



LITIGATION, ADR & CONTRACTS PRACTICE GROUP

Meeting report

Sat. 15 October 2016 / 9:00am-1:00pm

Hotel Marriott, Prague

9:15-10:00 *Freezing of bank accounts* (EU Reg. N° 655/2014) by F. WALLACE (RIX & KAY, UK)

Thank you to Francis WALLACE, a UK solicitor, who is unfortunately a “victim” of BREXIT, but nevertheless still interested in EU regulations, even if the UK has notified not to take part, as well as Denmark.

This regulation relates to freezing of bank accounts in Europe, only in cross-border cases located in a member State, except for such topics like customs, matrimonial, wills, insolvency, arbitration...

This regulation shall apply from 18 January 2017.

It will be useful for urgent judicial protection (court decision within 10 or 5 days after the application). The defendant is not informed prior to the issuing of the protection order. Where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the creditor has to justify the issuing of the Preservation Order by proving that he is likely to succeed his claim.

There are some provisions and guarantees to compensate defendant's damages.

Upon request by the information authority, the bank should disclose whether the debtor holds an account with them.

Remedies against the order are located in the country where the order is issued, and remedies against enforcement, in the country where the order is enforced.

There are standard forms.

Service on the defendant shall be *initiated* by the end of the third working day following the day of receipt of the declaration of the bank concerning the preservation of funds.

10:15-11:15 Internet contract disputes

By P. BEMBO (STUDIO LEGALE BEMBO, Italy)

From a legal point of view, there is no global definition for e-commerce.

Some EU directives define the boundaries, such as commercialization of goods and services, online distribution of products in digital format, carrying out financial transaction and stock exchange, execution of public procurement and implementation of procedures (Directive 2000/31/EC).

Implementation in Italy by Decree 70/2003, with a distinction between professional trade and consumers.

The member states have to ensure that the legal requirement for civil contracts does not hamper the effective use of electronic contracts.

The parties may choose the applicable law.

But the jurisdiction is to be selected according to the criteria of EC Regulation 44/01 or now EU Regulation 1215/2012.

In case of conflicting laws, first we refer to the EU Regulation 592/2008 (Rome I). In BtoB sales relationships the Vienna Convention of 11 April 1980 on the international sales of goods is to be applied (it can be applied directly as *lex specialis* on the basis of article 1.1 sub a, and indirectly on the basis of article 1.1 sub b).

In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected.

Regarding conflicting laws in BtoC, most of the rules are in favor of the weaker contracting party (see EC Directive 31/00 and decree 70/03 in terms of IT service and online commerce).

See also the new Directive 2011/83 which contains a uniform and specific set of rules, especially regarding the rapid compensation to consumer in case of withdrawal, returning goods, pre-contractual information, especially regarding the price and ancillary costs.

Full report available upon request.

By V. CREVECOEUR (IFL AVOCATS, France) and R. DELPECH (open-source consultant, France)

We cannot ignore the strong interaction of open-source programmes with corporate programmes any longer.

It is important that legal counsels should be able to identify precisely the open-source licenses applicable to any component used in the framework of their clients' business models and advise them on the consequences in terms of authorized use.

Open-source licenses differ from proprietary licenses in organizing circulation of the software programme without requiring financial compensation, but their use is often subject to conditions.

Traceability rules are common to most, if not all, open-source licenses.

The vast majority of open-source components are governed by copyleft licenses.

A reciprocity provision of copyleft incurs the existence of additional notions known as licence compatibility, which is appraised upon distribution of the open source software programme.

For external use in the absence of a detailed view of open-source usage by technical teams, and due to the lack of open-source governments processes, lawyers can offer guidelines for open-source component use in order to secure the IT of their clients.

In France, originality is essential for any claim based on software licenses infringement and the French concept of originality differs from that prevailing in other legal systems.

11:45-12:15 European order for payment (EU Reg. N°1896/2006) by L. VANFRAECHEM (GANDALEX, Belgium)

It is a *uniform* procedure, but all procedural issues not specifically dealt with in the Regulation are governed by national law. Not all member states have implementation law. Application by analogy of existing national rules is possible, but the application of the relevant national laws must not impair the effectiveness of the Regulation, and EU law in general (the “*effet utile*” of EU law).

The exceptional remedy of “*review*” in article 20 is the most important example of problematic application of national laws for procedural issues not specifically dealt with in the Regulation.

After the expiry of the time limit the defendant shall be entitled to apply for a review in exceptional cases. While the Regulation prescribes the conditions for opening the right for a review, the procedure itself is governed by national law. National procedures implementing the review are very different from one member state to another. Implementation of the review procedure has given rise to questions and uncertainties.

Most Court of Justices judgments concern article 20. Our speaker discussed these ECJ judgments (Flight Refund C-94/14, Thomas Cook C-245/14, Eco Cosmetics C-119/13, Novontech-Zala C-324/12). A questionnaire has been answered for Germany (S. DAUBNER), France (Th. CLERC), and the Czech Republic (S. HOLUB) regarding their national experience.

12:30-13:00 State courts V arbitration V Alternative dispute resolution (ADR) in international contracts by Pierantonio PAULON (Italy).

This report explains the different mechanisms and options provided by the 3 systems, i.e. court, arbitration, mediation, as well as pros and cons.

It also explains the mediation directive 2008/52, the directive enhancing consumer ADR (2013/11/EU), the regulation on consumer ODR 524/2013. The report further analyses the jurisdiction clause under the Brussels I bis Regulation 1215/2012, as well as the arbitration clause under the NY Arbitration Convention (1958) and contains other useful information.

A questionnaire was filled in by member firms: S HOLUB (Czech Republic), Th CLERC (France), S DAUBNER (Germany).