EU Case Law

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Abstract: *This article provides an overview of cases decided by the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of January 2020 and the end of June 2020.*

General Law of Contract and Obligations

'Period for payment' and 'late payment' in commercial transactions between economic operators and public authorities: Judgment in Case C-122/18 *Commission v Italian*

The judgment of the Grand Chamber of the Court of Justice of the European Union (CJEU) concerns an infringement procedure brought by the European Commission against the Italian Republic about the failure of the Member State to fulfil obligations of Directive 2011/7/EU (the Directive). The Directive has two objectives: combating late payment in commercial transactions between economic operators, and between economic operators and public authorities. Regarding the latter, under Article 4(3)(a) of the Directive, Member States are to ensure that the period for payment does not exceed 30 calendar days where the debtor is a public authority. Article 4(4) gives Member States the option of extending that period up to a maximum of 60 calendar days for the public authorities and other entities covered by it.

Following a series of complaints from Italian economic operators and associations of economic operators, the Commission requested that the Court declare that the Italian Republic failed to fulfil its obligations under Article 4(3) and (4) of the Directive by not ensuring that public authorities pay remunaration to economic operators within the period of 30 or 60 calendar days. In addition to the com-

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plaints, the Commission underlined studies carried by several associations that revealed the existence of average late payment times 'ranging from 99 days (study by the Confartigianato, an association representing certain craftsmen and SMEs), 145 days (study by the Assobiomedica, an association representing undertakings providing medical devices to Italian healthcare facilities), or 156 days (study by the ANCE, an association of undertakings in the construction sector)' (para 21). The Commission notes that the concept of 'period for payment', within the meaning of Article 4(3)(a) of the Directive 'refers to the period within which public authorities are required effectively to pay their commercial debts', while the meaning of 'late payment' in Article 2(4) 'refers to a specific element, namely, "payment not made" within the contractual or statutory period of payment' (para 23).

In contrast to the Commission's argument, the Italian Republic's defence has four steps. According the defendants, first and foremost, the systematic interpretation of Article 4(3) and (4) of the Directive imposes on Member States only the obligation to ensure that the statutory and contractual payment periods applicable to commercial transactions involving public authorities are in conformity with those provisions. Therefore, in the event of non-compliance with those periods, a creditor who has fulfilled his contractual and statutory obligations would have the right to obtain the statutory interest for late payment from the public authority. Secondly, Article 4(3) of the Directive merely fixes the beginning of the periods for payment in commercial transactions, but does not ensure the concrete compliance with those deadlines. Thirdly, the absence of a precise deadline within which the obligation imposed by Article 4(3) and (4) of the Directive must be fulfilled highlights that, as regards complying with periods for payment, that directive puts the Member State concerned not under obligations to achieve a specified result. Fourthly, the 'Italian Republic claims that it cannot be held liable for the public authorities' exceedance of periods for payment' (para 34). It also refers to the *IOS Finance EFC* (judgment of 6 February 2017, C-555/14, EU:C:2017:121) as a precedent where the Court approved a regulatory mechanism that allowed the systematic late payment of public authorities' debts.

To reject the arguments of the Italian Republic, the Grand Chamber of the Court of Justice refuses the relevance of *IOS Finance EFC* (judgment of 6 February 2017, C-555/14, EU:C:2017:121) as a precedent. The Court argues that the case-law concerns an extraordinary mechanism, introduced for a limited period, and intended to deal with the delays which had built up because of the economic crisis. Moreover, the creditors involved in *IOS Finance EFC* had freely agreed with the public authority to waive the right to interest for the late payment in exchange for immediate payment of the principal amount of the debt. Secondly, the Court also emphasizes that literal and contextual interpretations of Article 4(3) and (4) does not uphold the arguments of the Italian Republic. Textually, it follows from the

wording of Article 3(4), that 'Member States shall ensure that in commercial transactions where the debtor is a public authority … the period for payment does not exceed any of the following time limits' (para 40). Contextually, according to Article 1(1), 'the aim of the Directive is to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and, in particular, of SMEs' (para 45). Said that, the Court then concludes that the Italian Republic failed to fulfil its obligations prescribed in Article 4(3) and (4) of the Directive on combating late payment in commercial transactions between economic operators and public authorities.

Drawing the line between good and service in the Consumer Rights Directive: Judgment in Case C-208/19 *NK*

This request for a preliminary ruling concerns the interpretation of Article 2(3)(4) and Article 3(3)(f) of Directive 2011/83/EU (the Directive) on consumer rights. The judgment concerns a dispute between two consumers and an architect contracted to elaborate a project for a new single-family house. The key issue of the judgment is the interpretation on the whether personalized project elaborate by an architect could fall within the concept of 'goods made according to the consumer's specification or clearly personalized'.

By e-mail of 12 February 2017, the consumers informed the architect that they were not satisfied with the quality of the construction plan and informed the professional that they immediately ended the contractual relationship and that they revoked the assigned planning tasks. The architect brought an action before the *Bezirksgericht Graz-Ost* (Court of First Instance in Graz-Este, Austria) asking for the consumers to be ordered to pay the fees for the architectural services provided. Within the scope of the action, the architect maintained that the Austrian national legislation which transposed the Directive was not applicable to the contract of architectural services entered into for two reasons. First, the services provided were related to the 'construction of a new building' and, therefore, were covered by the exception provided for by Article 2(3)(f) of the Directive. Secondly, the architect also claimed that as the consumers did not, under Paragraph 18(1), point 3, of the Austrian Consumer Code, have a right of withdrawal in respect of that contract, since it presupposed the elaboration of clearly customized plans according to their needs. Finally, the architect stated that the plans drawn up were goods, within the meaning of Article 2(3) and (4) of the Directive.

The referring judge asks two questions to the Court of Justice. Firstly, must a contract concluded between an architect and a consumer, according to which the

architect (only) has to elaborate a project for a new single-family house, including the elaboration of plans, be understood as a construction of new buildings within the meaning of Article 3(3)(f) of the Directive? Secondly, if the first question is answered in the negative, must the abovementioned contracts be understood as the supply of 'goods made to the consumer's specifications or clearly personalize' within the meaning of Articles 16(c) and 2(3) and (4) of the Directive?

Regarding the first question, the Court of Justice dismisses the argumentation that an agreement concerning the elaboration of an architectural project for a new single-family house, including the elaboration of plans, could be perceived as a construction of new buildings. The Court underlines that the Directive seeks to ensure a high level of consumer protection. Moreover, Article 169 TFEU and Article 38 of the Charter of Fundamental Rights of the European Union impose the obligation of protecting consumers who are in a position of inferiority in relation to professionals, insofar as they must consider themselves less informed, economically weaker and legally less experienced than their co-contractors (para 39). Therefore, the judgment holds that a contract concluded between an architect and a consumer, by virtue of which the latter undertake needs to draw up only, does not constitute a contract for the construction of a new building, in the sense the Article 3(3)(f) of the Directive.

Regarding the second question, the CJEU recalls that Article 9 of the Directive gives the consumer a right of withdrawal following, *inter alia*, the conclusion of a contract outside the commercial establishment, within the meaning of Article 2. Article 16 of the Directive provides for exceptions to the right of withdrawal, *inter alia*, for contracts concluded outside the commercial establishment with regard to the supply of goods carried out according to the consumer's specifications or clearly personalized. On the one hand, the Court of Justice agrees that a contract concluded between an architect and a consumer for the elaboration of construction plans implies that these plans are necessarily handed over to the consumer as paper documents or in the form of digital files, which are tangible movable objects (para 58). On the other hand, the main object of such a contract consists in the realization, by the architect, of an intellectual performance that consists of the elaboration of a project of an individual house to be built, with the provision of the plans as merely secondary goods in relation to the main performance a accomplish (para 59).

Consumer Protection

General Consumer Protection

National consumer law can be extended to a commonhold association: Judgment in Case C-329/19 *Condominio di Milano, via Meda*

Does the concept of consumer within the meaning of the Unfair Contract Terms Directive (the UCTD) preclude a commonhold association – a '*condominio*' in Italian law –, which does not come within the concept of 'natural person' or 'legal person', from being regarded as a consumer under national law? The question on the extension of consumer protection rights to a condominium was referred by the *Tribunale di Milano* (District Court of Milan) in the dispute between the Condominium Meda – a commonhold association – and Eurothermo. The legal and factual background regards unfair contract terms in a supply agreement of thermal energy.

The dispute between Condominio Meda and Eurothermo arose from Article 6 (3) of the supply contract of thermal energy. Article 6(3) provides that, in the event of late payment, the debtor must pay a 'default interest at the rate of 9.25 % from the expiry of the period for payment of the balance' (para 14). On 18 April 2016, Eurothermo obtained an order of payment for the amount of EUR 21 025,43, calculated on the grounds of Article 6(3) of the supply contract. Condominio Meda challenged the order for payment before the referring court, arguing that it was a consumer within the meaning of the UCTD and that Article 6(3) of that contract was an unfair contract term.

It is worth noticing that the referring court considered that Article 6(3) of the supply contract was in fact unfair and that, in accordance with the case-law of the CJEU, it could annul it of its own motion. However, that same referring court was uncertain whether it is permissible to regard a commonhold association, such as the condominium in Italian law, as a consumer within the meaning of the UCTD. In Italian law, a condominium is a commonhold association which is neither a natural nor legal person. Therefore, the *sui generis* nature of condominium in the Italian law motivated the request for preliminary reference.

By answering the preliminary reference, the Court of Justice decided that a commonhold association, such as the applicant in the main proceedings, does not satisfy the first of the conditions provided for in Article 2(b) of the UCTD and, therefore, does not fall within the concept of 'consumer' within the meaning of that provision. The Court recalls that it 'previously held that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of Article 2(b)' of the Directive (judg-

ment of 22 November 2001, *Cape and Idealservice MN RE*, C-541/99 and C-542/99, EU:C:2001:625, para 16). Moreover, the Court also notes that, as EU law currently stands, the concept of 'ownership' is not harmonised at EU level and differences may exist between the Member States. The Treaties are in no way to prejudice the rules in Member States governing the system of property ownership.

Notwithstanding the exclusion of a condominium from the notion of consumer according to Article 6(3) of UTCD, the Court of Justice also notes that Member States may introduce more stringent consumer protection measures provided that they are compatible with the Treaties, in accordance with Article 169(4) TFEU. Accordingly, the CJEU concluded that Article 1(1) and Article 2(b) of as the UCTD does not preclude national case-law extending the 'protective rules' of the UCTD to a *condominio* in Italian law (para 38), even though they are not proper consumers under the UCTD.

Information Duties

Unavoidability and foreseeability of administrative fees for credit cards: Judgment in Case C-28/19 *Ryanair*

The judgment of the CJEU concerns the interpretation of Article 23(1) of Regulation 1008/2008 (the Regulation) on common rules for the operation of air services. This specific provision has the purpose of enabling customers to effectively compare the prices for air services of different airlines. The factual and legal background of the case-law goes back to the decisions issued by the Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM) against Ryanair on 15 June 2011. The AGCM found Ryanair guilty of various unfair commercial practices under the Italian Consumer Code. Some of the violations concerned the way in which the prices charged were presented in Ryanair's online booking system. According to the AGCM, the prices did not include certain elements of indication of the final price that were compulsory according to the Italian Consumer Code.

Against the AGCM, Ryanair requested the judicial review of the administrative decision before the *TAR Lazio* (Regional Administrative Court for Lazio, Italy). The Regional Court, on the contrary, dismissed the action and upheld the decision by the AGCM. Ryanair appealed to the *Consiglio di Stato* (Council of State), which referred to the CJEU the preliminary question on the interpretation of Article 23(1) of the Regulation. Article 23(1) deals specifically with the indication of the final price to be paid by the general public for an air flight ticket. The provision established that the final price should include the applicable (a) air fare or air rate, (b) taxes, (c) airport charges, and (d) other charges, surcharges and fees which are

unavoidable and foreseeable at the time of indication of the final price. In contrast to the 'unavoidable and foreseeable fees', Article 23(1) excludes 'optional price supplements' insofar as those fees are communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer is on an 'opt-in' basis. The referring court observed that, 'for the purposes of resolving the dispute, it is necessary to determine whether those elements may be regarded as falling within the category of unavoidable and foreseeable price supplements, within the meaning of the second sentence of Article 23 (1) of the Regulation, or that of optional price supplements within the meaning of the fourth sentence of that provision' (para 14).

To assess whether the price components regard 'unavoidable and foreseeable fees' or 'optional price supplements', the Court examined the classification of four price components at issue in the main proceedings on the basis of Article 23(1) of the Regulation. These price elements are (i) the passengers' online check-in fees, (ii) the value added tax (VAT) applied to the fares, (ii) the optional supplements relating to domestic flights, and (iv) the administrative fees for purchases made by means of a credit card other than that approved by Ryanair (Mastercard prepaid).

The judgment concerning the first three price components are not controversial. Firstly, in relation to the passengers' online check-in fees, the Court of Justice argues that it cannot be automatically inferred that the necessary and compulsory nature of check-in fees are unavoidable. In fact, Ryanair offers one or more possibilities for checking-in free of charge. Where the consumer is required to choose between at least two check-in methods, passengers' online check-in fees cannot be regarded as an unavoidable component of the final price to be paid, within the meaning of the Article 23(1)(d) of the Regulation. Secondly, regarding the VAT applied to fares for domestic flights, the Court considers it unavoidable and foreseeable as a tax applicable to any air fare. Thirdly, the Court examined the VAT applied to optional supplements. Contrary to the VAT applied to fares, the tax applied to optional supplements cannot be regarded as foreseeable, since it is intrinsically linked to the triggering event which are chosen exclusively by the passenger. The decision explains that 'the indication of a specific tax must always follow the price element to which that tax relates, as is moreover apparent from the last part of the third sentence of Article 23(1)' (para 30).

Finally, the judgment considers the administrative fees for purchases made by means of a credit card other than that approved by the air carrier. Different from the abovementioned price components, the line that divide 'unavoidable and foreseeable fees' from 'optional price supplements' in this specific price component is thinner. The Court of Justice argues 'those fees are foreseeable since their application results from the air carrier's policy itself as regards the method

of payment' (para 31). Although the payment of the administrative fees is avoidable, the customer could do so only by using the credit card approved by the air carrier. For the Court, it cannot be accepted that such a price supplement is avoidable. '[T]he option offered to the consumer is subject to a condition imposed by the air carrier, by reserving the free nature of the service in question for the benefit of a restricted class of privileged consumers and by requiring, *de facto* the other consumers to either refuse the free service or buy Ryanair's credit card, thereby delaying the purchase of the flight ticket (para 33).

Unfair Contract Terms

Transparent interest rates: Judgment in Case C-125/18 *Gómez del Moral Guasch*

Another dispute about Spanish loans gives the Grand Chamber of the Court of Justice the opportunity to make important statements about the Unfair Contract Terms Directive (UCTD). The main proceeding was initiated by Mr Gòmez del Moral Guasch against Bankia, a Spanish banking institution. The plaintiff seeks, *inter alia*, a declaration that the term establishing the interest rate is unfair and therefore null and void.

The Court of Justice reformulates the first question by the referring judge as whether Article 1(2) UCTD excludes from the scope of application of the unfairness test a term 'which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation' (para 28). The CJEU answers in the negative.

The Court begins by observing that Article 1(2) introduces an exception to the review of unfair terms and therefore shall be interpreted strictly. Then, it points out that the exception is applicable if two conditions are jointly met. First, the term 'must reflect a statutory or regulatory provision'; second, 'that provision must be mandatory' (para 31).

As it is well-known, the limits of the jurisdictional powers of the Court of Justice imply that the definite decision with regard to the satisfaction of these two conditions in the main proceedings is left to the referring judge. Nevertheless, based on the information available in the case file, the Court notes that the provision invoked by the defendant appears to be supplementary rather than mandatory. Consequently, Article 1(2) does not exclude the review of the unfairness of the contractual term under consideration.

The analysis of the second question asked by the referring judge is divided in three parts by the Court of Justice. In part (a), the Court consider conflicting views emerged during the proceedings about whether Article 4(2) UCTD has been trans-

posed in the Spanish legal system or not – as made possible by Article 8 thereof. The CJEU avoids taking a position on this point. Instead, it offers a quick overview of the cornerstones of the concept of transparency: transparency has to be understood in a broad sense, not limited to formal and grammatical intelligibility; it has to be evaluated from the perspective of the average consumer, who is reasonably well-informed and reasonably observant and circumspect. Moving from these premises, the Court recalls that Article 5 UCTD requires explicitly that contractual terms must 'always' be transparent. From this textual observation, the CJEU concludes that transparency applies even if Article 4(2) had not been transposed.

Finally, parts (b) and (c) of the second question ask, in essence, to clarify the limits of the transparency requirement. More precisely, the referring judge asks whether the 'supplier must provide the consumer with information on the method used for calculating the index on the basis of which that interest rate is calculated as well as past fluctuations of that index and possible future fluctuations' (para 48). To answer this question, the Court of Justice moves from a reconstruction of the role and content of the transparency requirement of contractual terms.

Transparency about 'the terms of the contract and the consequences of concluding it is of fundamental importance' for the consumers because this information is at the core or the decision to enter into the contract (para 50). The CJEU then reaffirms that transparency has to be understood in broad terms and has to be evaluated from the perspective of the (in)famous average consumer. More precisely, according to the case-law, the average consumer has to be able 'to understand the specific functioning of the method used for calculating that rate and has to evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial situation' (para 51).

Against this background, the Court of Justice reminds again the limit of its jurisdictional powers. However, the CJEU still offers some considerations on the merits of the case based on the available information. In essence, the Court agrees with the Advocate General that it is likely that the defendant has offered to the plaintiff transparent terms. This conclusion is supported by several considerations. First, the essential information about the interest rate was 'eas(ily) accessible to anyone intending to take out a mortgage loan' since 1990. The average consumer was therefore in the position to understand the functioning of the term (para 53). Second, Spanish legislation imposed on the banking institution 'to provide consumers with data relating to the fluctuations of the IRPH of the Spanish savings banks during the two calendar years preceding the conclusion of loan agreements as well as with the last available value' (para 54). In the Court's view, this is an important piece of information for evaluating the transparency of the term because it enables 'a comparison between the calculation of the variable

interest rate [under scrutiny] and other formulas for calculating interest rates' (para 54).

This consideration is of great argumentative consequence in the understanding of the transparency requirement. As understood by the Court up to paragraph 54 of this decision, the transparency requirement has not had any explicit connection with comparisons. The consumer has to understand the consequences of entering into this particular contract. This is a difference with the unfairness test in the UCTD, which since *Aziz* (judgment of 3 March 2013, C-415/11, ECLI:EU:C:2013:164, para 68), has included a comparative element. To what extent this consideration of the Court constitutes the opening for a comparative understanding of the transparency of contract terms is still to be seen.

While it is for the referring judge to say the last word on the matter, it is rather clear that the Court of Justice and the Advocate General think that Bankia successfully offered up transparent term to the plaintiff.

With its third and last question, the referring judge seeks guidance with regard to the consequences of finding a core term unfair. The reasoning of the Court of Justice is in line with a long line of cases on the matter going back to *Kásler and Káslerné Rábai* (judgments of 30 April 2014, C-26/13, EU:C:2014:282, para 81). The general rule is that judges cannot revise the content of an unfair term in order not to reduce the dissuasive effect of the UCTD. An exception to this rule has been carved by the Court for those situations in which the contract is uncapable 'of continuing in existence' without the unfair term. The *ratio* of this exception is protecting consumers from the 'particularly unfavourable consequences' of nullifying the entire contract (para 61). The exception empowers national courts to replace the unfair term with a supplementary provision. Leaving again the last word to the referring judge, the court suggests that this exception is applicable in the present case.

It is interesting to note that the Court does not refer to the additional requirement introduced by *Dziubak* (judgment of 3 October 2019, C-260/18, ECLI:EU:C:2019:819, para 62),[1] namely that the provisions of national law used to this end cannot be 'of a general nature'. While this requirement would have not been arguably an obstacle to the conclusion suggested by the CJEU, one is still left to wonder whether the Grand Chamber has implicitly signalled that *Dziubak* went in the wrong direction.

Finally, the Court of Justice dismissed the request for temporal limitation of the effects of the nullification of the term in light of 'the financial consequences …

1 For a comment, see F. Esposito and P. Hacker, 'European Union Litigation' (2020) 16(1) *European Review of Contract Law* 212, 222–223.

for the banking institutions … and for the banking system as a whole' (para 71). As whether the term is actually going to be nullified is not only a matter of EU law, but also of national law, the CJEU finds 'not appropriate to limit the temporal effects of the … judgment' (para 72). This is an interesting example of how the multi-level structure of the EU legal system shields the Court of Justice from considering the economic consequences of its decisions when it does not want to do so.[2]

Passenger Rights

Unruly passengers as extraordinary circumstances: Judgment in Case C-74/19 *Transportes Aéreos Portugueses*

A trip from Fortaleza (Brazil) to Oslo, with a stop in Lisbon, arrives at its final destination with almost a one-day delay after the original flight from Fortaleza to Lisbon is cancelled. The commander of the flight operated using the same aircraft meant for the Fortaleza-Lisbon flight decided to re-route to the Canary Islands. This choice was made to disembark a passenger 'who had bitten a passenger and assaulted other passengers and members of the cabin crew' (para 26). As a consequence, the plaintiff was relocated on the next flight to Oslo operated by the air carrier.

The air carrier denied the request of compensation by invoking the exemption of extraordinary circumstances, adding that even sending an aircraft to Fortaleza would have not avoided the delay. The referring judge seeks guidance with regard to both elements invoked by the air carrier to justify its refusal to pay compensation, namely concept of extraordinary circumstance and the scope of the obligation to pay compensation in case of extraordinary circumstance.

Before entering into the merits of the questions asked, the Court of Justice briefly explains the conditions under which Regulation 261/2004 (the Regulation) is applicable in the main proceedings. First, the Court points out that the EEA Agreement extends the scope of application of the Regulation also to the Norwegian territory. At the same time, the Regulation is not applicable when the passenger 'received benefits or compensation and was given assistance in Brazil' pursuant to Article 3(1)(b) of the Regulation (para 33).

2 See, recently on this point, with particular reference exactly to the Spanish loans saga and the CJEU, F. Gómez Pomar, 'Characterizing Economic and Legal Approaches to the Regulation of Market Interactions', in P. Cserne and F. Esposito (eds), *Economics in Legal Reasoning* (Palgrave, forthcoming) 63–79.

With its answer to the first question, the Court of Justice explains under what conditions an unruly passenger counts as an 'extraordinary circumstance' for the purposes of applying the Regulation. The Court begins by reinstating the conditions for considering an event an extraordinary circumstance. In essence, the event must be neither inherent in the normal operation of an air carrier, nor under the control of the air carrier. Then, the Court notes that Recital 14 of the Regulation identifies security risks as possible extraordinary circumstances.

Against this background, the Court of Justice focuses its attention on the duty of the pilot in command to ensure the safety of its passengers recognised by the Tokyo Convention and by point 7.d of Annex IV to Regulation 216/2008. In this regard, the Court notes that EU legislation explicitly recognises that 'difficulties in controlling intoxicated, violent or unruly passengers are likely to pose a significant risk to aviation safety' (para 40).

Moreover, the Court of Justice finds that an unruly behaviour as the one occurred on the flight from Fortaleza to Lisbon 'is not inherent in the normal exercise' of an air carrier (para 41). To justify this view, the Court notes that a passenger has the duty of 'complying with all orders issues by the commander in order to ensure safety on board … but also for ensuring that he does not himself jeopardise the proper performance of the contract of carriage' (para 42). The Court also finds that the type of unruly behaviour under consideration is unforeseeable and 'the commander and the crew have only limited means of controlling' a passenger behaving in such a manner (para 43).

These considerations allow the Court of Justice to identify the limits of application of the concept of extraordinary circumstances to the unruly behaviour of a passenger: when the air carrier has 'contributed to the occurrence of the unruly behaviour of the passenger … or if that carrier was in a position to anticipate such a behaviour and to take appropriate measures at a time when it was able to do so without any significant consequences for the operation of the flight concerned, on the basis of warning signs of such behaviour' (para 45). As argued by the Advocate General, the French and Austrian Governments and the European Commission, this limitation is justified by the fact that the commander has the 'authority to refuse to carry or disembark any person, baggage or cargo which may constitute a potential risk to the safety of the aeroplane or its occupants' (para 46).

With its second question, the referring judge asks to the Court of Justice to clarify whether an air carrier can rely on an extraordinary circumstance affecting 'a previous flight which the (air carrier) operated using the same aircraft' (para 49). The CJEU answers in the affirmative. This answer is interesting, because the case-law of the CJEU on the Regulation has traditionally extended rather than reduced the scope of the liability of air carriers.

The Court of Justice begins by observing that there is nothing in the wording of the Regulation suggesting that air carriers cannot rely on extraordinary circumstances affecting a previous flight operated by the same aircraft. Additionally, the Court notes that the Regulation must take into account 'the way in which aircrafts are operated by air carriers and in particular, of the fact, … that … the same aircraft may carry out several successive flights on the same day' (para 52). On these grounds, the CJEU finds that air carriers can rely on extraordinary circumstances affecting oblivious frightened to escape from the obligation to pay compensation for long delays.

At the same time, the Court of Justice elaborates on the limits of this possibility, with the clear intention of discouraging any attempt to abuse it. The Court demands the establishment of 'direct causal link' between the extraordinary circumstances affecting the previous flight and the delay or cancellation of a second flight (para 54).

The third question explores under what conditions the air career in case of extraordinary circumstances can rely on Article 5(3) to escape from the liability. The referring Court wants to know whether re-routing a passenger on the next flight operated by the airline, which arrives the following day and with a delay of more than three hours, is one of those reasonable measures.

The Court of Justice explains that the condition under consideration is integrated when the air carrier 'deploys all the resources at its disposal to ensure reasonable, satisfactory and timely re-routing, including seeking alternative direct or indirect flights … arriving at the scheduled time that is not as late as the next flight of the air carrier concerned' (para 59).

Moving from this premise, the Court of Justice makes explicit the conditions under which re-routing on the next available flight arriving the next day can be considered a reasonable measure: There must be 'no seats available on another direct or indirect flight' making the passenger reach its final destination before the next flight operated by the carrier'; or 'the implementation of such rerouting constitutes an unbearable sacrifice for that carrier in the light of the capacities of its undertaking at the relevant time' (para 60).

The answer of the CJEU to this third question deserves a comment. For this purpose, it is appropriate to cite Article 5(3) in full: 'An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'. In its plain meaning, that the Court does not elaborate on, the reasonable measure test applies only to measures that would have avoided the extraordinary circumstance from happening. This interpretation has been previously confirmed by the case law (already in judgments of 19 November 2009, *Sturgeon and Others*, C-402/07

and C-432/07, EU:C:2009:716, para 69). The right to re-routing is disciplined by Article 8 and granted in case of cancelation by Article 5(1)(a) in addition to the right to compensation, which is granted by Article 5(1)(c).

In answering to the question of the referring judge, however, the Court of Justice qualifies re-routing, which is granted to air passengers by Article 8, as a measure capable of granting the exclusion of liability pursuant to Article 5(3). However, such an extension is hardly compatible with the plain meaning of Article 5(1)(c)(iii), disciplining the relationship between the right to compensation and the right to re-routing in case of cancelation. Article 5(1)(c)(iii) establishes that air passengers lose the right to compensation when 'they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival'. It is this provision, that the CJEU does not consider at all in its answer, and not Article 5(3), that sets the conditions under which air passengers lose the right to compensation in the event of re-routing after a cancellation.

The argumentative scheme used by the CJEU to introduce such a marked change in the governance structure underpinning the Regulation is not adequate to the significance of the change. More fundamentally, a question that deserves more reflection that is possible to offer here is whether, as it seems, the Court of Justice has reduced the level of protection enshrined in the scheme of Article 5 in the event of cancelation due to extraordinary circumstances.

Consumer Credit

Making the obligation to evaluate the consumer's creditworthiness effective: Judgment in Case C-679/18 *OPR-Finance*

This judgment applies to the Consumer Credit Directive, the conceptual apparatus that the Court of Justice has been developing in its interpretation of general consumer law and, in particular, the Unfair Contract Terms Directive. The main proceedings concern a consumer who failed to repay a debt arising from a credit contract that was not preceded by an evaluation of the consumer's creditworthiness, as required by Article 8 of the Consumer Credit Directive. The Czech judge asks guidance to the Court of Justice with regard to the compatibility with EU law of several aspects of the national law applicable to this contract. In particular, the national court wants confirmation that the *ex officio* doctrine applies to Article 8 of the Consumer Credit Directive and about whether Czech law is compatible with

Article 23 of the directive, establishing that the penalties for the violation of Article 8 have to be effective, proportionate and dissuasive.

First, the referring judge asks whether the *ex officio* doctrine applies also to the Consumer Credit Directive. The Court of Justice has no hesitation in giving an affirmative answer. The CJEU notes that the objectives of the Consumer Credit Directive, namely ensuring a 'high and equivalent level of protection' to all consumers in the European Union and 'to facilitate the emergence of a well-functioning internal market in consumer credit' (para 21). Moreover, the Court reminds that EU consumer law moves from the concern that 'there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him' (para 22). These considerations justify the obligation for the national court to review of its own motion if the creditor has performed the creditworthiness test (on the content of the obligation, see above *Lintner*).

Next, the Court of Justice examines whether Czech law complies with Article 23 of the Consumer Credit Directive, namely whether the Member State has introduced penalties that are effective, proportionate and dissuasive and respect also the principle of equivalence. Czech law provides that the failure to perform the assessment of the borrower's creditworthiness is penalised 'with an obligation on the consumer to return only the principal to the creditor at a time appropriate to the consumer's financial capacity, on condition that that consumer raises that objection of nullity within a limitation period of three years from the conclusion of the agreement' (para 29).

The Court of Justice suggests, leaving for the referring judge to decide, that such a penalty is compliant with Article 23 of the Consumer Credit Directive only in part. The CJEU observes that losing the right to receive the payment of the agreed interest and costs is potentially an effective, proportionate and dissuasive penalty. The Court expresses reservations with regard to the procedural limitation that the consumer has to raise the objection of nullity within three years from the conclusion of the contract. The principle of procedural autonomy, according to settled case law, implies that a measure like the one under scrutiny has to be reviewed under the principles of equivalence and effectiveness.

The CJEU notes that the case file suggests that there is no evidence of the violation of the principle of equivalence. It is expectably the principle of effectiveness that leads the Court to doubt about the compatibility with EU law of the procedural limitation under scrutiny. Relying on its usual observations about the *ex officio* doctrine, the Court finds that Czech law seems in violation of the principle of effectiveness.

The Czech Government observes that this compensatory penalty is complemented by the imposition of fines by The Czech National Bank. However, the Eur-

opean Commission has pointed out that these powers have never been exercised. The Court of Justice agrees with the Advocate General that, in any event, fines 'are not capable of ensuring, in a sufficiently effective manner, the protection of consumers against the risk of over indebtedness and insolvency' (para 38). Additionally, the CJEU observes that as the Czech legal system provides for a civil penalty in favour of the consumer, such penalty must 'be implemented in compliance with the principle of effectiveness' (para 39).

Finally, the Court of Justice explains to the referring judge what EU law demands from a national court when its legislation is incompatible with EU law. In fact, the national court has the 'obligation to interpret national law in conformity with EU law' in order to comply with Article 288(3) TFEU (para 41). For this reason, the national court has to 'do whatever lies within (its) Jurisdiction, taking the whole body of domestic law into consideration and apply the interpretive methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective' (para 42). This duty obliges national courts to change their 'established case-law, where necessary' (para 43).

The CJEU concludes its answer on the matter with the brief and enigmatic observation that the 'obligation to interpret national law in conformity with EU law is limited by the general principles of law, particularly that of legal certainty, in the sense that it cannot serve as the basis for an interpretation of national law *contra legem*' (para 45).

Service and Employment Law

A self-employed commercial agent does not need the power to modify terms: Judgment in Case C-828/18 *Trendsetteuse*

This judgment, still unavailable in English, concerns the interpretation of Article 1(2) of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents (the Directive). In particular, the referring judge wants to know whether a commercial agent, within the meaning of that provision, must have the power to modify the sale conditions and prices of the goods sold on behalf of the principal. The answer of the Court of Justice is in the negative.

The CJEU begins its analysis of the interpretive issue by reminding that the qualification of commercial agent within the meaning of Article 1(2) of the Directive follows from three necessary and sufficient conditions. First, the agent must be a self-employed intermediary. Second, there must be a contractual relationship between the principle and the agent. Third, the agent must have the 'continuing

authority to negotiate the sale or the purchase of goods … or to negotiate and conclude such transactions on behalf of and in the name of that principal', as expressly provided by Article 1(2).

The Court of Justice then points out that to answer the question asked by the referring judge is necessary to interpret the term 'negotiating' found in the third condition. The Directive does not define the term 'negotiating', but the Court finds that its connection with the sale or purchase of goods for the principal shows in the intention of the EU legislator that such activity has as its objective the 'conclusion of contracts for the sale or purchase on behalf of the principal' (para 24). Since the provision does not refer to national laws for the meaning of 'negotiating', the term has to be understood as an autonomous notion of EU law. The CJEU then remind it's settled case-law according to which the meaning of a term of EU law that is not defined has to be understood according to 'its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part' (para 26).

In applying this interpretive scheme, the Court of Justice begins by noting that there is a slight difference between the German and Polish versions of the Directive and that of the other official languages. While the term 'negotiating' captures the wording in most languages, the German and Polish versions use broader terms that can be translated with the expression 'acting as intermediary' (para 27). However, even this broader expression does not imply that a commercial agent must have the power to determine the price of the goods it sells on behalf of the principal. Moving from this finding, the CJEU then considers the context in which the expression occurs and the purposes of the Directive.

In relation to the context, the Court of Justice observes that the object of the activity of the commercial agent depends from the terms of the contract with the principal. In this regard, the Court takes the view that forbidding the commercial agent from modifying the prices of the goods is a choice justifiable by the principal's commercial strategy. Moreover, according to Articles 4(3) and 17(2), letter a) of the Directive, the tasks of the commercial agent consist in the search of new costumers for the principal and in developing the business with the existing ones. The CJEU agrees with the Austrian Government that the commercial agent is able to perform these tasks even without the power to modify the price of the goods it sells on behalf of the principal.

Finally, excluding from the scope of application of the Directive someone without the power to modify sale prices is contrary to the objectives of the Directive. Recitals 2 and 3 of the Directive show that its objectives are 'the protection of commercial agents in their relationship with the principals, promoting the security of commercial transactions, and facilitating the trade of goods between Member States' (para 36). A restrictive interpretation of the notion of commercial agent

would deprive of the protection granted by the Directive those without the power to modify sale prices. In this regard, the Court of Justice agrees with the Austrian and German Governments, as well as the Commission, that such restrictive interpretation would enable principals to avoid the application of the mandatory provisions of the Directive easily, thereby compromising the pursuit of its object.

Discrimination Law

Non-Discrimination in the Treaty and the geographical restriction in insurance contracts: Judgment in Case C-581/18 *TÜV Rheinland LGA Products and Allianz IARD*

This recent judgment of the Court can be considered a new chapter of a saga composed by several decisions concerning defective breast implants, known as the Poly Implant Prothèses SA ('PIP') scandal.[3] Different to *Schmitt* (judgment of 16 February 2017, C-219/15, ECLI:EU:C:2017:128), which concerned the liability of certification body TÜV Rheinland LGA Products GmbH ('TÜV Rheinland') for the harm caused by the defective breast implants, this preliminary reference shifts the attention to insurance contracts. The request has been made in proceedings between a German Citizen RB, TÜV Rheinland and the insurance company Allianz IARD SA ('Allianz'). The proceedings concern an action seeking compensation for harm caused by the insertion of defective breast implants. The key issue concerns the application of Article 18(1) TFEU on the prohibition of discrimination on the grounds of nationality, to contracts between private parties, which recaptures the debate over the horizontal direct effect of Treaty provisions on non-discrimination and directives.[4]

The factual and legal backgrounds of the case are the following. By decision on 28 June 2005, the AGF IARD, the predecessor of Allianz, entered into an insurance contract with PIP. The insurance contract covered the civil liability arising from the manufacture of the breast implants by PIP. The conclusion of that insur-

3 B. van Leeuwen, *European Standardisation of Services and Its Impact on Private Law: Paradoxes of Convergence* (London: Bloomsbury Publishing, 2017), and P. Verbruggen and B. van Leeuwen, 'The Liability of Notified Bodies under the EU's New Approach: The Implications of the PIP Breast Implants Case', *European Law Review* 2018, 394–409.

4 N. Reich, 'The Impact of the Non-Discrimination Principle on Private Autonomy', in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart Publishing, 2013); and M. Dougan, 'The Impact of the General Principles of Union Law upon Private Relationships', in D. Leczykiewicz and S. Weatherill (eds), this note.

ance contract was not freely agreed between the parties. In contrast, it had been imposed by the French *Bureau Central de Tariffication* ('the BCT'), the competent national authority in this area. Following rejection by various insurance companies approached by PIP, the BCT had ordered AGF IARD to issue to PIP an insurance policy for a duration of one year, that term being extended several times. Despite the order to issue the insurance, some terms of the contract had been concluded on the basis of a proposal made to the BCT by AGF IARD, and that it included a clause limiting the geographical extent of the insurance coverage to harm that occurred in metropolitan France or in the French overseas territories.

On 30 October 2006, in Germany, the applicant, RB, had breast implants inserted which were manufactured by PIP. RB brought an action before the Regional Court of Frankfurt am Main for damages imputing joint and several liability to the doctor who had inserted her defective breast implants, TÜV Rheinland and Allianz. According to RB, the doctor had not given her sufficient information on the risks entailed by the procedure itself and by the nature of the implants to be inserted, TÜV Rheinland had not properly carried out the necessary checks or annual inspections, and Allianz was wrong in refusing the obligation of covering civil liability on the grounds of the clause limiting the geographical extent of the insurance coverage.

On 21 December 2016, the action was dismissed by the first instance. The applicant, therefore, brought an appeal before the Higher Regional Court of Frankfurt am Main, the referring court. The latter is uncertain whether the geographical restriction clause of the insurance coverage is compatible with the prohibition of any discrimination on grounds of nationality according to the first paragraph of Article 18 TFEU. In those circumstances, the Court of Justice was requested to answer four preliminary questions. The first question was on whether Article 18 (1) TFEU is directed not only to EU Member States and the Union institutions, but also to private parties. The other three questions were subsidiary to the first one.

By answering the first question, the Court of Justice acknowledges that the first paragraph of Article 18 TFEU states that within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited. However, the Court underlines that the dispute in the main proceedings concerns an insurance contract, entered into by Allianz and the manufacturer of breast implants, PIP, which contained a clause limiting the geographical extent of the insurance coverage against civil liability (para 34).

In this regard, the Court of Justice makes an important remark. The judgment argues that Article 18 TFEU applies to a 'dispute only where (i) that dispute relates to a situation which falls within the scope of application of EU [secondary] law and (ii) that situation does not fall within the scope of a specific rule on non-dis-

crimination laid down by the FEU Treaty' (para 35). Firstly, the CJEU notes that, in EU secondary law, there is no provision which imposes an obligation on the manufacturer of medical devices to take out civil liability insurance designed to cover risks linked to those devices. The Court does so by referring to many pieces of EU legislation that concern similar issues. The Court argues that point 6 of Annex XI to Directive 93/42, aiming to harmonise the national provisions for the safety and health protection of patients and users of medical devices, imposes an obligation solely on the 'notified body' (para 40). Likewise, Directive 85/374, establishing the principle that a producer is liable without fault on his part for damage caused by the defectiveness of his products, does not impose any obligation on the manufacturer of such products (para 44). In addition to those references, the Court adds that there are cases by which EU secondary law imposes an obligation on each Member State to take the appropriate measures to ensure that an insurance contract also covers harm caused on the territory of other Member States, such as in Directive 2009/103/EC on insurance against civil liability in respect of the use of motor vehicles. That is not the case of the preliminary ruling.

Secondly, the Court also determines whether the situation giving rise to the discrimination claimed in the present case falls within the scope of a fundamental freedom laid down by the TFEU. The judgment clarifies that such connection is particularly evident when the person who has suffered the alleged discrimination is a person who has moved within the European Union according to Article 56 TFEU, or when the discrimination is related to the cross-border movement of goods in itself, laid down in the Article 34 TFEU. However, neither the situation at issue in the main proceedings is linked by any specific connecting factor to the freedom to provide services, nor it relates to the cross-border movement of goods in itself, but the harm caused by the goods that have been so moved. Consequently, 'the answer to the first question is that the first paragraph of Article 18 TFEU must be interpreted as meaning that it is not applicable to a clause, stipulated in a contract concluded between an insurance company and a manufacturer of medical devices, limiting the geographical extent of the insurance coverage against civil liability arising from those devices to harm that has occurred in the territory of a single Member State' (para 60).

Public Procurement Law

Exclusion of an economic operator from a tender procedure for non-compliance by an indicated subcontractor with social obligations: Judgment in Case C-395/18 *Tim*

This request for a preliminary ruling concerns the interpretation of Articles 57(4) and 71(6) of Directive 2014/24/EU (the Directive) on public procurement. The case is relevant for European contract law because it deals with the exclusion of Tim, one of the economic operators competing in a tender procedure, because of the non-compliance of an indicated subcontractor with social and labour obligations, namely the standards relating to the right to work for people with disabilities. The key dilemma discussed by the Court is whether the failure of the economic operator to ensure the compliance with environmental, social, and labour law obligations by its suggested subcontractor justifies the automatic exclusion from the tender, or whether the exclusion is a disproportional penalty.

The factual and legal backgrounds are the following. Consip, the Italian central authority for public procurement, launched an open procedure for the award of a contract for the supply of an optical communication system for the interconnection of the data processing centre of several departments of the Ministry of Economy and Finance on 3 August 2016. Tim submitted a tender mentioning three subcontractors whom it intended to use in the event of being awarded the contract. In the course of the procedure, the contracting authority found that one of the subcontractors mentioned by Tim in its tender did not comply with the standards relating to the right to work for people with disabilities. Consip therefore excluded Tim from the procedure pursuant to Article 80(5)(i) of the Italian Public Procurement Code, which imposes on public authorities the obligation to exclude an economic operator from participation in a tendering procedure in case of non-compliance with certain requirements, also when the violation is by a subcontractor of the economic operator. Against the decision issued by Consip, Tim brought an action before the national court, challenging the unfair and disproportionate nature of its exclusion. For the plaintiff, a ground for exclusion in respect of a subcontractor could not result in the imposition of a penalty more severe than replacement of that subcontractor.

The referring court, the Regional Administrative Court of Lazio, decided to refer two questions to the Court of Justice for a preliminary ruling. The first question asked whether Articles 57 and 71(6) of the Directive preclude national legislation from imposing the exclusion of a tendering economic operator who, during the tendering procedure, indicated a subcontractor that fails to comply with environmental, social, or labour obligations. The second question, instead, con-

cerns an alternative. Does the principle of proportionality enshrined in Article 5 of the EU Treaty preclude the national legislation from imposing the obligation of excluding the economic operator, where there were other suggested subcontractors that satisfy the requirements?

Pursuant the Rules of Procedure, the Court of Justice sent to the referring court a request for clarification, seeking in particular to ascertain whether Tim was required to indicate three subcontractors in its tender and, if so, whether it was required to use those three subcontractors or at least one of them. In its reply, the referring court stated, first of all, that 'Tim was obliged to indicate a fixed number of three subcontractors only in so far as it wished to reserve the option of subcontracting in the event of being awarded the contract at issue in the main proceedings' (para 22).

The Court of Justice examines together the two referred questions, namely whether the Directive and the principle of proportionality preclude national for such automatic exclusion of the economic operator who submitted the tender. On the one hand, the Court argues that Member States indeed 'enjoy some discretion in determining the implementing conditions of the optional grounds for exclusion laid down in Article 57(4)' of the Directive (para 34). Moreover, the CJEU also acknowledge the Advocate General's reasoning, who argued that contracting authorities should be able to exclude unreliable economic operators for failure to monitor their subcontractors about their compliance with environmental or social obligations. On the other hand, the Court raises the red flag to the proportionality of the penalties. '[C]ontracting authorities must, throughout the procedure, observe the principles of procurement set out in Article 18 of the Directive 2014/24, which include, *inter alia*, the principles of equal treatment and proportionality' (para 45). For the Court, penalties must not go beyond what is necessary to achieve the objectives of that directive. In contrast, the national legislation in question 'does not allow the contracting authority to take account, for the purposes of assessing the situation, of a series of relevant factors such as the means which the economic operator submitting the tender had at its disposal to verify whether there was a failure on the part of the subcontractors or any indication in its tender that it is able to perform the contract without necessarily having recourse to the subcontractor in question' (para 52). In those circumstances, the CJEU concludes that 'national legislation providing for such automatic exclusion of the economic operator who submitted the tender infringes the principle of proportionality by requiring the contracting authorities to proceed automatically to that exclusion on the ground of the failure of a subcontractor and thus exceeding the discretion enjoyed by the Member States pursuant to Article 57(7)' of the Directive (para 53).

Private International Law

Unenforceability of a jurisdiction clause against a third-party insured: Judgment in Case C-803/18 *BALTA*

This judgment, still unavailable in English, provides guidance on the interpretation of jurisdiction clauses in insurance contracts against large risks pursuant to Article 15, n 5 and Article 16, n 5 of Regulation 1215/2012 (the Regulation). The referring judge asks the Court of Justice to provide guidance on the enforceability against the insured of such jurisdiction clauses agreed between the insurance company and the contracting party. The answer of the CJEU is in the negative.

To reach this conclusion, the Court of Justice begins by noting that to the extent Articles 15 and 16 of the Regulation have a wording similar to that of Articles 13 and 14 of Regulation 44/2001, the provisions of the former have to be interpreted on the grounds of the case law on the latter. At the same time, Section 3 of Chapter II of the Regulation introduces special norms with the aim to protect the weaker contractual party, as explicitly stated in Recital 18. The function of these norms is increasing access to justice for the weaker party.

Against this background, the Court of Justice considers two orders of arguments. The first argument is about the wording of Article 15, n 5 and its difference from the nn 3 and 4 of the same article. There is a linguistic difference in that n 5 refers only to jurisdiction clauses about insurance contracts, whereas nn 3 and 4 mention the contracting parties. This difference in wording might suggest that the jurisdiction clause can be enforced against anyone, including the insured third party. The CJEU rejects this conclusion by looking at the 'genesis' of Article 15 (para 34). The Schlosser Report on the Convention on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom shows that the reference to the insurance contract was not intended to make jurisdiction clauses enforceable against third parties.

The CJEU then considers the objectives underlying Section 3 of Chapter II of the Regulation. The enforceability against a third party is possible only when it is not in contrast with the objective of protecting the economically weaker person (para 36). The Court then examines whether this protective objective is relevant also in the context of insurance against a large risk. The EU legislator has empowered the contracting parties to derogate from the protective rules set in Section 3 of Chapter II of the Regulation, since the companies involved are large undertakings and neither is in need of protection.

The Court of Justice continues by rejecting the extendibility of these considerations to the insured third party. The power granted by the provisions under consideration applies exclusively to the relationship among contractual parties.

To support this conclusion, the Court cites its judgment *MMA IARD* (judgment of 20 July 2017, C-340/16, EU:C:2017:576, para 34), where it argued that case by case analysis over the economic weakness of the insured third party is against the requirement of legal certainty and predictability set by Recital 15 of the Regulation. These considerations apply *a fortiori* in case of insurance against large risks given the complexity of the definition of 'large risk' given in article 13, n 27 of Directive 2009/138.

While there is no need of special protection in the relation between professionals of the insurance industry, the same cannot be said for the insured third party, who is not a professional of the insurance industry (para 45).

Hence, the conclusion that the jurisdiction clause under scrutiny is not enforceable against the insured third party. It can be seen that the Court has some difficulty in integrating considerations about economic weakness, which predominate in the reasoning, and considerations about the parties' expertise, that are invoked only at the very end of the decision.

Note: The primary responsibility for the areas of Unfair Contract Terms, Consumer Credit, Passenger Rights, Services and Employment Law, and Private International Law lies with Fabrizio Esposito; for the areas of General Law of Contract and Obligations, General Consumer Law, Information Duties, Discrimination Law, and Public Procurement Law with Lucila de Almeida.