

## **INTERNATIONAL LITIGATION, ADR and CONTRACTS**

**Marseilles – RADISSON BLU**

**Saturday 14 May 2016**

### **Meeting report**

#### **List of attending firms:**

Th. CLERC / CLERC IFL AVOCATS (France)  
P. BEMBO / STUDIO LEGALE BEMBO (Italy)  
T. MÄENPÄÄ / BACKSTRÖM & CO (Finland)  
J-D. GUEDJ / GUEDJ & ASSOCIES (France)  
F. WALLACE / RIX & KAY SOLICITORS LLP (UK)  
D. WALRAVENS / RACINE (Belgium)  
F. LEGRAND / LEGRAND & PARTNERS CVBA (Belgium)  
P. PAULON / STUDIO LEGALE AVV. PIERANTONIO PAULON (Italy)  
P. SECK / VAN DAM & KRUIDENIER (Netherlands)  
F. BIENFAIT / VAN DAM & KRUIDENIER (Netherlands)  
B. FIUTOWSKI / BUDZOWSKA FIUTOWSKI I PARTNERZY (Poland)  
J. KLAGES / SAGAWE & KLAGES RECHTSANWÄLTE (Germany)  
S. APPERT / MANNAERTS & APPELS (Netherlands)  
S. DAUBNER / BUSEKIST (Germany)  
L. VANFRAECHEM / GANDALEX (Belgium)  
P. KEMAYOU MENGUE / GIACCARDI (Monaco)  
K. JAULIN BARTOLINI / PECH DE LACLAUSE JAULIN (France)

#### **Introduction:**

All the authors of “When distribution contracts come to an end” agreed to publish this paper on both the EJ INTERNATIONAL and INTERNATIONAL LITIGATION, ADR & CONTRACTS websites.

The Group’s presentation was approved by the participants – to be distributed during the Congress and published on the website in lieu of the current presentation.

**Topic: General Terms & Conditions**

▪ Presentation by Professor Denis MOURALIS: “Limitation of liability in contracts under French law”

- New French contract law
- Validity of exclusion or limitation clauses and exceptions
- Penalty clause
- Difference betw. contractual and extra-contractual liability.
- Information about damages calculation:
  - o 10% in Italy
  - o In the UK, penalty clause under Common law is now more flexible in England and Wales

▪ Further discussion on Limitation of liability using the Questionnaires prepared by:

- o Th. CLERC (France),
- o P. PAULON and P. BEMBO (Italy),
- o F. WALLACE (UK)
- o B. FIUTOWSKI (Poland)
- o F. LEGRAND (Belgium)
- o P. SECK (Netherlands)
- o S. DAUBNER (Germany)

▪ Presentation by Prof. MOURALIS: “Unforeseeable events at international level: Force majeure – hardship – embargo”

- Hardship:
  - o What criteria to trigger the hardship provisions?
  - o Examples: hardship clauses in the UNIDROIT principles and the ICC documentation
- Force majeure:
  - o Can be temporary or not
  - o Notified to the other party



- Defined by the parties themselves based on objective criteria
  - Force majeure provisions must be tuned with the insurance policy, especially as regards exclusion of the insurance coverage.
  - Force majeure may be excluded from the contract.
- Embargo:
- Embargo is more or less similar to force majeure if it happens after the beginning of the contract.
  - It is recommended to check embargo rules and define embargo in the contract.
- Roundtables using the above mentioned Questionnaires.
- Presentation by Francis WALLACE (solicitor, RIX & KAY, Hove, UK): “Vienna Convention: to be excluded or not?”
- The Convention (CISG) was ratified by 84 states (excluding the UK and India but including the USA, China, Brazil, Japan, and Russia).
  - The Convention governs sales of goods but does not apply to validity of the contract nor ownership of the goods.
  - The main provisions relate to:
    - Cancellation of the offer (or not)
    - Conditions of offer acceptance
    - Breach of contract and available remedies
    - Product delivery
    - Product acceptance (compliance)
    - Damages
  - The Convention may be expressly excluded from the contract, failing which it shall apply to any contract where it is applicable and supersede the applicable national law.

**UK:** In Francis WALLACE's opinion, the CISG is a useful convention, which is applied by a lot of countries.

**France:** French law is more favorable to the seller – exclusion of the CISG is recommended for the purchaser.

**Belgium:** Belgian law is more precise – exclusion of the CISG is therefore recommended.

**Poland:** Exclusion of the CISG is recommended because of higher standards for seller's liability under Polish law.

▪ Presentation by Pierantonio PAULON (Avvocato, Paese, Treviso, Italy): "Retention of title clause in EU comparative law"

- Extensive review under CISG, national law and INCOTERMS
- Transfer of title and passing of risks: Delivery – possession - identification
- Payment
- Type of clauses
- Law of the contract and conflict of laws
- Registration
- Insolvency law under Italian, German, French and England & Wales law, EU law, Swiss law and example in a US State law
- ECJ case-law review 2005-2008

▪ Report on a EU case by Timo MÄENPÄÄ (Lawyer, BACKSTROM, Helsinki, Finland)

The case under consideration involved:

- a Polish seller,
- a Finnish debtor which became insolvent after delivery

in Finland

with a contract governed by Austrian Law.

▪ Programme for the Congress in Prague (13 – 16 October 2016):

- "Internet contract litigation", by P. BEMBO, Th. CLERC and Valérie



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- "Freezing of bank accounts", by F. WALLACE and F. BIENFAIT
- Additional topic to be disclosed by L. VANFRAECHEM

- Programme for the joint meeting with the CORPORATE GROUP in PRAGUE:

Where to go in Prague?

If possible, it would be interesting to hold this meeting at the local Chamber of Commerce or Arbitration Court.

The help from local lawyers would be very much appreciated.

Topics for the joint meeting:

- Shareholders' disputes
- Board Members' liability
- Assets & Liabilities Guarantee disputes
- Arbitration Vs State courts

Papers to be published in connection with the days' topics:

- The Vienna Convention (F. WALLACE)
- Retention of Title (P. PAULON and T. MÄENPÄÄ)
- Limitation of Liability (B. FIUTOWSKI)
- Hardship (Th. CLERC)

On 19 May 2016

Thierry CLERC