

LISBON MEETING REPORT

JOINT SESSION LITIGATION & CONTRACTS GROUP & BANKING, INSOLVENCY & RESTRUCTURING GROUP

Saturday 6 May 2017

9:30 – 15:30

Intercontinental Hotel, Lisbon

9:30 – 10:15

Registration, Welcome and Introduction

Edmund Roehlich, Proksch & Partner (Austria) Insolvency, Restructuring and Banking Law Group, and **Thierry Clerc**, IFL Avocats (France), Chair of Litigation, ADR & Contracts Group

Overview of the program for the day

Who is around the table

21 participants among which 15 from the INTERNATIONAL LITIGATION & ADR practice group and 6 from the Banking law group. 15 countries were represented: Belgium, Finland, France, Germany, Poland, Spain, UAE, UK, Austria, Bulgaria, Hungary, The Netherlands, Monaco, Portugal, Italy.

3 lawyers from Dubai attended the meeting.

Please see list of attendees attached.

Christian Schlemmer, Caemmerer Lenz (Germany), agreed to co-chair the practice group with Thierry Clerc

10:15 – 11:15

Claims for product non-compliance, hidden defects and interim measures with a jurisdiction clause

Open discussion on the basis of the Questionnaire filled in by the participants

Summary of the questionnaires by **Thierry Clerc**, IFL Avocats (France)

Regarding the questionnaire on hidden defects, it will be useful to provide a definition of warranty Vs guarantee.

Also, deliveries in **Finland** seem to be interesting, because time bar is 10 years.

For products from Israel, Dubai authorizes contract termination for hidden defects.

Regarding bank transparency, there is no bank secrecy in **Belgium**.

No insolvency proceedings in **Dubai**: the defaulting debtor is liable for a jail sentence in Dubai.

We need to think of the TOKEN banking solution to prevent transfer frauds.

Banking: check the directive 2007/64/EC, providing that banks are not bound to disclose the beneficiary's name. Bank details to be included in the contract. The debtor (i.e. the buyer) is responsible for checking the bank account prior to transferring the money and using the TOKEN procedure.

HIDDEN DEFECTS:

We checked the following questions in open discussion:

1°) Is the duration of the guarantee against hidden defects limited to contract term?

France

Professionals are liable for the quality of the products delivered, including in case of hidden defects.

UK

Exclusion of liability is possible as long as it is reasonable.

Italy

5 years

2°) What is the applicable time-limit for the purchaser to start an action for hidden defects?

Monaco

The deadline to start an action is 6 months.

France

A 2-year deadline to start an action, in the context of a general 5-year time bar. CISG is applicable.

UK

The deadline to start an action is 6 years.

Belgium

The deadline to start an action is 6 years from delivery.

Dubai

A 1-year time bar

Poland

A 2-year time bar

Germany

A 2-year time bar

Finland

A 3-year time bar from a 10-year period from conclusion of the sale.

Italy

Notice of the defect within 8 days from discovery.

Spain

A 6-month time bar

Netherlands

2 years

3°) *If the contract includes a jurisdiction clause, may the Purchaser refer the case to another court, especially the one having jurisdiction in the country of delivery, in order to request that the defective product be subject to an expert assessment?*

France

The proceedings usually start with the court appointing an expert.

Germany

The court may order an expert assessment to prove the existence of the defect.

4°) *Are there any other provisions relating to hidden defects in your country?*

Dubai

The contract may be cancelled if the product includes any part from Israel.

Poland

The defect must be present at the date of delivery and the burden of proof is on the buyer.

Spain

Notice of any defect must be given within 30 days of discovering the defect.

5°) *To what extent are international conventions, in particular the Vienna Convention (CISG) applied in your country?*

Monaco

The Vienna Convention was never ratified.

UK

The Vienna Convention was never ratified.

Dubai

The Vienna Convention doesn't apply in Dubai.

Finland

The Vienna Convention doesn't apply in the case of a contract between a seller and a buyer both from Scandinavia.

6°) What about defect curing by the non-performing party?

Monaco

There is no provision on curing defects prior to termination by the seller.

France

The seller may cure the defect.

The seller may suspend the performance of its obligations, claim a price reduction or request contract termination.

UK

The seller may cure the defect. Mitigation of loss is mandatory.

Belgium

In case of a hidden defect, either the seller cures the defect, or the buyer claims damages.

Germany

The choice between replacing the product, repairing the product and cancelling the sale is on the buyer.

7°) What about the right to terminate the contract in case of non-performance?

Monaco

It is possible to terminate the contract.

UK

The contract may be terminated on the ground of hidden defects.

Spain

End of the contract within 6 months of discovering the defect.

For more specific answers please refer to a summary of the questionnaires to be prepared by Stefan Daubner, Busekist Winter & Partner, (Germany) and the questionnaires, which are attached.

11:30 – 12:30 FRAUDULENT BANK TRANSFER AS A RESULT OF EMAIL INTERCEPTION BY FRAUDSTERS

Open discussion on the basis of the Questionnaire filled in by the participants

Summary of the questionnaires by **Thierry Clerc**, IFL Avocats (France)

1°) What would the manufacturer's liability be as regards its Internet protection and agent's protection?

2°) Is there any liability on the agent's side since he provided the wrong banking information to the customer?

3°) What would the bank's liability be since it received the money without checking the beneficiary mentioned in the bank transfer from the customer?

In **France**, the bank incurs liability if it was aware of the beneficiary's name and failed to check that the transfer was made onto the account with identical holder name.

In **Belgium**, pursuant to Directive 2007/64/EC of 13 November 2007, there is no obligation on the bank to check the beneficiary's name.

UK: There is no obligation on the bank to check the beneficiary's name.

Dubai: there is no obligation on the bank to check the beneficiary's name.

Spain: "culpa di vigilando" rule

4°) Would the customer company be able to get information from the bank regarding the actual money transfer beneficiary?

There is no bank secrecy in **Belgium**.

Austria: the beneficiary's name may be disclosed as part of a criminal inquiry.

UK: as soon as it has been informed of a possible fraud, the bank may freeze the funds.

Dubai: bank secrecy exists in Dubai.

5°) As the lawyer of the customer company, can you sue the bank to get information

about the compliance of its undertakings? Ask the court to appoint an expert to check whether this obligation was fulfilled or not? Without violating bank secrecy.

In **France**, we need to check is the bank fulfilled its obligations.

Dubai: an expert may be appointed to determine if the bank's obligation was fulfilled.

6°) *Given that the customer got the name of the actual beneficiary of the bank transfer through its own, could it use this information against the bank, without violating bank secrecy?*

7°) *Would a lawyer be able to use the information gathered from the customer to start a legal action against the bank with evidence that the beneficiary was wrong, without violating bank secrecy and its own ethical rules?*

8°) *What happens if the wrong beneficiary of the bank transfer is insolvent?*

Dubai: no concept of insolvency, the debtor is liable for a jail sentence.

For more specific answers please refer to a summary of the questionnaires to be prepared by Francis Wallace, Rix & Kay Solicitors LLP, (UK) and the questionnaires, which are attached.

14:00 – 15:30 **program of the next congress in Brussels (13-14 Oct 2017):**
“How to handle a European case?” by an ERA speaker

Discussion of the program of the next session in Brussels

We agreed upon the following points:

1) Presentation of Xandra KRAMER

Subject: *How to handle a European case?*

Topic to be selected in common with European Law + Dubai + Asia

+ recognition of judgements

+ freezing of bank account or assets

+ touch on BREXIT

+ workshop on a case study

2) Mediation will be the second topic

How does it works in participating countries?

Speaker: One for France or recommendation from Fabienne LEGRAND for Brussels

3) BREXIT: have on the agenda to discuss status/update

4) Location to be determined.

Attachments:

list of attendees
questionnaires on hidden defects
questionnaires on Banking liability