European Law-Developments 2012

1. Jurisprudence:
(Court of Justice of the European Union)

1.1. Procedural law / international jurisdiction:

1.1.1. Iwona Szyrocka v SiGer Technologie GmbH, C-215/11, 13.12.2012 **(order for payment procedure)**:

(This decision was omitted in my presentation)

Regulation No 1896/20061 introduced a European order for payment procedure. It establishes, inter alia, (all) the information that must appear on a European order for payment application, including the amount of the claim. In 2011, Mrs Szyrocka, who is resident in Poland, applied to a Polish court for a European order for payment to be issued, which complied with the Regulation, but not with Polish law.

The Court of Justice states that the regulation establishes exhaustively the requirements to be made by an application for a European order for payment – member states are not to request additional requirements.

Furthermore the court pointed out, that the applicant is entitled to claim interests up to the time of payment of the principal claim.

1.1.2. Daniela Mühlleitner v Ahmad Yusufi, Wadat Yusufi, C-190/11, 06.09.2012 **(ability to sue before own court):**

A consumer may sue in his national courts a trader with whom he has concluded a contract, even if the trader is domiciled in another Member State, on two conditions: first, the trader must pursue commercial or professional activities in the Member State in which the consumer resides or, by any means (for example, via the internet), direct such activities to that Member State and, secondly, the contract at issue must fall within the scope of such activities.

Mrs. Mühllechner from Austria came across an offer to buy a car by searching the internet. However, to sign the contract of purchase' and take delivery of the vehicle, she went to Hamburg. On her return to Austria she discovered that the vehicle was defective. Mrs Mühlleithner brought proceedings in the Austrian courts, whose international jurisdiction the other party disputed. The Austrian High Court considered the two conditions mentioned above to be given. It was uncertain, however, as to whether the jurisdiction of the Austrian courts presupposes that the contract was concluded at a distance.

The Court of Justice holds that the consumer's possibility of bringing proceedings before the courts of his member state' against a trader domiciled in another Member State is not subject to the condition that the contract was concluded at a distance. The essential condition to which the application of that rule is subject' is that relating to a commercial or professional activity directed to the state of the consumer's domicile (or to more or all member states – for example by presenting a telephone number in the internet).

1.2. Consumer rights:

1.2.1. Banco Español de Crédito SA v Joaquín Calderón Camino, C-618/10, 14.06.2012 **(unfair contract terms are not to be respected by courts)**:

In Spain, an application may be made to a court for an order for payment of a debt, where proper evidence as to the amount of that debt is provided. The debtor must pay the debt or may object to that payment order within a period of 20 days. Spanish legislation does not, however, authorize the courts before which such an application had been brought to decide of their own motion, that unfair terms contained in a contract concluded between a entrepreneur and a consumer are void, except the order for payment was objected. Furthermore, where a Spanish court is authorized to find that an unfair term included in a consumer contract is void, the national legislation allows it to modify the contract by revising the content of that term in such a way as to remove its unfair aspects.

Mr Calderón Camino entered into a loan agreement for the sum of €30'000 with the Spanish bank Banesto for the purchase of a car. The nominal interest rate was fixed at 7.950% and the rate of interest on late payments at 29%. After some monthly repayments had not been made in time, the bank submitted an application for an order for payment.

The national court had issued an order in which it held, of its own motion, that the term relating to interest for late payment was void on the ground that it was unfair. It also reduced the rate of interest for late payment from 29% to 19% and ordered Banesto to recalculate the amount of interest.

In its judgment, first, the Court holds that the national court is required to assess, of its own motion, whether a contractual term in a consumer contract is unfair, where it has available to it the legal and factual elements necessary for that task. The Court takes the view that the Spanish national procedural arrangement is liable to undermine the effectiveness of the protection of customers according to the regarding directive(Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts).

Furthermore, the Court points out that, according to the Directive, an unfair term included in a contract concluded between a seller or supplier and a consumer does not bind the latter and that the (rest of the) contract containing such a clause remains binding for the parties on the same terms if it is capable of continuing in existence without that unfair term. If it were open to the national court to revise the content of unfair terms, sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could, nevertheless, be modified by the court in such a way as to safeguard their interests. Consequently, where they find that there is an unfair term, national courts are required solely to exclude the application of such a term in order that it does not produce binding effects with regard to the consumer, without having the power to revise the content of that term.

1.3. Intellectual property:

1.3.1. UsedSoft GmbH v Oracle International Corp., C-128/11, 03.07.2012 **(resale of used software)**:

Oracle develops and distributes, in particular by downloading from the internet, computer programs functioning as 'client-server software'. The customer downloads a copy of the program directly onto his computer from Oracle's website. The user right for such a program, which is granted by a licence agreement, includes the right to store a copy of the program permanently on a server and to allow up to 25 users to access it by downloading it to the main memory of their work-station computers. The licence agreement gives the customer a non-transferable user right for an unlimited period, exclusively for his internal business purposes. On the basis of a maintenance agreement, updated versions of the software (updates) and programs for correcting faults (patches) can also be downloaded from Oracle's website.

UsedSoft is a German undertaking which markets licences acquired from other customers of Oracle. Customers of UsedSoft who are not yet in possession of the software download it directly from Oracle's website after acquiring a 'used' licence. Customers who already have that software can purchase a further licence or part of a licence for additional users. In that case they download the software to the main memory of the work stations of those other users.

By its judgment the Court finds that the exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale. The principle of exhaustion of the distribution right applies not only where the copyright holder markets copies of his software on a material medium (CD-ROM or DVD) but also where he distributes them by means of downloads from his website. (Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs). Therefore, even if the license agreement prohibits a further transfer, the rightholder can no longer oppose the resale of that copy.

Moreover, the exhaustion of the distribution right extends to the copy of the computer program sold as corrected and updated by the copyright holder.
The Court points out, however, that if the license acquired by the first acquirer relates to a greater number of users than he needs, that acquirer is not authorized to divide the license and resell only part of it.

Furthermore, the Court states that an original acquirer of a tangible or intangible copy of a computer program for which the copyright holder's right of distribution is exhausted, must make the copy downloaded onto his own computer unusable at the time of resale.

In this context, the Court's states, that any subsequent acquirer of a copy for which the copyright holder's distribution right is exhausted, constitutes a lawful acquirer. Therefore the new acquirer of the user license, such as a customer of UsedSoft, may, as a lawful acquirer of the corrected and updated copy of the computer program concerned, download that copy from the copyright holder's website.

1.3.2. SAS Institute Inc. v World Programming Ltd, C-406/10, 02.05.2012 **(no copyright for computer program or programming language)**:

The Court states, that the object of the protection conferred by Directive 91/250 (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs) is the expression in any form of a computer program, such as the source code and the object code, which permits reproduction in different computer languages.

On the basis of this consideration, the Court holds that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression. Accordingly, they do not enjoy copyright protection. To accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolize ideas, to the detriment of technological progress and industrial development. In the given case, WPL only studied, tested and reproduced the functionality of the program, but did not copy its source code. Therefore SAS´s rights were not infringed.

Secondly the court observed, that according to the mentioned directive, contractual provisions, which prohibit studying and testing the functionality of a program by a purchaser of a software license are null and void.

1.3.3. Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v Netlog NV,C-360/10, 16.02.2012 **(filtering for unlawful content - not needed for social network):**

SABAM is a Belgian management company which represents authors, composers and publishers of musical works. Netlog NV runs an online social networking platform where every person who registers acquires a personal space known as a 'profile'. According to SABAM, Netlog's social network enables all users to make use, by means of their profile, of

the musical and audio-visual works in SABAM's repertoire, making those works available to the public in such a way that other users of that network can have access to them without SABAM's consent and without Netlog paying it any fee.

The Court of First Instance asked the Court of Justice whether a hosting service provider can be required to install a system for filtering information stored on its servers by its service users, which applies indiscriminately to all of those users, as a preventative measure, exclusively at its expense and for an unlimited period.

The Court held, that the owner of an online social network cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audio-visual work.

Such an obligation would not be respecting the prohibition to impose on that provider a general obligation to monitor, nor the requirement that a fair balance be struck between the protection of copyright, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

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2. Legislation:

2.1. Company Register

2.1.1. Directive of the European Parliament and of the council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers

This directive came into force on 06.07.2012. It regulates the linkage between the national business registers in Europe by the implementation of a new European platform for company information. This will permit access to up-to -date company information throughout Europe. It also structures the cooperation between business registers in Europe in procedures for cross-border mergers, seat transfers and updating the registration of foreign branches where cooperation mechanisms are lacking or limited.

The directive is to be implemented within two years.

2.2. Citizens Rights (for Crime Victims)

2.2.1. Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (Proposal: PE-CONS 37/12).

The directive was published in the Official Journal on 14th of November 2012 and sets out minimum rights for victims, wherever they are in the EU (see IP/11/585). Member States now have three years to implement the provisions into their national laws. The new EU Directive on minimum standards for victims will ensure that, in all 27 EU countries:]-

• victims are treated with respect and police, prosecutors and judges are trained to properly deal with them;
• victims get information on their rights and their case in a way they understand;
• victim support exists in every Member State;
• victims can participate in proceedings if they want and are helped to attend the trial;
• vulnerable victims are identified – such as children, victims of rape, or those with disabilities – and are properly protected;
• victims are protected while police investigate the crime and during court proceedings.

2.3. Procedural Law:

2.3.1. Amendment of Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters:

On 6 December 2012, the Council adopted the revision of a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the so-called Brussels I regulation. The revised text will make it easier to ensure the smooth recognition and enforcement of judgments issued in another member state. This marks an important step forward for the free movement of judgments within the EU. The new regulation will make the circulation of judgments in civil and commercial matters easier and faster within the Union, as it simplifies the procedure for enforcement of a judicial decision in another member state. This will reduce costs and delays.

Under the current rules of the regulation, a judgment given in one member state does not automatically take effect in another member state. In order to be enforced in another country, a court in that country first has to validate the decision and declare it enforceable.
Under the new provisions, a judgment delivered in one member state will be recognised in the other member states without any specific procedure and, if enforceable in the member state of origin, once it has been declared enforceable there, it can be enforced in the other member states. The introduction of standard forms will facilitate the enforcement of foreign judgments.

Regulation (EU) No 650/2012 of the European Parliament and of the Council 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

The new law makes it considerably simpler to settle international successions by providing a single criterion for determining both the jurisdiction and the law applicable in crossborder cases: the deceased's habitual place of residence. It also permits citizens to plan their succession in advance in full legal certainty. The law also provides for a European Certificate of Succession, which will allow people to prove that they are heirs or administrators of a succession without further formalities throughout the EU. This will represent a considerable improvement from the current situation in which citizens have great difficulty exercising their rights. The result will be faster and cheaper procedures, saving people time and money in legal fees.

2.4. Driving License

2.4.1. Directive 2006/126/EC on driving licences:

It was adopted by the member states and the European Parliament in 2006 and became fully applicable on January 19, 2013.

Now all new driving licences issued across the EU will be in the form of a plastic "credit card," with a standard European format and enhanced security protection. Furthermore new regulations in regard to driving mopeds and heavy motorcycles were established.

3. Legislation – Proposals:

3.1. Single European Patent

In December 2012 the Council and the European Parliament gave their green light to the creation of unitary patent protection in Europe.

The current European patent system, in particular in the phase after granting a patent, is very expensive and complex. This is widely recognised as a hindrance to innovation in Europe. The European Patent Office (EPO) – a body of the intergovernmental European Patent Organisation comprised of 38 countries (EU 27 + 11 other European countries) – examines patent applications and is responsible for granting European patents if the relevant conditions are met. However for a granted patent to be effective in a Member State, the inventor has to request validation in each country where patent protection is sought. Obtaining patent protection in 27 Member States, including the procedural costs, could reach € 36000 today. In comparison, a US patent costs €1 850 on average.
Furthermore, the maintenance of patents requires the payment of annual renewal fees country by country and a transfer of the patent or a licensing agreement to use the patented invention has to be registered the same way.

The accepted proposal of the commission contains, that:

- Holders of European patents can apply for unitary patent protection for the territory of all participating Member States at the EPO.
- Patent applications can be submitted in any language, however, the EPO will continue to examine and grant applications in English, French or German.
- A single jurisdiction to hear patent cases will be set up. The Unified Patent Court will have exclusive competence in cases relating to the validity or infringement of classic European patents and patents with unitary effect. The new system will eliminate the risk of multiple patent lawsuits in different member states for the same patent, as well as the risk that court rulings on the same dispute might differ from one member state to another. In addition, it will significantly bring down litigation costs for businesses. The Court's central division will be based in Paris and its specialized sections in London and Munich. The Court of Appeal will be located in Luxembourg.

Member states will sign the Unified Patent Court agreement next year. It will enter into force once it has been ratified by at least 13 member states. If the implementing decisions are

taken in a timely manner, the first European patent with unitary effect could be granted in 2014.

3.2. Insolvency Rules

The revision of the EU Insolvency Regulation seeks to modernize the existing rules so that they support restructuring of companies in difficulties, and create a business-friendly environment, especially in times of financial difficulties. It will bring the Regulation (EC) No 1346/2000 up to date.

It will increase legal certainty, by providing clear rules to determine jurisdiction, and ensuring that when a debtor is faced with insolvency proceedings in several Member States, the courts handling the different proceedings work closely with one another. Information to creditors will be improved by obliging Member States to publish key decisions – about the opening of insolvency proceedings, for example.

In the future, there could be separate rules for honest entrepreneurs and for cases where the bankruptcy was fraudulent or irresponsible. In the case of honest bankruptcies, a shortened discharge period in relation to debts and the legal restrictions stemming from bankruptcy would make sure entrepreneurship does not end up as a "life-sentence" should a business go bust.

4. EU Cybercrime Centre:

Today, cybercrime is on the rise and cyber-criminals have created a profitable market around their illegal activities where credit card details can be sold between organised crime groups for as little as €1 per card, a counterfeited physical credit card for around €140 and bank credentials for as little as €60. Cybercrimes are also targeting social media: up to 600,000 Facebook accounts are blocked every day, after various types of hacking attempts and over 6,700,000 distinct bot-infected computers were detected in 2009.

The European Commission proposed to establish a European Cybercrime Centre to help (the member states) protect European citizens and businesses against cyber-threats. The centre will be established within the European Police Office, Europol, in The Hague (The Netherlands). The centre will be the European focal point in fighting cybercrime and will focus on illegal online activities carried out by organized crime groups, particularly those

generating large criminal profits, such as online fraud involving credit cards and bank credentials. The EU experts will also work on preventing cybercrimes affecting e-banking and online booking activities, thus increasing e-consumers trust. A focus of the European Cybercrime Centre will be to protect social network profiles from e-crime infiltration and will help the fight against online identity theft. It will also focus on cybercrimes which cause serious harm to their victims, such as online child sexual exploitation and cyber-attacks affecting critical infrastructure and information systems in the Union.

The centre is expected to start operations in January 2013.