin, *juris* and *dictio*, literally meaning to speak the law, firstly refers to the basic principle of applying the law, handing down decisions, issuing injunctions, etc. In other words, the court's or the judge's general authority to interpret and apply the law. The French equivalent of this meaning is *pouvoir juridictionnel*. Secondly, *jurisdiction* also refers to the right to apply the law according to criteria such as the matter at stake, e.g. civil or criminal matter, or the place of the harmful event or performance of the contract. This difference in meaning is clearer with the concepts of *subject-matter jurisdiction* or *territorial jurisdiction*, for instance. The most appropriate translation in this case is the French word *compétence*, which literally means the capacity to rule, it being noted that *subject-matter jurisdiction* will specifically be translated by *compétence d'attribution* and *territorial jurisdiction* by *compétence territoriale*.

Even though specific translations exist, in France, people often tend to use the close French word *juridiction* when translating *jurisdiction*. This is a common and easy mistake and a typical example of false friends. Indeed, in French, *juridiction* only refers to the bodies entitled to hear and settle disputes. It is, therefore, a synonym of the French words *tribunal* or *cour*, the translation of which would be *court* in English.

As you can see, when translating or interpreting the word *jurisdiction* it is important to fully understand to what the term refers to avoid using the wrong translation. This example also illustrates the problem of false friends and hasty translations, which can completely change the meaning of a sentence.



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