Hogan Lovells

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Overview of Recent Developments

LEGISLATIVE DEVELOPMENTS IN FRANCE

- **The new Senate attempts to introduce class actions in French law**

At the end of 2010, the French Senate was willing to put new life to the project of introduction of class actions into French law. After a Senate report published in May 2010 in favour of such procedure, two draft bills were submitted to Parliament on 22 December 2010. The procedure would be divided into two stages: after the examination of the admissibility of the claim, the first stage would consist in determining whether the sued company is liable or not. Once this stage achieved, the judgment would then be published and consumers having suffered a similar loss would be entitled to join the proceedings similarly as in an opt-in system. It is also planned to limit class actions to material injuries suffered by consumers in the event of a company's breach of contractual or pre-contractual obligations in the field of consumer or competition law. Only accredited associations would be entitled to introduce class actions.

These two bills should, however, not be enacted as the Government announced at the end of May 2011 that the creation of class actions was no longer one of its priorities. A previous Senate bill which similarly suggested introducing class actions in French law had already been dismissed by French Parliament on 24 June 2010.

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PROCEEDINGS BEFORE FRENCH COURTS

- **Reform of the appellate procedure with mandatory representation**

In France, proceedings before the Courts of Appeal present certain characteristics, which are not found in proceedings before first-instance courts. In particular, the parties must, in most cases, be represented (which means that they cannot appear before the Court themselves). Lawyers before the Courts of Appeal named *Avoués*, who are judicial officers, and which creation dates back to the French Revolution, are at the moment the only persons authorised to act as representatives. Therefore, *Avoués* are the main interlocutors of the Court of Appeal and are in charge, for instance, of filing procedural acts with the Court, although such instruments were generally not drafted by them. Similarly, *Avoués* do not try cases during the trial hearings, this task being carried out by attorneys.

Nevertheless, as from 1st January 2012, the profession of *Avoués* will merge with the profession of attorneys pursuant to Law no. 2011-94 of 25 January 2011. Any attorney will then be able to represent his/her clients before the Court of Appeal in which jurisdiction he/she practises, whereas *Avoués* will be able to continue to practise as attorneys, should they wish to do so. This historic reform, which is significant from a practical standpoint, was accompanied by a reorganisation of the rules governing the appellate procedure itself. In this respect, a Decree dated 9 December 2009 has been adopted and then amended by a second Decree dated 28 December 2010. Both texts came into force on 1st January 2011.

The creation of new conditions for the information of parties when an appeal is lodged features among the major modifications. As was previously the case, the Office of the Clerk of the Court of Appeal addresses a letter to the appellee informing the latter of the appellate proceedings. However, since this reform, if an *Avoué* for the appellee (or, as will shortly be the case, an attorney) is not registered with the Court of Appeal within a month following this letter, the appellant must serve on it its notice of appeal under penalty of the appeal being held null and void.

Rules governing the course of the proceedings before the Court of Appeal have also been reformed with the adoption of a set and imperative procedural schedule. Now, the appellant only has three months (instead of four) as from the notice of appeal to file its appellate submissions. Then, the appellee must provide submissions in response within two months, and the appellant must then respond within two months. Such a strict timeframe, instituted under penalty of the appeal being held null and void for the appellant or under penalty of inadmissibility of the appellee's submissions, shall compel the parties and their Counsel to make sure that they file their submissions within the given time. Pursuant to an Order dated 30 March 2011, this process will occur electronically,

this method of communication becoming mandatory for the main procedural instruments as from 1st September 2011.

Such strictness can also be noticed regarding the merits since Appellate Judges are now authorised to raise, *sua sponte*, the novelty of any claim that would not have been brought in first instance. Furthermore, the presentation of procedural acts is also subject to rules which confirm requirements already implemented by the Courts of Appeal in practice. In particular, it is now mandatory to refer to the produced exhibits in the body of the submissions and to summarise the claims in the operative part of the writings.

These new provisions mainly result from the Second Report on the "*Promptness and Quality of the Legal system*" of Jean-Claude Magendie, former First President of the Paris Court of Appeal. The purpose of this report presented in 2008 was notably to make suggestions as regards the organisation of the appellate procedure in order to "*guarantee the persons subject to trial that an effective decision is handed down within a reasonable time period and to allow the Courts of Appeal to become real institutions of excellence*".

While the objective of promptness should be reached in the mid-term thanks to the restrictive timeframe applicable to the various stages of the procedure, the fact remains that the simultaneousness of the reform of the appellate procedure and the reform of the profession of *Avoués*, as well as the scattering of the texts of that reform will certainly give rise to significant practical difficulties. Numerous questions remain unanswered at present while heavy procedural penalties are provided for.

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- **Inauguration of the "International Chamber"**

The so-called "international Chamber" of the Paris Commercial Court was officially inaugurated by the Presiding Judge of the Court on 17 January 2011. The Third Chamber of this Court will be composed of nine judges speaking other languages than French (for the moment, English, Spanish and German). Nonetheless, common procedural rules will remain in force before this Chamber of the Paris Commercial Court, as before every French court. As a consequence, the use of the French language will remain mandatory for the drafting of the ruling by the judges, as well as for the oral arguments of the parties pursuant to a very old Order (the famous Villers-Cotterêts Order dating back to August 1539).

Regarding the exhibits produced by the parties in support of their allegations, case law has previously admitted that judges may assess the probative value of exhibits communicated without a French translation because the Villers-Cotterêts Order, in a restrictive interpretation, applies to procedural acts only and not to exhibits. The main advantage of having a case heard by the Third Chamber will thus lie in the fact that the judges will be able to examine evidence even if written in a language other than French without requiring a translation. However, if an exhibit is communicated without its French translation, the opponent may still request such translation. It is thus not very likely that this international Chamber will meet its first objective, which is to make the Paris Commercial Court more attractive to non-French litigants.

Christelle Coslin and Delphine Lapillonne

EUROPEAN LAW

- **Referral to the CJEU of a question relating to choice-of-court agreements in a chain of contracts**

Currently, the issue of whether a jurisdiction clause may be applicable through a chain of contracts is still uncertain. The French Supreme Court (*Cour de Cassation*) has raised a referral question regarding this topic before the Court of Justice of the European Union ("CJEU") on 17 November 2010 (French Supreme Court, 1st Civil Chamber, case no. 09-12.442).

In the present case, a jurisdiction clause had been concluded between the manufacturer and the intermediate purchaser of the good. The Court of Appeal ruled that, as European law considers that an action between a manufacturer and a sub-purchaser is an action in tort and not a contractual matter, this choice-of-court clause should not apply.

The French Supreme Court, which decided that the matter required an interpretation of Article 23 of Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters asked the following:

- *"is a clause conferring jurisdiction which has been agreed, in a chain of contracts under Community law, between a manufacturer of goods and a buyer in accordance with Article 23 of Regulation No. 44/2001 of 20 December 2000 effective as against the sub-buyer and, if so, under what conditions?*
- *is the clause conferring jurisdiction effective as against the sub-buyer and its subrogated insurers even if Article 5 (1) of Regulation No. 44/2001 of 20 December 2000 does not apply to the sub-buyer's action against the manufacturer, as the Court held in its judgment of 17 June 1992 in Handte?".*

These referral questions, which are currently pending before the CJEU, should not lead to a ruling before several months.

Christelle Coslin and Delphine Lapillonne

- **Publication of the list of international conventions derogatory to Regulations Rome I and Rome II**

The European Commission has published the list of conventions notified by the Member States under Articles 26 (1) of Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation") and 29 (1) of Regulation no. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation").

In this respect, The Hague Convention of 15 June 1955 on the law applicable to international sales of goods and The Hague Convention of 2 October 1973 on the law applicable to products liability have been respectively notified by France. These conventions thus remain applicable within their scope of application despite the entry into force of Rome I and Rome II Regulations and this will be effective until their possible denunciation by France.

Christelle Coslin and Delphine Lapillonne

FOREIGN CASE LAW

- **The end of human rights litigation in the US for corporations?**

Although this provision had almost been forgotten until the beginning of the 1980s, the Alien Tort Statute ("ATS") has generated in the US, since its revival, much debate. Pursuant to the ATS, enacted as part of the 1789 Judiciary Act, a US federal court has jurisdiction over a tort action brought by one or more non-US citizens seeking civil damages as compensation for an alleged violation of international law. In the last decades, the ATS has been increasingly asserted in the scope of class actions brought against corporations, including non-US companies, for alleged human rights' violations perpetrated outside the territory of the US.

A decision of the US Court of Appeals for the Second Circuit, in the *Kiobel v. Royal Dutch Petroleum* case, could put an end to this trend. Nigerian citizens had brought an ATS-based action against Royal Dutch Petroleum and Shell, alleging that these corporations would have been accomplices to human rights' violations allegedly perpetrated by the Nigerian army. On 17 September 2010, the US Court of Appeals for the Second Circuit ruled that it did not have subject-matter jurisdiction because corporations are not subject to liability under customary international law. Indeed, the judges considered that corporate liability is not a universal principle recognised as a norm of customary international law. On 4 February 2011, the Court then denied the claimants' motion to have the case reheard *en banc*, i.e. by a larger panel.

This case is likely to have a significant impact since companies (in particular non-US companies as in the *Kiobel* case) could not be held liable for breaching an international norm, and not even be sued before US courts under the ATS. Previously, the very same Court of Appeal had adopted, in 2009, a restricted approach of the cases in which the liability of companies can be sought under the ATS. In a matter where nearly 300,000 people alleged that Talisman Energy, represented by Hogan Lovells, had been an accomplice to war crimes and genocides perpetrated by the Sudanese Government, the appellate judges considered that companies could not be held to be accessories to human rights' violations unless, pursuant to customary international law, these companies had substantially and intentionally assisted the author of the crime. The Supreme Court then denied a writ of *certiorari* in this case.

Nonetheless, even after the *Kiobel* case, claimants will potentially be able to act on the ground of this provision against the managers or employees of the corporations. Indeed, natural persons are subject to liability should they breach norms of customary international law, even though proving the directors or employees' liability may be difficult for claimants. Therefore, the *Kiobel* case should not lift all concerns raised by ATS litigation within corporations notably in terms of potential reputational damages, time and defence costs. The impact of business operations on human rights indeed remains quite a hot topic (see the article in this Bulletin commenting on the Guiding Principles on Business and Human Rights established by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie).

Christelle Coslin and Delphine Lapillonne

- **Judicial victory for Vivendi following Morrison case law**

The wind has changed. One year ago, Vivendi was found 100% liable by an American jury in a securities fraud class action under the American Securities Exchange Act of 1934. In this action, former French, American, English and Dutch shareholders alleged that Vivendi's misrepresentation had caused them a loss assessed roughly at the amount of 6.9 billion Euros as a result of the artificially inflated prices of the shares they had purchased. However, further to the recent case law of the US Supreme Court in *Morrison v. National Australia Bank Ltd* of 24 June 2010, the District Court for the Southern District of New York requested claimants and defendants' respective observations regarding the impact of this case law on the pending matter.

Indeed, by Order dated 21 May 2007, this Court had certified a single class comprising all persons from the United States, France, England and the Netherlands who had bought Vivendi's ordinary shares or American Depository Receipts ("ADRs") between 30 October 2000 and 14 August 2002, regardless of the place where this transaction had taken place. In *Morrison*, the Supreme Court dismissed, under the Securities Exchange Act, so-called foreign-cubed actions which aspects are all located outside the United States, thus denying the extraterritorial application of the Securities Exchange Act. More precisely, the Supreme Court held in the majority opinion that "*Section 10(b)* [of the Securities Exchange Act] *reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States*".

Based on this, claimants and Vivendi agreed that *Morrison* had no impact on the purchase of ADRs since such securities were listed and traded on the New York Stock Exchange. To the contrary, it was ruled on 22 February 2011 that "*claims brought by purchasers of Vivendi's ordinary shares must be dismissed under* Morrison". The Court decided that the fact that the purchaser resides in the United States is not sufficient to hold the transaction as a domestic one and neither is the fact that the shares were registered with the Security Exchange Commission for the purpose of issuing ADRs. According to Vivendi, the amendment of the class certification could lead to a reduction by 90% of the damages claimed by the claimants.

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The French Supreme Court holds that an order to pay punitive damages is not, in itself, contrary to French international public policy

Ruling for the first time on this issue, the French Supreme Court held in a decision of 1st December 2010 handed down in a matter relating to the recognition in France of a foreign judgment that "*the principle of an order to pay punitive damages is not, in itself, contrary to public policy*". However, the French Supreme Court upheld the non-recognition of the foreign judgment in France on the ground that the amount allocated to the claimant was disproportionate given the loss suffered and the debtor's breaches of its contractual obligations.

In this case, a couple of US citizens domiciled in the United States had bought for 826,000 US dollars a catamaran from a French company, Fountaine Pajot. The couple, complaining about defects resulting from the inefficient repair of the boat after a storm that had occurred before delivery, served on Fountaine Pajot and its US intermediary a summons to appear before the Superior Court of California, County of Alameda. By judgment dated 26 February 2003, the US Court awarded damages to the claimants of an amount exceeding three million US dollars, half of which were punitive damages. The claimants then requested that the decision be recognised in France.

To this day, there is no international convention on the recognition of decisions in civil and commercial matters that binds France and the United States. To grant recognition in France of a US decision, the French courts thus had to check that the following three conditions were met: the connection between the dispute and the US court, the compliance with international public policy relating to the merits and procedure and the absence of fraudulent contravention of the law.

The Poitiers Court of Appeal, upholding the first-instance decision, dismissed the claim for enforceability of the US judgment in France, thus refusing to let such judgment produce its effects in France. First of all, it noted that the amount of allocated damages was "*manifestly disproportionate as largely exceeding, on the one hand, the sale price and on the other hand, the very amount of the compensatory damages allocated as compensation for the entire loss*". The Court of Appeal also recalled that "*under French law, the very purpose of civil liability is to restore as accurately as possible the balance destroyed by the damage and replace the victim in the position in which it would have been if the harmful event had never occurred*". The Court of Appeal thus expressly dismissed two of the criteria on which the US courts base themselves to decide whether or not to grant punitive damages, i.e. "*the significance of the fault*" and the "*financial situation of the author of the damage*".

The buyers of the boat lodged an appeal against this decision, notably asserting that the control of international public policy is exclusive from the revision of the merits of the case and that the allocated amount was not disproportionate in light of the absolute impossibility to use the boat which they had bought and of the fraudulent behaviour of Fountaine Pajot.

The French Supreme Court dismissed the appeal holding that "*if the principle of an order to pay punitive damages is not, in itself, contrary to public policy, this is not the case when the allocated amount is disproportionate compared to the suffered loss and the breaches of the debtor's contractual obligations*".

The future in France of foreign decisions ordering the losing party to pay punitive damages is still uncertain

The decision of the French Supreme Court of 1st December 2010 is two-fold. On the one hand, the recognition in France of a decision ordering a party to pay punitive damages is not excluded as a matter of principle. Litigants having obtained punitive damages abroad must not, however, rejoice too quickly. Indeed, the French Supreme Court insisted on adding that the damages allocated abroad, in order to be recoverable in France, must be proportionate in light of the loss suffered, and also of the "*breaches of the debtor's contractual obligations*".

If the French Supreme Court had imposed a control of proportionality in light of the suffered loss only, orders to pay punitive damages would not have been recognised in France. Indeed, by definition, punitive damages come as an addition to the mere compensation of the loss suffered resulting in a sanction, a punishment imposed on the debtor at fault.

However, by adding the "*breaches of the debtor's contractual obligations*" to the control of proportionality, the French Supreme Court accepts, at the stage of recognition of foreign judgments, to depart from the principle of full compensation that only takes into account the loss suffered by the victim and not the behaviour of the debtor and the seriousness of the latter's fault.

Therefore, the French Supreme Court refuses to bring the principle of full compensation to the level of international public policy. It, consequently, accepts to let the door open to the recognition of foreign decisions allocating punitive damages, in particular when the behaviour of the debtor justifies it. However, the fact that the French Supreme Court requires proportionality between the amount of allocated damages and the behaviour of the debtor, may, in numerous cases, justify a refusal to recognise a decision. One also ought to underline the fact that compliance with international public policy is always assessed *in concreto*. This will result in a case-by-case analysis of the proportionality of the allocated damages.

It will, therefore, be necessary to pay a lot of attention to the future decisions handed down in this field by the courts ruling on the merits so as to determine the way in which the criterion of proportionality established by the French Supreme Court will concretely be assessed.

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A step forward in the revision of the Brussels I regulation: the European Commission's proposal

Regulation No. 44/2001 of 22 December 200 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation") is the cornerstone of the European legislation regarding cross-border litigation and judicial cooperation in the European Union. Since its entry into force only nine years ago, it is generally considered that the Brussels I Regulation, which succeeded to the Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters, has been successful in establishing common jurisdiction rules, as well as facilitating the recognition and enforcement of court decisions in other Member States. This being said, the European Commission is contemplating bringing radical changes to the current version of the Regulation, as demonstrated by the draft proposal of the Brussels I Regulation published on 14 December 2010.

This draft proposal follows the publication of several preliminary studies, among which is the report prepared by Professors Hess, Pfeiffer and Schlosser regarding the concrete application of the Brussels I Regulation. Based on such studies, as provided for by Article 73 of the Regulation, the European Commission released a report in April 2009 proposing some of the changes developed further in the draft proposal. According to the European Commission, the objectives of these changes are three-fold: (i) lowering legal costs, diminishing procedural delays and improving legal certainty; (ii) allowing a better access to justice and protecting weak parties; and (iii) ensuring a better coordination of legal proceedings. Only a few points amounting to major modifications among those envisaged will be examined hereafter.

The end of recognition and enforcement proceedings?

Based on the principle of mutual trust among Member States and the progress achieved towards the single market, the Commission considers that it is now possible and adequate to completely abolish *exequatur* procedures. The view of the European Commission is that such procedures make cross-border litigation "*cumbersome, time-consuming and costly*" while in 95% of the cases the request for the *exequatur* of the decision of a judge from another Member State is granted in the end. The draft proposal thus provides for an automatic system of circulation of judgments in civil and commercial matters among Member States by removing the requirement to apply for *exequatur* before enforcing a judgment.

To protect defendants' rights, two procedural safeguards are proposed. Firstly, the defendant would be allowed to challenge the judgment if he/she was not adequately informed of the proceedings that led to the judgment which *exequatur* is sought. Secondly, as an extraordinary precaution, the defendant could also argue that the rules for a fair trial were not complied with in these proceedings. Moreover, he/she could challenge the enforcement of a judgment which would not be compatible with another judgment previously handed down in the Member State of enforcement, or, in certain conditions, in another State.

In addition, there are a few areas where the requirement of *exequatur* proceedings will persist because of the major differences existing among the Member States' legislations, notably in matters relating to defamation and collective redress mechanisms.

The expansion of the territorial scope of the jurisdiction rules

At present, the territorial scope of most of the jurisdiction rules provided for by 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 groundbreaking proposals, which will probably trigger a fierce debate consists in eliminating such a limitation. Indeed, the Commission suggests extending the jurisdiction rules from the Brussels I Regulation to defendants domiciled in third countries. This would, for instance, result in the protective jurisdiction rules available for consumers, employees and insured persons being applicable in a greater number of cases as underlined by the European Commission. Another consequence would be that Member States, within the material scope of the revised Regulation, would no longer be allowed to apply their own international jurisdiction rules; this point is clearly controversial.

The draft Regulation also proposes two additional rules, which would be applicable where no other rule of the Brussels I Regulation would confer jurisdiction to the courts of one of the Member States. By definition, such rules would only apply 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. This is why both these rules require that the dispute has sufficient connections with the Member State of the court seized. Pursuant to the first rule, non-EU defendants could be sued at the place where their moveable assets are located, provided that the value of such goods would not be disproportionate with respect to the value of the claim. Secondly, non-EU defendants could also be sued before a *forum necessitatis* in cases where no other forum (outside the European Union) would guarantee the right to a fair trial. The application of such rule should nevertheless remain exceptional.

The search for better coordination

Quite a number of proposed amendments aim at allowing better coordination between various sets of proceedings. The first objective is to ensure the proper enforcement of choice-of-court agreements. At present, when the parties have designated a particular court to solve their dispute, *lis pendens* rules (applicable when the same dispute is brought before two different courts) prevail over jurisdiction clauses. In other words, if a party brings an action before a

different court from the one originally elected, the court agreed upon, if seized afterwards, is compelled to stay the proceedings until the decision of the first court accepting or declining its own jurisdiction. According to the draft proposal, the court initially designated by the parties would now be given priority to decide on its own jurisdiction. Such proposal would increase the effectiveness of a choice-of-court agreement and reduce abusive litigation or practices of *forum shopping*.

The draft Regulation also seeks to improve the *lis pendens* rules by creating a six-month time limit for the court first seized to rule on its jurisdiction. However, it is uncertain whether, in practice, courts will be able to comply with this timeframe. For this purpose, the European Commission contemplates establishing mechanisms allowing a smooth exchange of information between the courts seized.

Similarly, the draft Regulation includes provisions on the interface between arbitration and court proceedings. If a court's jurisdiction is challenged on the basis of an arbitration agreement, the said court will have to order a stay in the proceedings if proceedings have been initiated in the Member State of the seat of arbitration relating to the validity and effects of the arbitration agreement. This modification could raise a number of concerns since it may have the undesired effect of increasing the number of instances where the arbitration agreement is challenged before the courts of the seat of the arbitration.

In conclusion, it is interesting to note that the Commission published at the same time as the draft proposal a study by the Centre for Strategy and Evaluation Services (CSES) entitled "*Data Collection and Impact Analysis - Certain aspects of a possible revision of the* [Brussels I] *Regulation*". This report concludes that, regarding three key topics (which are the abolition of *exequatur* proceedings, the interface between the Regulation and arbitration and the international scope of the Regulation), the major amendments proposed by the Commission "*would have mostly beneficial effects*".

This draft Regulation is now in the hands of the European Parliament and the Council. It remains to be seen whether both these institutions will approve the political choices endorsed by the European Commission and of which the draft proposal is the result. The European Economic and Social Committee has already submitted its opinion on this proposal at the beginning of May 2011. If it generally approves the draft Regulation and its major orientations, this Committee adopts a more balanced position regarding certain specific points of these modifications, in particular concerning the non-general scope of the abolishment of *exequatur* proceedings or the relations between arbitration and court proceedings. The co-decision procedure that will lead to the enactment of the revised Regulation is expected to last for at least another year.

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When should a national court have jurisdiction over consumer contracts concluded on the Internet?

Because of the worldwide reach of the Internet network, businesses operating a website have faced great uncertainty with respect to the courts before which they may be sued under EU 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"). This is especially true concerning their contractual disputes with consumers, which are subject to special jurisdiction rules provided for by the Brussels I Regulation in favour of consumers (basically allowing a consumer to bring proceedings before the courts of his/her own domicile irrespective of the domicile of his/her co-contracting party, see Articles 16 and 17 of the Brussels I Regulation together with Recital 13 of the same Regulation).

On 7 December 2010, the Grand Chamber of the Court of Justice of the European Union (CJEU) interpreted for the first time one of the conditions for the application of such rules provided for by Article 15.1(c) of the Brussels I Regulation (Pammer & Hotel Alpenhof, Consolidated cases no. C-585/08, Peter Pammer vs. Reederei Karl Schlüter GmbH & Co KG, and C-144/09, Hotel Alpenhof GesmbH vs. Oliver Heller), i.e. that the professional party "*by any means directs* [its] *activities*" in the Member State where the consumer is domiciled. This notion of "directing activities" is rather recent since it did not appear in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, to which the Brussels I Regulation succeeded. It was indeed introduced with Article 15 of the Brussels I Regulation to ensure that contracts concluded on the Internet would be subject to the jurisdiction rules favourable to consumers (paragraphs 59 to 62 of the ruling).

This CJEU ruling was handed down in the scope of two consolidated matters referred by the Austrian Supreme Court where a consumer had booked services online. The first dispute involved an Austrian resident seeking reimbursement of a boat tour booked with a German company, through the website of an intermediary also established in Germany. This case also raised a question regarding the interpretation of the notion of "contract of transport" under Article 15.3, which will not be discussed here. The second case related to a German resident who booked hotel rooms in Austria on the Internet and left without paying his hotel bill.

The Austrian Supreme Court decided on 24 December 2008 and 24 April 2009 to seek the CJEU's guidance on the construction of Article 15.1 (c) of the Brussels I Regulation, in particular on whether the mere fact that a website can be browsed on the Internet is sufficient to find that an activity is directed to the Member State of the consumer's domicile. The CJEU considered that it should generally address the issue of knowing "*on the basis of what criteria a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile*" (paragraph 47 of the ruling).

Following the Opinion of Advocate General Verica Trstenjak dated 18 May 2010, the CJEU ruled that the mere accessibility of a website is insufficient to consider that a business is directing its activity to a Member State (paragraph 69 of the ruling).

In addition, the CJEU held that an activity may only be considered as being directed to a Member State if the website operator has shown an intention to establish commercial relations with consumers domiciled, notably, in this particular Member State. As a result, to rule that a trader's activity is directed to a certain Member State, the national courts should rely on the proof that, prior to the conclusion of a contract with the consumer in question domiciled in their State, the trader had envisaged doing business with consumers domiciled in this Member State (paragraphs 75 and 76 of the ruling).

The CJEU also indicated that the inclusion of contact details of the website operator (such as email or geographical addresses, which may be mandatory) is not sufficient to ascertain that an operator was willing to conduct business in a specific State.

To the contrary, the CJEU non-exhaustively listed several criteria which may constitute evidence of the intention of the operator to direct its activities to a specific Member State. Most of these criteria relate to the content of the website showing the international nature of the business: for example, the display of a list of countries where services or products are offered, the mention of an international clientele including clients in various Member States, the presence of indications on how to reach the operator from outside its country of establishment (telephone numbers with international codes, description of itineraries to go to the country of the operator), or the use of foreign languages or currencies by the operator (provided that they are not commonly used in the country of origin of the operator). Interestingly, the CJEU also noted that the top-level domain of the website could be meaningful in this respect if it corresponds neither to that of the country where the business is based nor to a "neutral" domain name, such as ".com" or ".eu". Finally, the use of referencing services for advertising purposes may also be construed as proof of the intention of an operator to facilitate access to its website by consumers in other Member States.

Furthermore, the CJEU specified that a trader may be regarded as directing its activity to other Member States even where it does not itself operate a website but uses an intermediary's website. Such determination could rely on the fact that the intermediary acts for and on behalf of the trader or that the latter was aware of the international scope of the intermediary's activity.

Conclusion

Obviously, the CJEU sought to find a balanced solution between protecting consumers (such protection not meant to be absolute), on the one hand, and allowing the development of e-commerce, on the other hand. As a result, e-commerce

operators should not be sued by consumers in Member States in which they never intended to supply their products or services. To ensure the lack of territorial jurisdiction of the courts of such Member States, online traders should follow the guidelines provided by the CJEU in this ruling when setting up their website.

In addition, this construction of "directing activities" is likely to have repercussions outside the scope of Article 15 of the Brussels I Regulation. Indeed, the same interpretation should prevail to determine the law applicable to consumer contracts as Recital 24 of EU Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations provides and which refers to the joint Declaration of the Council and Commission on Article 15 of the Brussels I Regulation (Declaration of November 2000, PRES/00/457 mentioned by both the Advocate General and the CJEU ruling in the Pammer & Hotel Alpenhof cases). Finally, the very same notion could be transposed more generally to assess jurisdiction in Internet tort matters, notably under Article 5.3 of the Brussels I Regulation, to determine where to locate a damage which occurred via a website. At the national level, the courts have so far retained diverging constructions of Article 5.3 in Internet liability cases, which the CJEU could attempt to solve by adopting the same notion.

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United Nations' guiding principles on business and human rights: what they concretely mean for businesses

The United Nations' Secretary General's Special Representative John Ruggie has recently presented his Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework released in 2008. These principles aim at providing recommendations and guidance to businesses and States throughout the world for the concrete implementation of this Framework. They were submitted in November 2010, were posted online to gather public comments until 31 January 2011 and attracted more than 3,500 visitors from all over the world. Approximately 100 written comments were provided and taken into account before the release of the latest version in March 2011. The Guiding Principles were then unanimously endorsed by the UN Human Rights Council in June 2011.

Background

In 2005, following a failed UN initiative, which had triggered a divisive debate between businesses and human rights advocacy groups, the UN appointed Harvard Professor in political science John Ruggie as Special Representative for Business and Human Rights to submit recommendations "*on the issue of human rights and transnational corporations and other business enterprises*". This resulted, in June 2008, in the "Protect, Respect and Remedy" Framework developed after several years of research and extensive consultation with businesses, States, NGOs and other stakeholders. This Framework, highly welcomed by the UN Human Rights Council, is based on three key pillars: State duty to protect against human rights abuses, corporate responsibility to respect human rights and access by victims to effective remedy. Further to this Framework, the Council extended Professor Ruggie's mandate to give him time to "*operationalise*" the Framework and provide guidance to States and businesses for its implementation.

State duty to protect human rights

In this respect, the Principles mainly provide that States must generally protect against human rights abuses within their territory and jurisdiction through appropriate and effective policies, regulations and laws. This includes the duty to ensure that businesses domiciled in their territory respect, in the scope of their activities, human rights at a domestic level as well as abroad. The Principles also provide particular guidance to businesses operating in conflict-affected areas and encourage businesses to communicate on how they address adverse human rights impacts. Lastly, the Principles prompt States to ensure policy coherence when acting as members of multilateral institutions involved in business issues, such as the Organization for Economic Cooperation and Development, and to work together with such institutions to ensure that businesses respect human rights.

Corporate responsibility to respect human rights

The Principles set as foundational principle that "*business enterprises should respect human rights.* […] *The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate*". Businesses should thus strive to integrate existing standards and codes of conduct as well as human rights in their management systems to ensure that they avoid causing or contributing to adverse human rights impacts and address them when they occur.

They target all businesses irrespective of their size, scale and field of operation. Consequently, small and medium-sized businesses should not consider themselves exonerated from the responsibility to respect human rights. However, the extent of standards and measures will not be the same depending on whether the businesses at stake are indeed SMBs or multinational groups.

One of the key aspects of the Principles concerning businesses' responsibility to respect human rights is based on the principle of due diligence. Indeed, businesses are advised, in order to prevent, mitigate and address adverse human rights impacts, to implement a due diligence system based on various processes. Firstly, businesses should implement an ongoing process of assessment of actual and potential impacts, through dialogues and consultation with affected groups and by calling upon the services of external human rights experts. Secondly, they ought to integrate their findings in appropriate internal standards and processes and where identified, take adequate remedy actions. Once these measures have been set up, and so as to ensure continuous respect, the Principles recommend that businesses track the effectiveness of their assessments and resulting measures.

From a legal standpoint, the Principles advise on the risk for businesses of being seen as contributing to adverse human rights impacts, which may, in some cases, give rise to their criminal liability. The due diligence system may, without fully exonerating them from such liability, help businesses address such risk by proving that they took all reasonable measures to initially avoid the adverse human rights impacts. Also, to avoid legal proceedings or prove respect of human rights where such proceedings arise, the Principles highly recommend that businesses establish policy commitments and communicate on these commitments and other initiatives both internally and externally.

Access to remedy

Considering the third pillar of the Framework, the Principles provide that States should ensure that when human rights abuses occur, the victims have access to effective remedy. Such remedy may result from the implementation of state-based judicial or non-judicial grievance mechanisms as well as non-state-based mechanisms, in particular, by businesses at an operational level. These mechanisms ought to be legitimate, accessible, predictable, equitable, transparent, rights-compatible and, with respect to businesses' operational-level mechanisms, these ought to be based on engagement and dialogue. Interestingly, the Principles

especially focus on the access to remedy and the grievance mechanisms, but do not address the specific forms the remedies should or could take.

Conclusion

In brief, these principles do not create any new legal obligations on businesses or States but only provide advice and guidelines. They arose further to a failed normative initiative that sought to impose new legal obligations on businesses to force them to respect and protect human rights. This "*global platform for action*", according to the words of Professor Ruggie, results from extensive consultation and involvement of all the different players.

These Principles are to be implemented by businesses on a voluntary basis. Yet, with time, businesses may face increasing pressure from competitors, individuals as well as States to comply with and provide their best efforts to follow Professor Ruggie's guidelines and communicate on their initiatives. The Principles have already yielded positive results since, without waiting for the unanimous endorsement of the Principles by the United Nations Council at its session in June 2011, a number of multinational companies, such as Hewlett-Packard or Tesco, have put Professor Ruggie's guidelines to use in their internal policies and procedures relating to human rights and are concretely testing the grievance mechanisms advocated by the Principles.

To conclude, one cannot highlight enough that the implementation of the Principles remains a step-by-step process that needs to be tailored for each business. Businesses as well as States throughout the world should already start thinking, after looking at the example of precursor companies, and concretely implementing these guidelines in their day-to-day management systems.

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